Ethical Standards for Judges

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American Judicature Society

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Contents

Ethical Standards for Judges

The ethical standards for judges are established by the code of judicial conduct adopted in each jurisdiction. The basis for the state and federal codes is the *Model Code of Judicial Conduct* — adopted by the American Bar Association in 1972 and revised in 1990 and 2007, although the jurisdictions modify the model before adopting it. References to the code of judicial conduct in *Ethical Standards for Judges* are to the canons in the 1990 model code, followed by the parallel rule from the 2007 model code. Unless otherwise indicated, quoted language is from both codes, with brackets indicating minor language changes in 2007.

Integrity, independence, impropriety, and impartiality

Noting that "an independent and honorable judiciary is indispensable to justice in our society," Canon 1 of the 1990 model code of judicial conduct states that "a judge shall uphold the integrity and independence of the judiciary." Similarly, the preamble to the 2007 model code explains that "inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." Thus, judges are required to "personally observe high standards of conduct" (Canon 1A) and maintain "the highest standards of judicial and personal conduct" (Preamble).

Commentary to Canon 1 of the 1990 model code describes the relationship between high ethical standards and public confidence in the courts and judicial independence:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Impropriety and the appearance of impropriety

The model code provides that a judge shall:

- avoid impropriety (Canon 2/Rule 1.2),
- avoid the appearance of impropriety (Canon 2/Rule 1.2),
- comply with the law (Canon 2A/Rule 1.1), and
- act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A/Rule 1.2).

The code applies to "all of the judge's activities" and "at all times" (Canon 2/ Preamble), in other words, to both the professional and personal conduct of a judge

(Canon 2, Commentary/Preamble).

Under Canon 2A/Rule 1.2, actual improprieties include:

- violations of the law,
- violations of court rules, and
- violations of specific provisions of the code of judicial conduct.

The test for appearance of impropriety from the commentary to Canon 2A of the 1990 model code is an objective one based on the perceptions of a reasonable person:

> Whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

The test for appearance of impropriety from comment 5 to Rule 1.2 is "whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Examples of appearances of impropriety for which judges have been disciplined:

- Having a conversation with a party in a case that was observed by the other party even though the judge did not discuss matters concerning the proceeding (*In re Slusher*, Stipulation and Agreement and Order (Washington State Commission on Judicial Conduct April 1, 1994) (www.cjc.state.wa.us/)).
- Engaging in several business transactions with and accepting a gift from a car dealer to whom the judge had awarded a substantial verdict even though the judge did not expect to receive a financial favor (*Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995)).
- Calling a police officer the judge knew personally after the officer had ticketed the judge's brother with knowledge that his intervention, even if innocently undertaken, would result in preferential treatment of his brother (*In re Snow*, 674 A.2d 573 (New Hampshire 1996)).
- Contact with another judge on behalf of a friend whose son had been arrested that conveyed the appearance of lending the prestige of judicial office to influence the other judge (*In the Matter of DeJoseph*, Determination (New York State Commission on Judicial Conduct July 5, 2005) (www.scjc.state.ny.us)).

Misuse of office

The model code provides that a judge shall not:

- allow family, social, political, [financial,] or other relationships to influence the judge's judicial conduct or judgment (Canon 2B/Rule 2.4(B));
- convey or permit others to convey the impression that they are in a position to influence the judge (Canon 2B/Rule 2.4(C)); and
- testify voluntarily as a character witness (Canon 2B/Rule 3.3).

Canon 2B of the 1990 model code

prohibited a judge from "lend[ing] the prestige of judicial office to advance the private interests of the judge or others." In one of the substantive changes from the 1990 model code, the 2007 model code changed "lend" to "abuse" so that Rule 1.3 prohibits only the "abuse" of "the prestige of judicial office to advance the personal or economic interests of the judge or others."

A judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

Examples of misuse of office for which judges have been disciplined:

- Warning a police officer who stopped the judge for driving while intoxicated that the officer would "regret this" and telling the officer to "watch out from here on in" (*In the Matter of Winkworth*, Determination (New York State Commission on Judicial Conduct September 21, 1992) (www.scjc.state.ny.us/)).
- Sending a letter on official court stationery to a federal judge as a character witness for a defendant who had pled guilty (*Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994)).
- Communications with the police, prosecutors, and other judges that created an unacceptable risk that the supreme court justice's judicial office could influence the handling of a matter relating to his son (*In the Matter of Rivera-Soto*, 927 A.2d 112 (New Jersey 2007)).
- Calling the prosecutor about a ticket received by a clerk (*In the Inquiry Relating to Alvord*, 847 P.2d 1310 (Kansas 1993)).
- Writing two letters on official judicial letterhead to the principal at his son's school explaining that he had been awarded custody of his son and asking that the school prohibit the boy's mother from visiting him at school (*In the Matter of Mosley*, 102 P.3d 555 (Nevada 2004)).
- Repeatedly and gratuitously referring to his judicial position in a dispute with a snowmobile dealership about repairs, leaving his business card with the clerk of the court while filing a small claims action, introducing himself to a judge of the court where the case was pending, and identifying himself as a judge while making a complaint about the dealership to a state agency (*In the Matter of the Dumar*, Determination (New York State Commission on Judicial Conduct May 18, 2004) (www.scjc.state.ny.us)).

Courtroom demeanor

Appropriate judicial demeanor is important because:

- If a judge is courteous, dignified, and patient, litigants are more likely to have confidence that the judge's decision has been rendered with integrity and impartiality.
- If a judge rises above the chaos that sometimes occurs in a courtroom, the judge sets an example that will encourage others to be professional and civil.
- If a judge berates those appearing in the courtroom, the judge abuses the judicial power because litigants, attorneys, and

others are forbidden to react in kind.

- If a judge is intemperate or sarcastic, litigants and attorneys may be inhibited from presenting their case.

Therefore, Canon 3B(4)/Rule 2.8(B) requires a judge to be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers, [court staff, court officials], and others with whom the judge deals in an official capacity." Moreover, a judge is prohibited by Canon 3B(10)/Rule 2.8(C) from "commend[ing] or criticiz[ing] jurors for their verdicts other than in a court order or opinion in a proceeding," but may express appreciation to jurors for their service to the judicial system and the community.

Charges of impatient, angry, and impolite behavior on the bench generate a large proportion of complaints filed with judicial conduct commissions. Judges disciplined for demeanor are often described as lacking a judicial temperament. Frequently, the discipline is for a pattern of conduct. Although the ways in which judges can behave intemperately are, of course, almost infinite, several types of misconduct appear in many discipline cases:

- rude and abusive behavior,
- biased comments,
- misuse of the contempt power, and
- treatment of court staff, including sexual harrassment.

Rude and abusive behavior

Rude and abusive behavior that violates the code of judicial conduct includes:

- becoming angry and upset,
- using an insulting, intimidating, or demeaning tone,
- engaging in ill-conceived humor,
- making a vulgar gesture,
- using profanity, and
- loudly, intemperately, and repeatedly interrupting an attorney or other person appearing in the courtroom.

Examples of rude and abusive statements for which judges have been disciplined:

- "You have verbal diarrhea" (*In the Matter of Rice*, Determination (New York State Commission on Judicial Conduct January 31, 1997) (www.scjc.state.ny.us/)).
- "You'll be sorry. Keep your mouth shut while I'm talking" (*Re Wright*, 694 So. 2d 734 (Florida 1997)).
- "It appears to me that you are more than a little nuts" (*In the Matter of Going*, Determination (New York State Commission on Judicial Conduct July 18, 1997) (www.scjc.state.ny.us/)).
- Describing a witness as a "beer-bellied, full-bearded, unemployed, seedy, coverall-clad lout" (*In the Matter of Jenkins*, 503 N.W.2d 425 (Iowa 1993)).
- "Would you like some cheese with that whine because I've heard about all that I wish to hear" (*In re Lamdin*, 948 A.2d 54 (Maryland 2008)).
- Following a not guilty verdict, telling a defendant, "You are, sir, a very, very, very lucky man," and asking the jurors "what the hell were you thinking about" (*In the Matter of Mathesius*, 910 A.2d 594 (New Jersey 2006)).

Biased comments

The requirement that a judge be "patient, dignified and courteous" obviously includes a prohibition on conduct that reflects bias or prejudice, and that restriction was made explicit in Canon 3B(5) of the 1990 model code and emphasized in Rule 2.3(C) of the 2007 model code. The 2007 version provides:

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

The types of biased statements that result in discipline include racial epithets, ethnic slurs, demeaning nicknames, inappropriate attempted humor based on stereotypes, drawing a connection between race and crimes, insensitivity toward domestic violence or other crimes against women, and irrelevant references to ethnic background.

Examples of racial epithets, ethnic slurs, or demeaning nicknames for which judges have been disciplined:

- Stating in the courtroom, "Now, you can throw your Italian temper around in the bars but you don't throw them around in my courtroom…. I'm just as Irish as you are Dago" (*Re: Carr*, 593 So. 2d 1044 (Florida 1992)).
- Saying "good boy" to an African-American adult man during a hearing (*Public Admonishment of Flier* (California Commission on Judicial Performance July 27, 1995) (http://cjp.ca.gov/pubdisc.htm)).
- Addressing women as "sweetie," "sweetheart," and "baby," in and about the courthouse (*Kennick v. Commission on Judicial Performance*, 787 P.2d 591 (California 1990)).
- Referring to two female juveniles charged with battery on two teachers as "bitches" during an in-chambers conference with counsel (*Inquiry Concerning Stevens*, Decision and Order (California Commission on Judicial Performance February 19, 1998) (http://cjp.ca.gov/pubdisc.htm)).

Examples of attempting inappropriate humor based on stereotypes for which judges have been disciplined:

- Questioning a potential juror who was Japanese about inflation and then commenting that he did not know why he was speaking to a Japanese juror about inflation because "what do fishheads and rice cost?" (*Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (California 1983)).
- Asking a potential juror who was an African-American who worked as a grocery clerk if she knew the price of watermelon (*Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (California 1983)).

- At a Christmas party attended by most of the court personnel, asking a female Jewish district attorney, "With all the inbreeding your people do, aren't you afraid that they will produce a race of idiots?" (*Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (California 1983)).

Examples of drawing a connection between race and crime for which judges have been disciplined:

- Stating in the presence of a legal aid attorney and legal interns that he recalled a time when it was safe for young women to walk the streets "before the blacks and Puerto Ricans moved here" (*In the Matter of Schiff*, Determination (New York State Commission on Judicial Conduct September 15, 1993) (www.scjc.state.ny.us/)).
- Asking in a case with a Mexican defendant, "Why is America being punished? Did we do something to you folks? We have to pay for all your crimes. Did we do something wrong? Could we get foreign aid from your native land for you being here? Now he has a felony. Who is his felony attorney? I know the taxpayers are paying for him. Did we do something to your country? Did they send you here to get even with us for something? Montezuma's revenge" (*Office of Disciplinary Counsel v. Mestemaker*, 676 N.E.2d 870 (Ohio 1997)).
- Stating to a jury after it had rendered a guilty verdict, "Ladies and gentlemen, I'm very happy that you reached that disposition because the Dominican people are just killing us in the courts" (*In the Matter of Cunningham*, Determination (New York State Commission on Judicial Conduct March 18, 1994) (www.scjc.state.ny.us/)).

Examples of statements indicating bias or insensitivity toward domestic violence or other crimes against women for which judges have been disciplined:

- In a domestic violence case, stating "my opinion is that the police do 95% of the work when they separate the parties, so that takes care of 95% of the problem. You know, all we're doing is slapping someone after the police have remedied the situation. But, so be it. So I mean there's nothing to get excited about in missing these cases" (*In re Turco*, Stipulation and Admonishment (Washington State Commission on Judicial Conduct December 1, 1995) (www.cjc.state.wa.us/)).
- In a case involving sex-related crimes, remarking to prosecutors and law enforcement officers that he did not think much of the charges because "everyone knows that the girls in Duncan are easy" (*In the Matter of Lehman*, 812 P.2d 992 (Arizona 1991)).
- During an arraignment, asking a police officer whether the alleged assault was "just a Saturday night brawl where he smacks her around and she wants him back in the morning" and advising the defendant to "watch your back" because "women can set you up" (*In the Matter of Bender*, Determination (New York State Commission on Judicial Conduct February 7, 1992) (www.scjc.state.ny.us/)).

Examples of irrelevant references to ethnic background for which judges have been disciplined:

- After a contentious dialogue with an attorney, asking the attorney if he was Jewish (*In the Matter of Dye*, Determination (New York State Commission on Judicial Conduct September 19, 2003) (www.scjc.state.ny.us)).
- Referring to a staff member as the "little Mexican" (*In re Gordon*, 917 P.2d 627 (California 1996)).
- Referring to a court reporter who was of Japanese ancestry as "little Buddhahead" (*In re Gordon*, 917 P.2d 627 (California 1996)).
- After the clerk called cases involving Garcia, Ponce, and Sanchez, stating "You know, you'd think we were living in Mexico" (*In the Matter of Warren*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct October 13, 1995) (www.cjc.state.wa.us/)).
- Stating, "Oh, it's been a rough day—all those blacks in here" (*In the Matter of Jensen*, Determination (New York State Commission on Judicial Conduct May 29, 1997) (www.scjc.state.ny.us/)).

Abuse of the contempt power

To maintain control of their courtrooms, judges have the power to punish contemptuous conduct—conduct that threatens to disrupt a court session—with fines and prison terms, without following many of the usual procedures in a criminal case. Judicial conduct commissions and supreme courts are reluctant to second-guess a judge's decision that holding someone in contempt is necessary to maintain order in the courtroom. Moreover, whether a judge improperly held someone in contempt may be a question of legal error or abuse of discretion, and ordinarily a complaint about a decision would be dismissed by a judicial conduct commission without investigation.

However, misuse of the contempt power can result in discipline if the judge fails to follow necessary procedures. The procedures that must be followed in contempt cases are clearly spelled out in case law and include warning the individual to stop the contemptuous conduct and preparing a written order that recites the facts on which the finding of contempt is based.

Examples of abuses of the contempt power for which judges have been disciplined

- Holding six persons in contempt without strictly adhering to proper procedures or following binding precedent reversing his contempt rulings (*Goldman v. Nevada Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992)).
- Sentencing a reporter to 72 hours in jail for direct contempt without following correct procedures after the reporter published an article regarding a juvenile proceeding, disobeying the judge's order (*Commission on Judicial Performance v. Byers*, 757 So. 2d 961 (Mississippi 2000)).
- Holding a prosecutor in contempt for failing to request permission before leaving the courtroom to console a witness and turning his back on the

judge, without affording the prosecutor the opportunity to be heard (*In re Jefferson*, 753 So. 2d 181 (Louisiana 2000)).

- Holding a defendant in contempt to teach him a lesson after he added a note reading, "You people are crazy. I hope you choke on it!" on a check he mailed to pay a parking fine (*In the Matter of Pizzi*, 617 A.2d 663 (New Jersey 1993)).

Treatment of court staff

The requirement to be courteous applies to a judge's treatment of court staff as well as litigants and attorneys.

Examples of rude treatment of court staff for which judges have been disciplined:

- Repeatedly using derogatory and demeaning terms when referring to or criticizing female employees, including "Alzheimer's," "PMS," "senile," "that time of the month," "dumb blond," "stupid," "gold digger," and "menopause" (*In re Brown*, Opinion (July 14, 2006) and Order (Pennsylvania Court of Judicial Discipline October 2, 2006) (www.cjdpa.org/decisions/index.html)).
- Correcting and/or criticizing secretaries loudly and in the presence of third parties, including members of law enforcement and the general public, causing them to suffer embarrassment and humiliation (*In re Brown*, Opinion (July 14, 2006) and Order (Pennsylvania Court of Judicial Discipline October 2, 2006) (www.cjdpa.org/decisions/index.html)).
- Throwing a stack of files over the ledge of the bench at a fill-in clerk; belittling the clerk by telling her she had wasted 20 seconds of the court's time by swearing in the bailiff on the record; and telling a deputy sheriff she needed to learn how to do her job (*Inquiry Concerning VanVoorhis*, Decision and Order (California Commission on Judicial Performance February 27, 2003) (cjp.ca.gov/pubdisc.htm)).

Sexual harassment

The prohibition on manifesting bias or prejudice includes a requirement that a judge "refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment…." Commentary to Canon 3B(5). Comment 4 to Rule 2.3(C) defines "sexual harassment" as including but not limited to "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome." Although all behavior that constitutes sexual harassment in violation of a statute also constitutes judicial misconduct, forms of offensive behavior that do not meet the legal definition of sexual harassment may violate the code of judicial conduct.

Examples of sexual harassment behavior for which judges have been disciplined:

- Passing a note to a court attorney concerning the physical attributes of a female law intern and suggesting to the intern that she remove part of her apparel (*In the Matter of Collazo*, 691 N.E.2d 1021 (New York 1998)).
- Telling a court reporter, "your butt looks good in that dress" (*Fitch v. Commission on Judicial Performance*, 887 P.2d 937

(California 1995)).

- Asking an assistant to go to lunch every day, telling her to cancel other plans, inviting her out for drinks after work on numerous occasions, and inviting her to attend a judicial conference with the judge (*In re McAllister*, 646 So. 2d 173 (Florida 1994)).
- Telling an intern she should not go to bed angry, explaining, "I mean, don't ever deny your husband sex when you're angry" (*In re Empson*, 562 N.W.2d 817 (Nebraska 1997)).
- Asking a court employee, "Did you get any last night?" and referring to her as "little copulator" (*In re Gordon*, 917 P.2d 627 (California 1996)).
- Telling a court reporter, after she turned away from his attempt to kiss her, "I certainly hope you're not that frigid at home with your husband" (*Fitch v. Commission on Judicial Performance*, 887 P.2d 937 (California 1995)).
- Hugging and kissing a subordinate employee even if those advances were welcome (*In the Matter of Brenner*, 687 A.2d 725 (New Jersey 1997)).
- Patting an employee and squeezing her breasts (*In the Matter of Hey*, 452 S.E.2d 24 (West Virginia 1995)).
- Mailing staff members at the courthouse postcards with a picture of a woman with exposed breasts or a sexually-suggestive picture of an orangutan (*In re Gordon*, 917 P.2d 627 (California 1996)).
- Describing a court clerk as a "shameless hussy" and commenting on the physical attributes and attire of court clerks and persons who appeared before the court (*In re Landry*, 157 P.3d 1049 (Alaska 2007)).
- Kissing a law clerk against her will (*In the Matter of Subryan*, 900 A.2d 809 (New Jersey 2006)).

Ex parte communications

The code of judicial conduct prohibits a judge from initiating, permitting, or considering ex parte or other communications concerning a pending or impending proceeding (Canon 3B(7)/Rule 2.9(A)). An ex parte communication is any communication:

- outside the presence of or without the knowledge or participation of every person who has a legal interest in a proceeding or that person's lawyer,
- about a pending or impending case,
- by or to the judge presiding in the case.

In addition to communications with only one of the parties or lawyers in a case, prohibited communications include:

- communications with lawyers, law teachers, and other persons who are not participants in the proceeding, and
- independent investigations of the facts.

Ex parte communications are prohibited because they undermine a judge's impartiality.

- In an ex parte communication, a judge may receive inaccurate or incomplete information that might easily be corrected if all parties had been present.
- Seemingly innocuous ex parte contacts can have a subtle influence that even the most conscientious judge does not recognize.

- If the excluded party suspects or learns of the communication, he or she will inevitably feel that his or her opponent gained an unfair advantage regardless whether the judge was swayed.

There are exceptions to the prohibition. Under certain circumstances, the model code allows ex parte communications:

- authorized by law, *or*
- with
  - — disinterested experts,
  - — other judges, or
  - — court personnel, *or*
- about
  - — settlement,
  - — emergencies, *or*
  - — scheduling and administrative matters.

Communications authorized by law. Ex parte communications may be "authorized by law" in proceedings such as requests for emergency restraining orders, applications for search warrants and wiretaps, default judgments where a party has notice but fails to appear, and petitions for orders of protection in domestic violence cases. What communications are authorized by law will vary depending on the statutes and rules in each jurisdiction.

Experts. Canon 3(B)(7)/Rule 2.9(A)(2) permits a judge to "obtain the [written] advice of a disinterested expert on the law applicable to a proceeding before the judge," if the judge gives the parties:

- advance notice of who will be consulted and the subject of the advice sought,
- [a reasonable opportunity to object], and
- a reasonable opportunity to respond to the advice received.

Communications with other judges and court personnel. A judge may consult ex parte with other judges and with court staff and court officials who "aid the judge in carrying out the judge's adjudicative responsibilities." New language in Rule 2.9(A)(3) emphasizes that a judge who consults other judges or court personnel must make "reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter."

Settlement. A judge may, with the consent of the parties, hold separate conferences with the parties and lawyers in an effort to mediate or settle matters pending before the judge (Canon 3B(7)/Rule 2.9(A)(4)).

Administrative matters. Canon 3B(7)/Rule 2.9A(1) expressly permits ex parte communications that do not address substantive matters if the communications are for:

- scheduling,
- administrative purposes, or
- emergencies,

but only if the judge:

- "reasonably believes that no party will gain a procedural, [substantive] or tactical advantage as a result of the ex parte communication," and
- "makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond."

Examples of ex parte communications for which judges have been disciplined:

- Sending an e-mail message to an attorney appearing in a case before the judge that solicited the attorney's advice on how to handle the matter (*Public Admonishment of Caskey* (California Commission on Judicial Performance July 6, 1998) (cjp.ca.gov/pubdisc.htm)).
- Receiving ex parte communications from police officers concerning the merits of traffic cases, including representations that the actual speed that defendants had been driving was greater than the speed charged (*In the Matter of Westcott*, Determination (New York State Commission on Judicial Conduct December 17, 1997) (www.scjc.state.ny.us/)).
- While presiding over a trial, soliciting communications from computer consultants and experts concerning technical issues relating to damages without the involvement of the litigants or their attorneys. *Inquiry Concerning Baker*, 813 So. 2d 36 (Florida 2002).
- Before ruling on a petition for name change, conducting an independent factual investigation about gender reassignment surgery, without notice to the petitioners, and communicating with several medical organizations (*In re Hutchinson*, Decision (Washington State Commission on Judicial Conduct February 3, 1995) (www.cjc.state.wa.us/)).
- Advising an assistant prosecuting attorney in an ex parte call to have some supporters present in the courtroom during closing argument in a sexual assault trial, to use the term "serial rapist" frequently, and to be more emotional before the jury (*In the Matter of Starcher*, 456 S.E.2d 202 (West Virginia 1995)).
- Having a substantive ex parte conversation with a child welfare worker while a case was pending on appeal (*In the Matter of Turnbull*, Public Reprimand (Nebraska Commission on Judicial Qualifications January 27, 2006) (www.supremecourt.ne.gov/professional-ethics/judges/public-reprimands.shtml?sub16)).

Disqualification

A judge who is neutral and appears to be neutral is a necessary element of justice and an essential requisite for public confidence in the decisions issued by the judiciary. Therefore, Canon 3E/Rule 2.11(A) of the model code of judicial conduct creates a general requirement for disqualification whenever a judge's "impartiality might reasonably be questioned." The code also lists specific examples of circumstances in which a judge's impartiality might reasonably be questioned.

Under the specific rules in the model code (Canon 3E(1)(a)/Rule 2.11(A)(1)), disqualification is required if the judge has:

- a personal bias or prejudice concerning a party or a party's lawyer, or
- personal knowledge of disputed evidentiary facts concerning the proceeding.

Moreover, disqualification is required:

- If the judge knows that, he or she individually or as fiduciary, has an

economic interest (Canon 3E(1)(c)/Rule 2.11(A)(3)):

— in the subject matter in controversy, or

— in a party to the proceeding.

- If the judge knows that the judge's spouse, [domestic partner,] parent, or child wherever residing or any member of the judge's family residing in the judge's household has an economic interest (Canon 3E(1)(c)/Rule 2.11(A)(3)):

  — in the subject matter in controversy, or

  — in a party to the proceeding.

- If the judge knows that the judge's spouse, [or domestic partner], or a person within the third degree of relationship to either of them, or the spouse [or domestic partner] of such a person is (Canon 3E(1)(d)/Rule 2.11(A)(2)):

  — a party,

  — an officer, director, or trustee of a party,

  — acting as a lawyer in the proceeding,

  — to the judge's knowledge, likely to be a material witness in the proceeding, or

  — known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.

Persons within the third degree of relationship are great-grandparents, grandparents, parents, uncles, aunts, brothers, sisters, children, grandchildren, great-grandchildren, nephews, and nieces.

Pre-bench conduct may also disqualify a judge if the judge:

- served as a lawyer in the matter in controversy (Canon 3E(1)(b)/Rule 2.11(A)(6)(a)).
- was a material witness concerning the matter (Canon 3E(1)(b)/Rule 2.11(A)(6)(c)).
- previously presided as a judge over the matter in another court (Rule 2.11(A)(6)(d)).
- participated personally and substantially as a government lawyer or public official concerning the proceeding or publicly expressed an opinion concerning the merits of the particular matter in controversy while in governmental employment (Rule 2.11(A)(6)(b)).

A judge is also disqualified if a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter (Canon 3E(1)(b)/Rule 2.11(A)(6)(a)).

Finally, a judge is disqualified if, while a judge or a judicial candidate, the judge "made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy" (Rule 2.11(A)(5)).

Economic interest

Under the 1972 model code of judicial conduct, disqualification was triggered by a "financial interest" and that term was defined as "ownership of a legal or equitable interest, however small . . . ." In one of the changes made to the model code in 1990, the term "economic interest" was substituted for "financial interest," and the definition was changed so that disqualification is no longer required by ownership of an interest "however small." Under the 1990 and 2007 model codes, disqualification is expressly required only for a "more than de minimus" legal or equitable interest or a relationship as officer, director, advisor, or other active participant in the affairs of a party.

Unless the judge participates in the management of the fund or a proceeding could substantially affect the value of the interest, an economic interest does not include:

- Securities held by a mutual or common investment fund in which the judge owns an interest.
- Securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, [domestic partner,] parent, or child serves as an officer, director, advisor, or other active participant.
- A deposit in a financial institution, mutual savings association, or credit union.
- Government securities.

Personal bias or prejudice

Although "personal bias or prejudice" is one of the specific grounds for disqualification, it is not as easily defined as most of the other grounds. A disqualifying bias or prejudice is not demonstrated by:

- A judge's rulings in a case, even if they are consistently against one of the parties, absent additional factors, such as comments indicating that the judge had formed an opinion on the case before all the evidence was presented.
- A misconduct complaint or civil suit filed by a litigant or attorney against the judge because litigants and attorneys are not allowed to "judge shop," in other words, use the discipline process or other litigation to obtain a change of judge.

Whether a judge's impartiality might reasonably be questioned

Even if none of the specific provisions of Canon 3E/Rule 2.11(A) apply, disqualification may be required if, under the general "catch-all" standard, a judge's impartiality might reasonably be questioned.

Examples of cases in which judges have been disciplined for failing to disqualify:

- ◆ Presiding over cases involving persons to whom the judge owed money (*Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995)).
- ◆ Failing to disqualify from a case after engaging in an ex parte communication with the defendant's co-conspirator who was also a witness (*In the Matter*

of Sanders, 674 N.E.2d 165 (Indiana 1996)).

- Failing to disqualify from a case after the judge had used harsh words to make public his opinion of one of the attorneys, the complaint the attorney had filed against him, and his opinion of the complaint (*In re Schenck*, 870 P.2d 185 (1994)).
- Failing to disqualify from prosecutions based on the complaint of the judge's friends against the judge's former opponent in a bitterly contested election (*In re Peck*, 867 P.2d 853 (Arizona 1994)).
- Failing to disqualify from a civil case in which one of the litigants previously brought criminal charges against the judge (*In re Peck*, 867 P.2d 853 (Arizona 1994)).
- Presiding over 11 cases in which a bank was a party while her husband was a paid director of the bank without disclosing the relationship or obtaining a waiver of her disqualification (*In the Matter of Ziegler*, 750 N.W.2d 710 (Wisconsin 2008)).
- Presiding over cases involving an attorney with whom the judge had a romantic relationship (*Inquiry Concerning Adams*, 932 So. 2d 1025 (Florida 2006)).

Disclosure

The model code provides that a judge should disclose on the record information that the judge believes the parties or their lawyers "might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification" (Canon 3E, Commentary) or "might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification" (Rule 2.11, Comment 5).

Remittal

A judge who is disqualified on grounds other than personal bias or prejudice may still hear a case if the disqualification is remitted, in other words, waived by the parties. Under Canon 3F/Rule 2.11(C), remittal is allowed if:

- the judge discloses on the record the basis of the judge's disqualification,
- the judge asks the parties and their lawyers to consider whether to waive disqualification,
- the parties and their lawyers consider waiver out of the presence of the judge or court personnel,
- the parties and the lawyers, without participation by the judge or court personnel, agree that the judge should not be disqualified,
- the judge is willing to participate, and
- the waiver agreement is incorporated in the record.

If a judge is disqualified because of a personal bias or prejudice concerning a party, remittal or waiver is not allowed.

The rule of necessity

Commentary to the model code recognizes that courts have established a rule of necessity that overrides the disqualification rules if no other judge is available to hear a case. As examples, the commentary notes:

- A judge might be required to participate in judicial review of a judicial salary statute even though obviously he or she has an economic interest that would be affected by the outcome because all other judges would be disqualified as well.
- A judge disqualified from a case may still hear it if he or she is the only judge available and the case requires immediate judicial action, such as a hearing on probable cause or a temporary restraining order.

Administrative responsibilities

Judges are administrators as well as adjudicators, and there are ethical directives related to their administrative responsibilities. Under the model code, a judge is required to:

- discharge administrative responsibilities
  - — competently and diligently (Canon 3C(1)/Rule 2.5(A)),
  - — without bias or prejudice (Canon 3C(1)/Rule 2.3(A)); and
- cooperate with other judges and court officials in the administration of court business (Canon 3C(1)/Rule 2.5(B)).

Unjustifiable delay in court proceedings, particularly in deciding cases, can have a significant impact on the parties and reflects adversely on the judicial system. Under Canon 3B(8) of the 1990 model code, a judge is required to "dispose of all judicial matters promptly, efficiently and fairly." Commentary to the 1990 model code reminds judges that "in disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard," while a comment to the 2007 model code cautions that "the duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed . . . to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate."

To ensure prompt and efficient disposition of cases, commentary to the code advises judges to:

- seek the necessary docket time, court staff, expertise, and resources,
- monitor and supervise cases,
- devote adequate time to judicial duties,
- be punctual in attending court,
- expeditiously decide matters under submission, and
- take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate to that end.

Case law recommends that, to prevent delay, a judge:

- give necessary instructions to court personnel,
- arrange for the hiring of additional staff if necessary,
- relinquish administrative duties to staff, and
- keep good records of pending cases, for example, implementing a tickler system to monitor all cases ripe for decision.

Delay is not excused by:

- participation in voluntary, extra-judicial, professional activities,
- dilatory or inadequate staff,

- the judge's belief that a delayed decision is in the best interests of the parties,
- the judge's heavy workload,
- the judge's temporary, disabling condition, or
- dilatory counsel.

Other factors that are considered in delay cases:

- whether a rule establishes a time limit for deciding the case,
- whether the judge failed to report the cases as undecided, as required by rule or statute,
- whether the judge's record indicates a pattern of unreasonable delay or deliberate neglect,
- whether a particular instance of delay so lacks legitimate justification that it is willful,
- whether a judge has defied administrative directives or attempted to subvert the system,
- whether the delay caused harm to the parties, or
- whether the case is of a type, for example child custody matters, where expeditious disposal is particularly desirable.

In some states, even one or two instances of unwarranted delay can result in either a private or public reprimand. In other states, however, by case law, delay is resolved administratively and is not considered a matter for the judicial conduct commission unless there is persistent or deliberate neglect of judicial duties.

Examples of administrative failures for which judges have been disciplined:

- ◆ Repeatedly failing to produce timely and accurate transcripts and willfully and persistently refusing to comply with supervisory orders from the court of appeal directing production of necessary trial transcripts (*In re Hunter*, 823 So. 2d 325 (Louisiana 2002)).
- ◆ Failing to ensure that deposits were made and bank accounts were reconciled monthly, which allowed an office assistant to take money from the court accounts to pay her bills (*In the Matter of Lynah*, 656 S.E.2d 344 (South Carolina 2008)).
- ◆ Delaying taking a verdict to stay at a baseball game (*In the Matter of Zellerbach* (California Commission on Judicial Performance August 15, 2006) (http://cjp.ca.gov/pubdisc.htm)).
- ◆ Failing to decide 18 cases for 3 to 9 months and failing to timely and accurately report cases under advisement (*In re Lee*, 933 So. 2d 736 (Louisiana 2006)).
- ◆ Proving either unable or unwilling to issue timely and documented decisions over a substantial period (*In the Matter of Kouros*, 816 N.E.2d 21 (Indiana 2004)).
- ◆ A pattern of absenteeism and appearing late for court (*In re Alford*, 977 So.2d 811 (Louisiana 2008)).

Appointment power

Under Canon 3C(4)/Rule 2.13 of the model code, a judge shall not:

- make unnecessary appointments,
- exercise the power of appointment partially or on a basis other than merit,
- engage in nepotism or favoritism, or
- approve compensation of appointees beyond the fair value of services rendered.

In 2007, a new comment was added to define "nepotism" as "the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative."

Examples of abuses of appointment power for which judges have been disciplined:

- ◆ Appointing attorneys who rent office space from the judge or have social relationships with the judge to represent criminal defendants in numerous cases (*Inquiry Concerning Shook*, Decision and Order (California Commission on Judicial Performance October 29, 1998) (http://cjp.ca.gov/pubdisc.htm)).
- ◆ Appointing his father as counsel for indigent defendants in 238 cases (*In re Davis*, 865 So. 2d 693 (Louisiana 2004)).
- ◆ Failing to apply statutory requirements regarding award of legal fees to counsel for public administrator and appointing a friend as counsel (*In the Matter of Feinberg*, 833 N.E.2d 1204 (New York 2005)).
- ◆ Making numerous court appointments to a friend and business partner who owed the judge money (*Public Reprimand of Windle* (Texas State Commission on Judicial Conduct August 31, 2006) (www.scjc.state.tx.us/pdf/actions/FY2006PUB-SANC.pdf)).

Disciplinary responsibilities

Public confidence in the justice system depends in part on judges responding to misconduct by other judges and by lawyers. A judge's duty depends on three variables: the amount and quality of a judge's information (from rumor to first-hand knowledge), the seriousness of the offense (from technical to substantial), and the possible measures a judge could take.

Under Canon 3D/Rule 2.15 of the model code, a judge:

- Should [shall] take appropriate action upon receiving information indicating a substantial likelihood that:
  - — another judge has committed a violation of the code, or
  - — a lawyer has committed a violation of the rules of professional conduct.

Appropriate action may include:

- direct communication with the judge or lawyer,
- communicating with a supervising judge, or
- reporting the violation to the appropriate authority or other agency or body.

Further, a judge:

- Shall inform the appropriate authority if the judge has knowledge that:
  - — another judge has committed a violation of the code that raises a

substantial question as to the other judge's [honesty, trustworthiness, or] fitness for office; or

— a lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer.

The "appropriate authority" is "the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported."

Rule 2.16 in the 2007 model code makes explicit the previously implicit requirement that a judge "cooperate and be candid and honest with judicial and lawyer disciplinary agencies" and the implied prohibition on retaliat[ing] directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer."

Examples of failures to cooperate with the conduct commission for which judges have been disciplined:

- Failing to respond to conduct commission inquiries regarding delay in two cases (*In the Matter of Jelsema*, 625 N.W.2d 751 (Michigan 2001)).
- Falsely telling the conduct commission that he had no cases awaiting decision beyond the prescribed period (*In the Matter of Waddick*, 605 N.W.2d 861 (Wisconsin 2000)).
- Calling a clerk who was a witness outside of work hours and the work setting to discuss the disciplinary investigation against the judge (*Inquiry into the Conduct of Murphy*, 737 N.W.2d 355 (Minnesota 2007)).
- Attempting to introduce a fraudulent letter into evidence in a conduct commission hearing and refusing to directly answer questions (*In re Ferrara*, 582 N.W.2d 817 (Michigan 1998)).

Commenting on cases

Canon 3A(6) of the 1972 model code of judicial conduct stated: "A judge should abstain from public comment about a pending or impending proceeding in any court. . . ." Concerned that that language was overbroad, the ABA narrowed that provision in the 1990 model code to provide in Canon 3B(9):

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness….

Rule 2.10(A) is substantially the same. A proceeding is "impending" if it "is imminent or expected to occur in the near future."

There are exceptions to the rule that allow judges to.

- Explain court procedures,
- Make "public statements in the course of official duties," an apparent reference to a judge's on-the-bench statements, and
- Comment on proceedings in which the judge is a litigant in a personal capacity, although that does not include cases where the judge is a litigant in an official capacity.

Examples of comments on pending or impending cases for which judges have been disciplined:

- Commenting in interviews with magazines on the "no pregnancy" probation conditions the judge had imposed in cases pending on appeal (*Inquiry Concerning Broadman*, Decision and Recommendation (California Commission on Judicial Performance August 22, 1996) (cjp.ca.gov/pubdisc.htm)).
- While one of the first prosecutions under the state's new capital punishment statute was pending before him, giving a speech to a group of police officials in which he spoke of constitutional problems with the statute, noted that prosecutors had found the statute difficult to work with, questioned the need for the capitol defenders office, and criticized defense lawyers generally for using "technicalities" to block prosecutions and obtain reversals (*In the Matter of Bruhn* (New York State Commission on Judicial Conduct June 24, 1998) (www.scjc.state.ny.us/)).
- Giving a reporter a summary of a court proceeding in a controversial case over which the judge was presiding (*In the Matter of McKeon*, Determination (New York State Commission on Judicial Conduct August 6, 1998) (www.scjc.state.ny.us/)).
- Writing a letter to the editor and a guest editorial that criticized the district attorney (*In re Schenck*, 870 P.2d 185, *cert. denied*, 513 U.S. 871 (1994)).
- Discussing a child custody case on a national television program while an appeal from his decisions was pending (*In the Matter of Hey*, 425 S.E.2d 221 (West Virginia 1992)).
- Telling a reporter that the drug company defendant in a civil case was trying to bury the plaintiffs in documents and had only itself to blame for developments in the case; that its defense strategy had backfired; and that the database created by a special master would be a national plaintiffs' blueprint for suits against the defendant (*Inquiry Concerning Andrews*, 875 So. 2d 441 (Florida 2004)).

Extra-judicial activities

Under the model code, a judge is required to conduct his or her extra-judicial activities so that they do not:

- interfere with the proper performance of judicial duties (Canon 4A/Rule 3.1(A));
- lead to frequent disqualification of the judge (Rule 3.1(B)); or
- cast reasonable doubt on the judge's impartially, [independence, or integrity] (Canon 4A/Rule 3.1(C)).

A judge may:

- speak, write, lecture, teach, and participate in other extra-judicial activities:
  - — concerning the law, the legal system, and the administration of justice;
  - — concerning non-legal subjects;
- appear at a public hearing before, or otherwise consult with, an executive or legislative body or official:
  - — on matters concerning the law, the legal system, or the administration of

justice (Canon 4C(1)/Rule 3.2(A));

— in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties (Rule 3.2(B)); or

— when acting pro se in a matter involving the judge or the judge's [legal or economic] interests (Canon 4C(1)/Rule 3.2(C));

- accept appointment to a governmental committee, board, commission, or position that is concerned with the law, the legal system, or the administration of justice (Canon 4C(2)/Rule 3.4); and
- represent a country, state, or locality on ceremonial occasions or in historical, educational, or cultural activities (Canon 4C(2)/Rule 3.4, Comment 2).

Personal use of court resources

Rule 3.1(E) of the 2007 model code of judicial conduct made explicit the prohibition on a judge using "court premises, staff, stationery, equipment, or other resources," for extra-judicial activites, "except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law."

Examples of use of court resources for which judges have been disciplined:

◆ Using court computer equipment and state-provided internet services to access web-sites for personal benefit (*In re Furman*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct June 2, 2000) (www.cjc.state.wa.us)).

◆ Having courtroom clerk help with the day-to-day management of two rental properties, using the clerk as the contact person for tenants, having the clerk prepare approximately 40 letters and legal notices to quit, and having the clerk accept rental payments in the courtroom (*Public Admonishment of Watson* (California Commission on Judicial Performance February 21, 2006) (http://cjp.ca.gov/pubdisc.htm)).

◆ Having his judicial assistant type about 300 pages of personal documents during the regular course of the work day, including a letter to the Consul General of France to secure a visa for the judge's daughter; a letter to the commissary of an air force base complaining about cash register errors; minutes of a neighborhood meeting; a letter to the president of the electric company about service at the judge's residence; a letter to the president of United Airlines about bereavement rates for himself and his wife; a pleading in the judge's own divorce case; letters to a computer publication and *Golf World* magazine threatening to report their practices to the state attorney general's office; letters to his lawyer, his ex-wife, and others about issues in his divorce; letters about his financial interests in Ireland; and letters to acquaintances about his St. Patrick's Day party (*Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998)).

◆ Conducting a personal business from judicial chambers by storing antiques throughout the courthouse, selling those antiques to persons with whom

he came in contact at the courthouse, and directing city employees and jail trustees to move antiques into and out of the courthouse; directing court employees during normal business hours to go to his mother's nursery business to provide Spanish translating services; and directing court employees to perform other personal errands during court hours and to chauffeur him to and from his home and for various purposes (*In the Matter of Davis*, 946 P.2d 1033 (Nevada 1997)).

Organizations that practice invidious discrimination

Canon 2C/Rule 3.6 of the model code provides:

> A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, [gender], religion, national origin, [ethnicity, or sexual orientation].

As a comment explains, a judge's membership in an organization that practices invidious discrimination gives rise to the perception that the judge is not impartial.

The analysis under Canon 2C/Rule 3.6 asks three questions:

1. Whether an organization discriminates based on race, sex, gender, religion, national origin, ethnicity, or sexual orientation.
2. Whether an organization's discriminatory practices are "invidious."
3. Whether the organization is "an intimate, purely private organization whose membership limitations could not be constitutionally prohibited."

Charitable activities

Under the model code(Canon 4C(3)/Rule 3.7(A)(6)), a judge may serve as an officer, director, trustee, or non-legal advisor for:

- an organization or governmental agency devoted to the law, the legal system, or the administration of justice, or
- an educational, religious, charitable, fraternal, or civic organization,
- unless the organization:
  - — is conducted for profit,
  - — is likely to be engaged in proceedings that would ordinarily come before the judge, or
  - — will be engaged frequently in adversary proceedings in the judge's court or in any court subject to the appellate jurisdiction of the judge's court.

In addition, a judge may:

- assist in planning fund-raising (Canon 4C(3)(b)(i)/Rule 3.7(A)(1));
- participate in the management and investment of the organization's funds (Canon 4C(3)(b)(i)/Rule 3.7(A)(1));
- personally solicit funds from judges over whom the soliciting judge does not have supervisory or appellate authority (Canon 4C(3)(b)(i)/Rule 3.7(A)(2));
- personally solicit funds from members of the judge's family (Rule 3.7(A)(2))

- attend a fund-raising event (Commentary, Canon 4C(3)(b)/ Comment 3, Rule 3.7(A)(4)); and
- allow his or her name to appear on letterhead used for fund-raising or membership solicitation if the letterhead lists (Commentary, Canon 4C(3)(b)/ Rule 3.7(A), Comment 4):
  - — only the judge's name and office or other position in the organization, or
  - — the judge's judicial designation when comparable designations are listed for other persons.

In addition, for organizations devoted to the law, the legal system, or the administration of justice, under the 2007 model code (Rule 3.7(A)), a judge may:

- personally solicit other judges to become members unless the soliciting judge exercises supervisory or appellate authority over the judges being solicited;
- appear, speak, receive an honor, or be recognized at a fund-raising event and permit his or her title to be used in connection with the event; and
- make recommendations to public or private fund-granting organizations in connection with its programs and activities.

Examples of charitable fund-raising activities for which judges have been disciplined:

◆ Soliciting attorneys to purchase jewelry for the benefit of the Franciscan Missionaries of Mary; permitting his chambers to be used for the sale of sweaters knit by a Russian immigrant nun for the benefit of an immigrant group; and selling to judges and attorneys who practiced in the court over $5,000 in raffle tickets for a spring weekend in Washington, D.C., that included a memorial regatta in honor of the judge's deceased son (*In re Arrigan*, 678 A.2d 446 (Rhode Island 1996)).

◆ Allowing the use of his name, title, and photograph in a brochure used to solicit funds (*In the Matter of Castellano*, 889 P.2d 175 (New Mexico 1995)).

◆ Serving as honorary co-chair of a fund-raising dinner for the state chapter of the National Multiple Sclerosis Society (*In the Matter of Coffey*, Public Reprimand (Nebraska Commission on Judicial Qualifications September 29, 2006) (court.nol.org/PublicReprimand/)).

◆ Failing to take sufficient care to ensure that his name was not used in an improper manner in an invitation to a fund-raising event for a non-profit organization (*In re Brown*, 662 N.W.2d 733 (Michigan 2003)).

◆ Preparing flyers for fund-raising events, handing out the flyers to court employees and attorneys, and encouraging attendance at the fund-raisers (*In the Matter of McNulty*, Determination (New York State Commission on Judicial Conduct March 16, 2007) (www.scjc.state.ny.us)).

◆ Soliciting donations to a charitable fund-raising auction, selling auction tickets and having court staff sell tickets, and acting as an auctioneer (*In the Matter of Quall*, Decision and Order (California Commission on Judicial Performance June 2, 2008) (http://cjp.ca.gov/pubdisc.htm)).

Business and financial activities

Under the model code, a judge is required to:

- manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified (Canon 4D(4));
- divest investments and other financial interests that might require frequent disqualification as soon as the judge can do so without serious financial detriment (Canon 4D(4)/Rule 3.11, Comment 2);
- keep informed about the judge's personal and fiduciary economic interests (Canon 3E(2)/Rule 2.11(B)); and
- make a reasonable effort to keep informed about the personal economic interest of the judge's spouse [or domestic partner] and minor children residing in the judge's household (Canon 3E(2)/Rule 2.11(B)).

The model code prohibits a judge from:

- engaging in financial activities that:
  - — will interfere with the proper performance of judicial duties (Rule 3.11(C)(1));
  - — may reasonably be perceived to exploit the judge's position (Canon 4D(1)(a));
  - — will lead to frequent disqualification (Rule 3.11(C)(2));
  - — will involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves (Canon 4D(1)(b)/Rule 3.11(C)(3));
- serving as an officer, director, manager, general partner, advisor, or employee of any business entity, except for a family business (Canon 4D(3)/Rule 3.11(B)); and
- [intentionally] disclosing or using, for any purpose unrelated to judicial duties, non-public information acquired in a judicial capacity (Canon 3B(11)/Rule 3.5).

Under the model code, a judge may:

- hold and manage investments of the judge and members of the judge's family, including real estate (Canon 4D(2)/Rule 3.11(A));
- manage and participate in:
  - — a business closely held by the judge or members of the judge's family (Canon 4D(3)(a)/Rule 3.11(B)(1)), and
  - — a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family (Canon 4D(3)(b)/Rule 3.11(B)(2)).

The permission to engage in "other remunerative activity" contained in Canon 4D(2) of the 1990 model code was removed from the 2007 model code as too broad and inconsistent with other aspects of the code.

Examples of inappropriate involvement in business and financial activities for which judges have been disciplined:

- Owning and operating a company that provided pay telephone service for the inmates in the local parish jail (*In re Johnson*, 683 So. 2d 1196 (Louisiana

1996)).

- Managing the affairs of a corporation (*In the Matter of Imbriani*, 652 A.2d 1222 (New Jersey 1995)).
- Jointly owning real estate with a lawyer who appeared before the judge (*In the Matter of Means*, 452 S.E.2d 696 (West Virginia 1994)).
- Continuing to serve as secretary/treasurer and director of a corporation after becoming a judge (*In the Matter of Torraca*, Determination (New York State Commission on Judicial Conduct November 7, 2000) (www.scjc.state.ny.us)).

Fiduciary activities

Under Canon 4E/Rule 3.8 of the model code, a judge:

- shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary for anyone other than a member of the judge's family, but
- may serve as a fiduciary for a member of the judge's family if:
  - — such service will not interfere with the proper performance of judicial duties;
  - — the judge is not likely as a fiduciary to be engaged in proceedings that would ordinarily come before the court on which the judge serves; and
  - — the estate, trust, or ward does not become involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

Serving as an arbitrator or mediator

Under Canon 4F/Rule 3.9 of the model code, a judge may not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity.

Practicing law

Under Canon 4G/Rule 3.10 of the model code, a judge:

- shall not practice law; but
- may
  - — act pro se, and
  - — give legal advice to and draft or review documents for a member of the judge's family without compensation.

Examples of the improper practice of law for which judges have been disciplined:

- ◆ Acting as a consultant and negotiator for a professional tennis player in contract negotiations with Nike, including serving as a spokesperson, advising the player about negotiation strategies and the substance of the contract, and traveling out of state to meet with Nike at least six times (*In the Matter of Fleischman*, 933 P.2d 563 (Arizona 1997)).
- ◆ Appearing on behalf of his sister-in-law at a motion hearing before a family law commissioner during regular court hours and at the same courthouse in which the judge performs his judicial duties, and personally addressing the court concerning several disputed issues (*In re Chow*, Stipulation and Order of Admonishment (Washington State

Commission on Judicial Conduct February 2, 1996) (www.cjc.state.wa.us/)).

- ◆ Acting as a fiduciary in several estates, performing business or legal services for clients, and maintaining an inappropriate business and financial relationship with his former law firm, which had an active practice before his court (*In the Matter of Moynihan*, 604 N.E.2d 136 (New York 1992)).
- ◆ Drafting a lease agreement on behalf of an airport authority on which the judge served (*In the Matter of Grenz*, 534 N.W.2d 816 (North Dakota 1995)).

Gifts

Under Canon 4D(5) of the 1990 model code, a judge was prohibited from accepting any gift, bequest, favor, or loan from a party or other person who had come or was likely to come or whose interests had come or were likely to come before the judge but could accept any other gift, bequest, favor, or loan as long as the judge reported any that exceeded $150. The 1990 model code also listed specific examples of gifts a judge could accept.

Rule 3.13 of the 2007 model code divides gifts into three categories: those a judge is prohibited from accepting, those the judge may accept but must report, and those the judge may accept without reporting.

- A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.
- A judge may accept but must publicly report:
  - — gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge,
  - — gifts incident to a public testimonial, and
  - — invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge a bar-related function or other activity relating to the law, the legal system, or the administration of justice or an event associated with any extra-judicial activities if the same invitation is offered to non-judges who are engaged in similar ways in the activity as is the judge.
- A judge may accept without publicly reporting:
  - — Items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards,
  - — Gifts or other things of value from friends, relatives, or other persons whose appearance or interest in a proceeding would require the judge's disqulification,
  - Ordinary social hospitality,
  - Commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are available on the same terms to similarly situated persons who are not judges,

- Rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges,
- Scholarships, fellowships, and similar benefits or awards if they are available to similarly situated persons who are not judges, based upon the same terms and criteria,
- Books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use, and
- Gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member residing in the judge's household, that incidentally benefit the judge.

Under the 1990 model code, a judge was required to urge members of the judge's family residing in the judge's household not to accept a gift, bequest, or loan that the judge may not accept (Canon 4D(5)). Under the 2007 model code, a judge is only encouraged to "remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits" (Rule 3.13, Comment 4).

Examples of inappropriate gifts for which judges have been disciplined:

- Accepting a gift from a litigant to whom the judge had awarded a substantial verdict, receiving gifts from attorneys whose interests had or were likely to come before him, and failing to disqualify or make full disclosure of his relationship with those attorneys or their firms when they appeared before him (*Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995)).
- Accepting and using four tickets to a college football game from a husband involved in divorce proceedings pending before the judge (*In re Daghir*, 657 A.2d 1032 (Pennsylvania Court of Judicial Discipline 1995)).
- Soliciting and accepting from an attorney a $2,000 loan, failing to report the loan on his statement of economic interest, failing to disclose the loan to the other parties and attorneys in lawsuits over which the judge presided that involved the attorney's law firm, and failing to disqualify himself from those cases (*In the Matter of Drury*, 602 N.E.2d 1000 (Indiana 1992)).
- Accepting, in open court, football tickets from an attorney appearing before him (*In re Haley*, 720 N.W.2d 246 (Michigan 2006)).

Political and campaign activities

When a judge engages in political activity or campaigns for judicial office, the public may get the impression that the judge is committed to certain causes or positions or indebted to particular supporters, parties, or politicians and, therefore, as a judge, will make decisions based on the political impact of the case or on political loyalties, not on the merits viewed impartially. To abate this

perception as much as possible, the code of judicial conduct contains restrictions on the political activities of all judges and the campaign conduct of judges who are subject to public election. Many of the prohibitions also apply to judicial candidates who are not judges but are seeking election or appointment to judicial office.

However, concerns that political activity undermines public confidence in the judiciary must be balanced with the First Amendment, particularly the need of citizens to know about candidates in order to make intelligent choices at the polls. In 2002, the United States Supreme Court held unconstitutional a clause in the Minnesota code of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal and political issues. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Since then, there have been many constitutional challenges to the code restrictions on campaign conduct by judicial candidates and on the restrictions on political activity by judges not related to their own campaigns. Some of the challenges have been successful; some have not. This is an evolving area of the law.

In addition, the rules on political and campaign activity vary considerably from state-to-state and from the model code because the methods for choosing judges— from appointment for life to partisan election— vary considerably from state-to-state and even within a state based on the type and locale of the court.

The rules regarding political and campaign activity in Canon 4 of the 2007 model code are substantively similar to those in Canon 5 of the 1990 model code but are organized differently and reflect the different methods of choosing judges.

Political organizations

Under Canon 5A/Rule 4.1(A), all judges and judicial candidates are prohibited from acting as a leader or holding an office in political organizations, making speeches on behalf of political organizations, and soliciting funds for or paying an assessment to political organizations. In addition, judges and judicial candidates are prohibited from contributing to political organizations and attending or purchasing tickets for dinners or other events sponsored by political organizations (Canon 5A/Rule 4.1(A)) *except* that judges subject to an election and judicial candidates may do so at any time during a campaign (Canon SC/ Rule 4.2(B)). In addition, judges and judicial candidates are prohibited from publicly identifying as a candidate of a political organization or seeking, accepting, or using endorsements from a political organization (Canon 5C/Rule 4.1(A)) *except* that judicial candidates in a partisan public election may do so during a campaign (Canon 5C/Rule 4.2(C)).

Endorsing other candidates

Judges and judicial candidates are prohibited from publicly endorsing or opposing a candidate for any public office (Canon 5A/Rule 4.1(A)) *except* that judges subject to an election and judicial candidates may during a campaign publicly endorse or oppose candidates for the same judicial office for which they are running (Canon 5C/Rule 4.2(B)). A comment in the 2007 model code notes that "although members of the

families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no 'family exception' to the prohibition . . . against a judge or candidate publicly endorsing candidates for public office."

Campaign conduct

The model code leaves to each state to define when a judge subject to election or a judicial candidate may begin engaging in campaign activity.

During a campaign, a judicial candidate, including an incumbent judge, is prohibited from personally soliciting or accepting campaign contributions except through a campaign committee (Canon 5C/Rule 4.1(A)). The model code allows candidates' committees to solicit only reasonable contributions but leaves to each state to establish a limit on the amount that can be solicited in the aggregate from any individual, entity, or organization (Canon 5C/Rule 4.4).

Once a campaign begins, a judicial candidate, including an incumbent judge, may speak on behalf of his or her candidacy through any medium, including advertisements, web-sites, and campaign literature (Canon 5C/Rule 4.2(B)). There are restrictions on campaign speech. Judicial candidates, including incumbent judges, are prohibited from:

- Knowingly [or with reckless disregard for the truth] making any false or misleading statement (Canon 5A(3)(d)/Rule 4.1(A)(11)).
- In connection with cases, controversies, or issues that are likely to come before the court, making pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office (Canon 5A(3)(d)/Rule 4.1(A)(13)).

A judge is prohibited from using court staff, facilities, or other court resources in a campaign for judicial office (Rule 4.1(A)(10)).

Resign-to-run rule

Canon 5A(2)/Rule 4.5(A) requires judges to resign from judicial office upon becoming a candidate for a non-judicial elective office.

Other political activity

Canon 5D of the 1990 model code allowed judges to, at any time, engage in political activity on behalf of measures to improve the law, the legal system, or the administration of justice. The 2007 model code does not include that provision although there is no express prohibition on such activity. Under this rule, judges may, for example, take a public stand on issues such as a ballot measure in which voters will decide whether to pay to build a new courthouse, whether to create a new family court, and how judges are chosen.

Examples of political and campaign conduct for which judges have been disciplined:

- ◆ Giving permission for a campaign sign supporting the sheriff to be placed in the yard of the judge's home and telling the conduct commission it was his wife who had authorized the sign (*In the Matter of McCormick*, 639 P.3d 735 (Iowa 2002)).
- ◆ Contributing to candidates for public office (*In re Shea*, 815 So. 2d 813

(Louisiana 2002)).

- Referring to his judicial position in a telephone message requesting voters to support a candidate for lieutenant governor (*In the Matter of Koon*, 580 S.E.2d 147 (South Carolina 2003)).
- Endorsing the mayor for re-election (*Inquiry Concerning Vincent*, 172 P.3d 605 (New Mexico 2007)).
- Serving as chair of the local Republican Party; participating in the political campaign of another judicial candidate; and publicly endorsing other candidates (*In the Matter of King*, Determination (New York State Commission on Judicial Conduct February 14, 2007) (www.scjc.state.ny.us)).
- Encouraging several people to vote for his wife who was running for judicial office (*In the Matter of Codispoti*, 438 S.E.2d 549 (West Virginia 1993)).
- Personally soliciting contributions for his campaign from attorneys (*Simes v. Judicial Discipline and Disability Commission*, 247 S.W.3d 876 (Arkansas 2007)).
- Incorrectly asserting in campaign literature the number of jury trials over which he had presided (*Inquiry Concerning Woodard*, 919 So. 2d 389 (Florida 2006)).
- Using phrase "a judge with our values" to create the false impression that he was the incumbent judge (*Inquiry Concerning Renke*, 933 So. 2d 482 (Florida 2006)).
- Accepting campaign contributions, failing to use a campaign committee to solicit and accept contributions, and having his court clerk solicit contributions and organize a campaign fund-raiser (*In re Cannizzaro*, 901 So. 2d 1035 (Louisiana 2005)).
- Campaign materials that depicted a very "pro-law enforcement" stance (*Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003)).
- Running for the state senate without resigning judicial position (*In re Dunleavy*, 838 A.2d 338 (Maine 2003)).
- Seeking endorsement of a party convention for the nomination for governor without first resigning judicial office (*Matter of Buckson*, 610 A.2d 203 (Delaware 1992)).

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