

Rule 1.01 Comment 4
Observing Standards of Judicial Conduct
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Association Special Committee finds the meaning of the bracketed language unclear, finds the list in brackets circular, and recommends the following revision of Comment 4 to Rule 1.01. (Additions underlined. Deletions struck through.)

“ . . . A judiciary of integrity is one in which judges are known for their adherence to legal and ethical principles. Independence means being ~~An independent judiciary is one~~ free of inappropriate outside influences and acting without fear or favor. Impartiality means being free of bias or favoritism. ~~[probity, fairness, honesty, uprightness, and soundness of character].”~~

Rule 1.01 Comment 5
Observing Standards of Judicial Conduct
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee suggests that Comment 5 to Rule 1.01 should be subject to Rule 2.11 (Judicial Statements on Pending and Future Cases).

Rule 1.01 Comment 7
Observing Standards of Judicial Conduct
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee believes that the deleted examples were helpful and suggest that they be restored.

Rule 1.01 Comment 6 and 7
Observing Standards of Judicial Conduct
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee notes that Rule 1.01 Comment 6 introduces “irresponsible” and “improper” conduct and Comment 7 defines impropriety as conduct that compromises “integrity, impartiality and competence.” It suggests that the Code uniformly refer to “integrity, independence and impartiality;” otherwise, the Commission should make clearer the connections between the terms used in Rule 1.01 and these Comment sections.

Rule 2.02 Comment

The Duty to Decide

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

Insofar as Rule 2.02 introduces the concept that there may be circumstances where recusal is not required but is appropriate, the Commission should explain this concept because a judge’s recusal, where not required, may undercut the duty to decide. The NY State Bar Special Committee recommends comment to Rule 2.12 with a cross-reference in the comment to Rule 2.02.

Rule 2.04

Impartiality and Fairness

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee recommends that the Commission define the term “fairness,” and suggests several meanings for the term:

- “free of bias or favoritism” (the same as impartiality)
- “consistent with the rules”
- “in accordance with relative merit,” (the result implied by “integrity,” or
- “just to all parties.” (a problematical concept).

Because a judge must uphold the law, which is not always perceived as “fair,” the NY State Bar Committee suggests that the Commission either (1) delete fairness as duplicative of integrity, independence and unbiased, or (2) define fairness in the comment as “free of bias or favoritism and consistent with the strict application of the law.” The current comment concerns only impartiality.

Rule 2.05

Bias and Discrimination

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee sees no reason for the Commission's decision to delete the phrase "by words or conduct" from Rule 2.05(b), yet retain the phrase in Rule 2.05(a).

Rule 2.05 Comment 3
Bias and Discrimination
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee observes that it is impossible to catalogue all the manifestations of bias, but suggests that the Commission add "gestures" to "acts."

Rule 2.07 Comment 3
Demeanor and Decorum
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee suggests addition of the following sentence to Rule 2.07 Comment 3 to clarify the limits of permissible debriefing. (Additions underlined.)

"Such debriefing is limited to the jury experience and may not include the jury's reasoning or other information that would impeach the verdict."

Rule 2.08 Comment 2
Ensuring the Right to be Heard
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee recommends substitution of "must" for "should." The Committee believes that the prohibition against coercion – as opposed to a prohibition against facilitation – provides the best balance between allowing the judge's participation and protecting parties against coercion.

Rule 2.09(a)(2)
Ex Parte Communications
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

Recognizing the impossibility of abolishing the expert consultation rule in favor of a requirement that judges decide cases on the court record along, the NY State Bar Special Committee recommends limiting a judge's ability to consult outside experts to consultation about the law.

The Committee further recommends that, in instances when a judge receives advice from an expert in writing, the judge should provide the parties with a copy of the written advice, and not solely the substance of the advice.

Rule 2.09 (a)(3)

Ex Parte Communications

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee notes that it is unclear why court personnel with whom the judge consults need not be disinterested.

Rule 2.09 (b)

Ex Parte Communications

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee observes that the result of a judge not independently investigating facts is that the judge may consider only the factual evidence presented and other information of which the rules of evidence allow the judge to take judicial notice.

Rule 2.12 D(1) Comment

Disqualification: Economic and Personal Interests

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee offers two comments about Rule 2.12 D (1):

- *New Comment:* To avoid misconstruction of the provisions on economic interests, the NY State Bar Special Committee suggests addition of the following new comment to paragraph D(1). (Additions underlined.)

“Where a judge owns stock of a corporation that is an affiliate of a party, the judge must determine if such interest is an “other more than de minimis interest” that could be substantially affected by the proceeding. Such determination will depend upon such factors as whether a judgment adverse to the party would have

(i) a substantial effect on the value of the party's stock held by the affiliate, and, if so, how material such investment is to the investor, or (ii) a material effect on the ability of the party to fulfill financial obligations to its issuer-affiliates."

Rejection of "more than de minimis" test: The Committee explains its rationale for not recommending that New York adopt the "more than de minimis" test, offering as background a report by the New York State Bar Association at the time of its consideration of the 1990 amendments to the Model Code of Judicial Conduct.

Rule 2.12E

Disqualification: Campaign Contributions

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee notes the belief of the NY State Bar Association that recusal provisions will only be meaningful when political contributions to candidates for judicial office are generally available on a searchable database, so that the parties to a proceeding may move for disqualification if the judge's impartiality might reasonably be questioned. While observing that such a system for the reporting of campaign contributions is not the province of a code of judicial conduct, the Special Committee urges the Commission to endorse the implementation of such systems.

Rule 2.12 G(3)

Disqualification: Prior Affiliations

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee notes the following infirmities of Rule 2.12 G(3):

- Parts of Rule 2.12 G(3) seem duplicative of other provisions of Rule 2.12 G.
- The meaning of serving as a material witness "concerning the proceeding" is unclear.
- The government lawyer's expressing an opinion on the law should not disqualify the lawyer from acting as a judge in a case that raises the same issues, any more than a judge who has issued an opinion on a matter of law would be disqualified from acting as a judge in cases that raise the same issue.

Rule 2.15 Comment 1

Supervision of Other Judges

New York State Bar Association

Special Committee to Review the Code of Judicial Conduct

Marjorie E. Gross

July 29, 2004

The NY State Bar Special Committee believes both the black letter of Rule 2.15 and its comment should encompass the identical standard that recognizes that administrative judges do not always have the means to guaranty a result. Consequently, the Committee suggests the following revision of Rule 2.15 Comment 1. (Additions underlined; deletions struck through.)

“[1] Public confidence in the courts depends on justice not being unduly delayed. TO promote the efficient administration of justice, judges with supervisory authority must take reasonable~~the~~ steps available to them~~needed~~ to assure~~ensure~~ that judges under their supervision administer the workload of their courts expeditiously”

Rule 2.20
Immunity for Discharge of Duties
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

While the NY State Bar Special Committee supports the concept that judges should have immunity for actions to discharge their duties, it is concerned that the language of Rule 2.20 may be more limited than existing law. The Committee suggests the following modification of Rule 2.20.

“Acts of a judge, in responding to judicial misconduct, lawyer misconduct, or disability and impairment under Rules 2.17, 2.18 and 2.19 are part of a judge’s judicial duties ~~and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.~~”

Canon 1
Conduct in General
New York State Bar Association
Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee submits the following editorial and drafting suggestions for Canon 1 to the Commission:

- Page 1, line 33. Change “the” to “these.”
- Page 6, line 28. Delete “the.”
- Page 10, line 3. It is not clear why there are brackets around “and.” The Committee supports consistent use of the phrase “integrity, independence and impartiality.”

Canon 2
Official Conduct
New York State Bar Association

D:\Documents and Settings\bogusla\Local Settings\Temporary Internet Files\OLK66C\comm_rules_gross_72904_ddt_summ.doc

Special Committee to Review the Code of Judicial Conduct
Marjorie E. Gross
July 29, 2004

The NY State Bar Special Committee submits the following editorial and drafting suggestions for Canon 2 to the Commission:

- Page 17, lines 18-19. Delete “however (i.e. the conduct in response to which action is necessary). Insert “of the impaired lawyer or judge.”
- Page 17, line 2. Insert “is” after “it.