Legal Ethics, Law. Deskbk. Prof. Resp. § 10.0-1 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.0. An Introduction to Judicial Ethics

# § 10.0-1 Introduction

Judges, obviously, must be aware of the ethics rules governing them, but lawyers should be cognizant about these rules as well. Granted, most lawyers will not become judges, but litigating lawyers will appear before judges and should be aware of the basic rules of judicial conduct, so that they will know when they should move to disqualify a judge.

In addition, the Judicial Code indirectly governs all lawyers. For example, judges may not engage in *ex parte* conversations with lawyers; [1] lawyers should know the rules governing *ex parte* conversations, because if the judge cannot be on one side of the conversation, the lawyer cannot be on the other. [2]

Similarly, the rules limit the circumstances and types of gifts that judges may receive. If a judge may not receive a gift from a lawyer, [3] the lawyer should not be giving it. [4] Judges must report serious lawyer misconduct and judicial misconduct. [5] Likewise, lawyers must report serous lawyer misconduct and judicial misconduct. [6] A lawyer may not accept an appointment from a judge if the lawyer or law firm had made a political contribution "for the purpose of obtaining" this appointment. [7] And, the judge may not appoint a lawyer to a position if the lawyer has contributed more than a reasonable amount to the judge's election campaign. [8]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.
a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Judicial Code, Rule 2.9.
2 Model Rules of Professional Conduct, Rule 3.5(b).
3 2007 Code of Judicial Conduct, Rule 3.13(B)(2).
4 Model Rules of Professional Conduct, Rule 3.5, Comment 1: "Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions."
5 2007 Code of Judicial Conduct, Rule 2.15.
6 Model Rules of Professional Conduct, Rule 8.3.
7 Model Rules of Professional Conduct, Rule 7.6.
8 2007 Code of Judicial Conduct, Rule 2.13(B).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.0-2 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.0. An Introduction to Judicial Ethics

# § 10.0-2 The Predecessor Codes and the Present Code

## § 10.0-2(a) The 1924 Code

In 1924, the ABA House of Delegates drafted the first judicial code of ethics, called the Canons of Judicial Ethics. The ABA decision to act was no mystery. An important catalyst to the 1924 Canons was the revelation, in the early 1920s, that Kenesaw Mountain Landis, a federal judge, was engaging in private employment and supplementing his federal salary of $7,500 with a more generous yearly salary of $42,500 as the major league baseball commissioner. The ABA adopted a resolution censuring the judge. [1] In the course of congressional hearings on this issue, one U.S. Representative said, "What is to prevent [baseball owners] from going into the Supreme Court now and hiring every member on the bench?" [2]

Chief Justice Taft was chairman of the ABA Committee that drafted the 1924 Judicial Canons. Yet, even with this prestigious parentage and the ABA as midwife, many states did not adopt the ABA Canons, with their "curious mixture of generalized, hortatory admonitions and specific rules of standards of proscribed conduct." [3]

## § 10.0-2(b) The 1972 Code

Nearly a half century after the ABA House of Delegates approved the Canons, it replaced them with the Code of Judicial Conduct. Once again, events surrounding a judge became an important activating agent that led to the 1972 Code. This Code grew out of financial disclosures that led to Justice Fortas's resignation from the Supreme Court and the financial and other disclosures that came about when the U.S. Senate rejected President Nixon's nomination of Federal Circuit Judge Haynsworth, and then Circuit Judge Carswell. The ABA drafted the 1972 Code in a more conventional statutory form, unlike the old Canons, and many states adopted it. [4]

## § 10.0-2(c) The 1990 Code

Alvin Toffler's 1970 book, *Future Shock*, [5] predicted that the future would bring not only change, but also an increase in the rate of change. We see the accelerating rate of change reflected in the increasingly shorter life spans of the ethics rules. Between 1987 and 1990, a Subcommittee of the Standing Committee on Ethics and Professional Responsibility conducted an extensive review process that led to adoption of the updated ABA Model Code of Judicial Conduct. In 1990, the ABA House of Delegates approved a comprehensive revision, called the Model Code of Judicial Conduct. [6]

As we saw with respect to the ABA Model Rules, the ABA itself does not enforce the Judicial Code and does not discipline judges for violating it. Instead, the ABA offers its model for state and federal jurisdictions to adopt, and every jurisdiction that does adopt a version of the ABA Model Judicial Code is responsible for creating a mechanism for enforcement and imposition of sanctions. For example, the United States Judicial Conference adopted a version of the ABA Model Code of Judicial Conduct, [7] even though federal statutes also govern federal judges. [8] These various jurisdictions enforce the judicial code that they have adopted.

The ABA has been very successful in persuading states and federal jurisdictions to adopt the 1990 Model Code, although various jurisdictions imposed their own nonuniform amendments. And, through the years, the ABA House of Delegates adopted various amendments to its Model Judicial Code. Finally, the ABA turned to a massive revision of the 1990 Judicial Code.

### § 10.0-2(d) The 2007 Code

In July 2003, the ABA created the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. After various drafts, the ABA House of Delegates unanimously approved the revised ABA Model Code of Judicial Conduct on February 12, 2007.

The ABA Joint Commission operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence. Since the adoption of the ABA Model Code of Judicial Conduct, changing circumstances called for a new revision. The ABA Commission articulated several of the changes that led to its creation. First, judges, judicial regulators, and judicial ethics commissions worked with the 1990 Code for many years, and they had experience with the problems that occurred, in particular by the different methods that developed regarding the judicial selection process, the development of new types of courts and court processes, and the increased number of *pro se* representations in the courts. [9]

The Joint Commission to Evaluate the Model Code of Judicial Conduct included ten judges and lawyers with extensive experience. It also included a public member who had been active in civic, business, and charitable affairs. In addition, there were eleven advisors with extensive experience in judicial ethics and disciplinary matters, and two well-known Reporters along with counsel from the ABA Center for Professional Responsibility and the ABA Justice Center. [10]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Walter P. Armstrong, Jr., *The Code of Judicial Conduct*, 26 SOUTHWESTERN L.J. 708, 709 (1972); JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 180–82 (Scribner, 1974); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 965 n.72 (West Pub. Co. Practitioner's ed. 1986).
On judicial ethics, see JEFFREY M. SHAMAN, STEVEN LUBET, & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS (Lexis Law Pub. 3d ed. 2000); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (Little, Brown & Co. 2d. ed. 2007).

2 House Hearing of Feb. 21, 1921, quoted in, Frederic J. Frommer, AP, *Congress Was Hard on First Commissioner*, WASHINGTON POST, Jan. 10, 2008.

3 John F. Sutton, Jr., *A Comparison of the Code of Professional Responsibility with the Code of Judicial Conduct*, 1972 UTAH L. REV. 355, 255–56.

4 Subject, of course, to various nonuniform amendments.

5 In ALVIN TOFFLER, FUTURE SHOCK 4 (Random House, 1970) Toffler explained that he coined the term "future shock" in 1965 to "describe the shattering stress and disorientation that we induce in individuals by subjecting them to too much change in too short a time."

6 The addition of the word "model" emphasized that the ABA, unlike a legislative or judicial body, has no right to "promulgate" anything. It merely proposes (and lobbies for) court rules or legislation.

7 The United States Judicial Conference adopted a Code of Conduct for United States Judges, reprinted at 175 F.R.D. 664 (1998). After the ABA updated its Judicial Canons, the United States Judicial Conference revised and adopted a new Judicial Code, found at, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf. It became effective on July 1, 2009. These federal judicial ethics rules apply to all federal judges other than U.S. Supreme Court Justices. The introduction to this Code states:

> "This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the 'Compliance' section. The Tax

> Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code."

On March 11, 2008, the Judicial Conference of the United States approved the first-ever binding, nationwide set of rules for handling conduct and disability complaints against federal judges, bringing consistency and rigor to the process. The Rules for Judicial-Conduct and Judicial-Disability Proceedings are at: http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf.

8 *E.g.*, 28 U.S.C.A. § 47 (disqualification of trial judge to hear appeal); 28 U.S.C.A. § 144 (bias or prejudice of judge); 28 U.S.C.A. § 372 (retirement for disability; substitute judge on failure to retire; judicial discipline); 28 U.S.C.A. § 454 (practice of law by Justices and Judges); 28 U.S.C.A. § 455 (disqualification of Justice, Judge, or Magistrate).

**Impeachment versus Discipline.** In addition to discipline, both state and federal judges are subject to impeachment and removal from office, though this remedy is difficult to implement and rarely used. *See* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY L. REV. 707 (1988); Ronald D. Rotunda, *Impeaching Federal Judges: Where Are We and Where Are We Going?*, 72 JUDICATURE: (the Journal of the American Judicature Society) 359 (1989); Ronald D. Rotunda, *Impeachment Showdown: Congress vs. Judges*, 16 LEGAL TIMES 37 (Nov. 1, 1993); Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector for the Courts*, 41 LOYOLA U. CHICAGO L. REV. 301 (2010), proposing an Inspector General for federal judges as a way to dealing with problem judges short of impeachment.

9 ABA Joint Commission To Evaluate The Model Code Of Judicial Conduct, Overview Of Model Code Of Judicial Conduct, As Adopted February 12, 2007, http://www.abanet.org/judicialethics/Overview_GAK_030707.pdf (2007); Statement of Commission Chair Mark I. Harrison, http://www.abanet.org/judicialethics/Chair_Message.pdf (2007). Mark I. Harrison of Phoenix, Arizona chaired the Joint Commission to Evaluate the Model Code of Judicial Conduct. He was a former member of the ABA Standing Committee on Ethics and Professional Responsibility and a former chair of the ABA Standing Committee on Professional Discipline.

10 The judges were M. Margaret McKeown, U.S. Court of Appeals for the Ninth Circuit; Cara Lee T. Neville, Minnesota Fourth Judicial District Court; Harriet L. Turney, Chief Administrative Law Judge, Industrial Commission of Arizona; and James A. Wynn, North Carolina Court of Appeals. The two Reporters were Professor Charles G. Geyh, of Indiana University School of Law, and former Professor W. William Hodes. The Advisory Commission also included several judges. See, http://www.abanet.org/judicialethics/roster.html

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.0-3 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.0. An Introduction to Judicial Ethics

# § 10.0-3 General Comparisons between the 2007 Judicial Code, the 1990 Judicial Code, and the 1972 Judicial Code

## § 10.0-3(a) Style

The 1990 Model Code is drafted in the same format as the 1972 Code, but many of the sections are renumbered and reorganized. For example, the 1990 Code has five Canons, while the 1972 Code had seven Canons. In addition, the 1990 Code, unlike the 1972 Code, is gender neutral. The drafters of the 1990 Code also intended to present clearer standards than those offered by the 1972 Code, but sometimes they did not succeed.

The 2007 Model Code changes the format substantially. First, the 2007 Code follows a format similar to the ABA Model Rules of Professional Conduct. The 1990 Code had various Canons, each followed by "sections" that (in the view of the framers of the 2007 Code) "discursively established the parameters of permissible and prohibited conduct." [1] In contrast, the 2007 Code keeps four Canons, and under each of them there are black letter Rules, such as Rule 1.1, Rule 1.2, etc. Comments usually follow each Rule. The Comments, like the Comments to the Model Rules of Professional Conduct, are in the nature of legislative history. They provide guides to interpretation as well as offer aspirational statements. These Comments "neither add to nor subtract substantively from the force of the Rules themselves." [2]

Second, the 2007 Code substantially reorganizes each of the Canons, in an effort to be more logical and functional.

- The 2007 Code takes the Preamble to the 1990 Code and reorganizes it into two parts: first, new Preamble, which states the objectives of the Model Rules; and, second, a Scope section, which describes how to interpret the Code, how to use it for guidance, and how to enforce it.

- The 1990 Code included an "Application Section" at the end. In the 2007 Code, the Application Section now appears after the Terminology section and before the Canons.

- Canon 1 of the 2007 Code and its Rules combine most of Canons 1 and 2 of the 1990 Code.

- Canon 2 of the 2007 Code and its Rules correspond, in general, to much of what is in Canon 3 in the 1990 Code.

- Canon 3 of the 2007 Code and its Rules focus on specific types of personal conduct, including extrajudicial activities, business, and financial activities; these sections match up to Canon 4 of the 1990 Code.

- Finally, Canon 4 of the 2007 Code and its Rules correspond to Canon 5 of the 1990 Code; this Canon deals with acceptable political conduct of judges and candidates for judicial office.

Many of the changes in the 2007 Code are differences of style and organization. Others offer clarification. However, there are a few substantive changes, and we will turn to them in the subsequent subsections.

## § 10.0-3(b) Structure

The 1990 Code has a *Preamble*, which explains that the Code is divided into a series of Canons. These Canons are broad statements of general principles. For example, Canon 1 states: "A Judge Shall Uphold the Integrity and Independence of the Judiciary." One can compare these Canons to chapter headings, rather than specific rules of behavior.

Specific rules under each Canon are called *Sections*. After this Preamble, there is a section called *Terminology*, which puts in one place all of the terms of art used in the 1990 Code. At the end of the 1990 Code is an *Application Section*, which discusses what types of persons the 1990 Code covers. The Canons, the Sections, Terminology, and Application Section are authoritative. The *Comments* (which follows various Sections) provides guidance, but are not intended to be a statement of additional rules. [3]

The 2007 Code also has a *Preamble*, followed by a *Scope* section. After the Scope, a section called *Terminology* sets forth in one place all of the terms of art used in the 2007 Code. This Terminology section adds several new terms and definitions. Following the Scope, there is the *Application* section, which the 1990 Code included at the end.

Following the Application section, there are now four Canons instead of five. Within each of the Canons, there are Rules, using the numbering system of Rule 1.1, Rule 1.2, etc. For example, Canon 4(C)(3)(a)(ii) of the 1990 Code corresponds to Rule 3.7(A)(6)(b) of the 2007 Code.

### § 10.0-3(c) Basic Interpretative Guidelines for the Judicial Code

The framers of the 2007 Judicial Code (and its predecessors) did not intend for the Judicial Code to be a basis for civil or criminal liability. [4]

In contrast, the framers did intend that the text of the Canons and the Rules are binding and govern the conduct of judges. Nonetheless, not "every transgression will result in disciplinary actions." [5] The 2007 Code (like its predecessors) is not an exhaustive guide, and the courts should interpret standards that it offers as rules of reason. The Preamble emphasizes this point several times. [6] A "minor violation of a rule need not invariably result in discipline." [7]

Lawyers are not supposed to invoke these Canons for "mere tactical advantage," [8] a principal that may be noble in spirit but difficult to enforce in practice, because the adversary system, by its very nature, gives many incentives to lawyers to use laws, rules, and precedent for "mere tactical advantage." Lawyers who exercise self-restraint and do not use the law when it helps them suffer competitive disadvantage compared to their opponents who accept the tactical advantage that the law offers them.

One would think that if one does not want the lawyer to use a provision in certain circumstances, the law would change the provision instead of leaving it as it is and then ask lawyers not to use it when it helps their clients to use it. Lawyers, after all, plead the statute of limitations even when they know that their client is liable, but for the running of the statute of limitations. If the law does not want lawyers to plead the statute of limitations, it creates other law (such as tolling) instead of merely asking the lawyer to pull his punches in a circumstance where the punch is completely legal.

### § 10.0-3(d) Preamble of the 2007 Judicial Code

### § 10.0-3(d)(1) The Text of the Preamble of the 2007 Judicial Code

**PREAMBLE**

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. 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.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.
[3] The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

### § 10.0-3(d)(2) Analysis of the Preamble the 2007 Judicial Code

The Preamble is one of the places where the Model Code emphasizes that it is a guide, but not an exhaustive one, to aid judges to comply with general ethical standards. [9]

The changes in the Preamble to the 2007 Code, when compared to the 1990 Code, are mostly stylistic. The provisions that used to address how the Rules are supposed to operate—the role of the Rules, the Comments, and the distinction between aspirational and mandatory comments—are now in the Scope section, discussed below.

The Preamble adds new language that emphasizes that judges must avoid impropriety "and the appearance of impropriety in their professional and personal lives." [10] This language, "the appearance of impropriety," is vague because it does not define conduct that is not an impropriety but nonetheless is an "appearance" of impropriety. Yet, one should not dismiss this phrase as no more than a trite platitude, overused bromide, or tired cliché. The drafters added this language specifically in the Preamble [11] as an introduction to its use as a new, specific, enforceable Rule that the drafters added to the 2007 Model Judicial Code. [12] We shall discuss this issue when we turn to Rule 1.2, which bans the appearance of impropriety.

### § 10.0-3(e) Scope of the 2007 Judicial Code

### § 10.0-3(e)(1) Text of the Scope Section of the 2007 Judicial Code

**Scope**

[1] The Model Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge or judicial candidate.
[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.
[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term "must," it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.
[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.
[5] The Rules of the Model Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7] The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

### § 10.0-3(e)(1) Analysis of the Scope Section of the 2007 Judicial Code

The Scope section makes clear several important points. First, one turns to the titles of the Canons, the Terminology section, this Scope section, and the Comments for "guidance." [13] The Comments offer aspirational norms. [14] The Canons are "guidelines," and provide "overarching principles of judicial ethics." [15] In addition, the Application section establishes which Rules apply to judges or judicial candidates.

In contrast, the Rules are the black letter law. They are "rules of reason," and one should not interpret them to interfere with judicial independence when judges are deciding cases. [16] That does not mean that every violation of a Rule must result in discipline. The judicial disciplinary authority should take into account all of the facts and circumstances, such as whether the judge had engaged in previous violations, the effect of the activity on third parties or on the judicial system, and the seriousness of the violation. [17]

The Scope section emphasizes that one should not use the Rules as a basis for civil or criminal liability. Nor should parties use the Rules to "seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court." [18] Presumably, the drafters were thinking about using the Rules in order to disqualify a judge.

The drafters can certainly hope that litigants will not use the Rules in conflicts motions (it is a free country, after all), but such a hope may be like whistling while walking by a graveyard. It does no harm to whistle, but one should not assume whistling has any magical power to ward off ghosts. As we discuss below, parties have routinely used the conflicts rules to disqualify judges and overturn lower court decisions, and that will continue to occur under the 2007 Model Code of Judicial Conduct. Moreover, such motions are a natural response to the Code. If the Code provides that a judge should not hear a case because of a given conflict, then we should hardly be surprised when the appellate court enforces that Rule (which the Code created in an effort to protect the litigants) in a manner that protects litigants.

### § 10.0-3(f) Terminology, Nomenclature, and Vocabulary of the 2007 Judicial Code

#### § 10.0-3(f)(1) Mandatory and Hortatory Language

The 1972 Code used the term "should" in both the Canons and the text. Consequently, some jurisdictions thought that "should" only expressed an aspirational standard. Although the Preface to the 1972 Code indicated that it intended its standards to be mandatory, some jurisdictions omitted the Preface when adopting the Code. The 2007 Code as well as the 1990 Code eliminates this confusion by using the term *"shall"* in the text and "*must*" in the Commentary to indicate that a standard is mandatory, and violation of that standard subjects the judge to discipline. The 2007 Code and the 1990 Code uses "*may*" to indicate that the judge has permissible discretion. "*Should*" or "*should not*" are both intended to be hortatory.

#### § 10.0-3(f)(2) Prior Case Law

Although the ABA approved the 2007 Code, the drafters did not write on a clean slate. Much case law decided under the 1972 Code and the 1990 Code is still relevant under the 2007 Code because many of the substantive provisions are basically unchanged (although many of the sections are renumbered). In this book, one should assume that any citation to a Code section is to the 2007 Code, unless this text indicates otherwise. This Chapter will also compare differences between the various Codes when such a comparison is useful.

### § 10.0-3(f)(3) Terminology

The 2007 Code includes a Terminology section. When the ABA printed its Model Code of Judicial Conduct, it placed asterisks [*] next to all of the terms (such as "member of the judge's family") in the body of the Canons the first time that it uses the term in the Rules. These asterisks direct the reader to the Terminology section, which collects all of the definitions. Following the definition of each term is a list of the sections in which each term appears. The ABA did not number these items, but we number them here for convenience, and we place the numbers in brackets to indicate that the numbering system is not part of the ABA Model Code of Judicial Conduct.

The provisions in the Terminology Section of the Model Judicial Code of 2007 are as follows:

[1] **"Aggregate,"** in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent. See Rules 2.11 and 4.4.

[2] **"Appropriate authority"** means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rules 2.14 and 2.15.

[3] **"Contribution"** means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.4.

[4] **"De minimis,"** in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.11.

[5] **"Domestic partner**" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 2.13, 3.13, and 3.14.

[6] **"Economic interest**" means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in 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 a director, an officer, an advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge.

See Rules 1.3 and 2.11.

[7] **"Fiduciary**" includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

[8] **"Impartial," "impartiality,"** and **"impartially"** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

[9] **"Impending matter"** is a matter that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, 3.13, and 4.1.

[10] **"Impropriety"** includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.

[11] **"Independence"** means a judge's freedom from influence or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

[12] **"Integrity"** means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rule 1.2.

[13] **"Judicial candidate"** means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2, and 4.4.

[14] **"Knowingly," "knowledge," "known,"** and **"knows"** mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.

[15] **"Law"** encompasses court rules as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15, 4.1, 4.2, 4.4, and 4.5.

[16] **"Member of the candidate's family"** means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship.

[17] **"Member of the judge's family**" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

[18] **"Member of a judge's family residing in the judge's household"** means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Rules 2.11 and 3.13.

[19] **"Nonpublic information"** means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

[20] **"Pending matter"** is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1.

[21] **"Personally solicit"** means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication. See Rule 4.1.

[22] **"Political organization"** means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by Rule 4.4. See Rules 4.1 and 4.2.

[23] **"Public election"** includes primary and general elections, partisan elections, nonpartisan elections, and retention elections. See Rules 4.2 and 4.4.

[24] **"Third degree of relationship"** includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 http://www.abanet.org/judicialethics/Overview_GAK_030707.pdf.

2 http://www.abanet.org/judicialethics/Overview_GAK_030707.pdf.

3 The 2007 Code refers to "Comments" and numbers each paragraph. The 1990 Code referred to "Commentary" and did not number them. For ease of reference, we will number the Commentary in this book when referring to them.

4 ABA Model Code of Judicial Conduct (1990), Preamble:

> "The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. *It is not designed or intended as a basis for civil liability or criminal prosecution*. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding." Preamble, 4th ¶; (emphasis added).
>
> > "The Code is intended, however, to state basic standards which should govern the conduct of all judges *and to provide guidance* to assist judges in establishing and maintaining high standards of judicial and personal conduct." Preamble, 6th ¶; (emphasis added).

The ABA Model Code of Judicial Conduct (2007), similarly states: "The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court." Scope, ¶7.

5 1990 ABA Code of Judicial Conduct, Preamble ¶5.

6 1990 ABA Code of Judicial Conduct, Preamble ¶¶3, 5.

7 ABA's Standing Committee Report on 1990 Code, Legislative Draft 2 (1990).

8 1990 ABA Code of Judicial Conduct, Preamble ¶4.

9 Preamble, ¶3. *See also* Scope, ¶1; ¶5.

10 Preamble, ¶2.

11 Reporters' Explanation of Changes to Preamble, at 2 (ABA 2007). Note that the ABA advises that the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct did not approve the "Reporters' Explanations of Changes." The Commission's Reporters drafted this Explanation, based on the proceedings and record of the Commission, solely to inform the ABA House of Delegates about each of the proposed amendments to the Model Code prior to their being considered at the ABA 2007 Midyear Meeting. The ABA did not adopt them as part of the Model Judicial Code.

12 2007 Judicial Code, Rule 1.2 & Comment 5. *See* Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 HOFSTRA L. REV. 1337 (2006).

13 Scope, ¶¶2 to 3.

14 Scope, ¶4

15 Scope, ¶2.

16 Scope, ¶5.

17 Scope ¶6.

18 Scope ¶7.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.0-4 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.0. An Introduction to Judicial Ethics

# § 10.0-4 Application of the Code of Judicial Conduct

## § 10.0-4(a) The Text of the Application Section of the Judicial Code: Defining Who Is a Judge

The Application section of the 2007 Judicial Code establishes when the various Rules apply to a judge or judicial candidate. It provides as follows:

**APPLICATION**

The Application section establishes when the various Rules apply to a judge or judicial candidate.

**I. APPLICABILITY OF THIS CODE**

**(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify provisions that apply to four categories of part-time judges only while they are serving as judges, and provisions that do not apply to part-time judges at any time. All other Rules are therefore applicable to part-time judges at all times. The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. Canon 4 applies to judicial candidates.**
**(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.** [1]
**[Ed. Note: In August 2010, the ABA House of Delegates amended section (A) to clarify the application of certain rules to part-time judges.]**

**COMMENT**

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The determination of which category and, accordingly, which specific Rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.

[3] In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions

set forth in the Code. Nevertheless, judges serving on "problem solving" courts shall comply with this Code except to the extent local rules provide and permit otherwise.

### II. RETIRED JUDGE SUBJECT TO RECALL

**A retired judge subject to recall for service, who by law is not permitted to practice law, is not required to comply:**

**(A) with Rule 3.9 (Service as Arbitrator or Mediator), except while serving as a judge.**

**(B) at any time with Rule 3.8(A) (Appointments to Fiduciary Positions).**

**[Ed. Note: The ABA House of Delegates amended this provision to refer to Rule 3.8(A) at its annual meeting in August 2010].**

### COMMENT

[1] For the purposes of this section, as long as a retired judge is subject to being recalled for service, the judge is considered to "perform judicial functions."

### III. CONTINUING PART-TIME JUDGE

**A judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall who is permitted to practice law ("continuing part-time judge"),**

**(A) is not required to comply:**

**(1) with Rule 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General) (A)(1) through (7), except while serving as a judge; or**

**(2) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.8(A) (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), and 3.11(B) (Financial, Business, or Remunerative Activities); and**

**(B) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.**

[Ed. Note: In August 2010, the ABA House of Delegated Amended III(A) to clarify the rules applicable to continuing part-time judges.]

### COMMENT

[1] When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the informed consent of all parties, and pursuant to any applicable Model Rules of Professional Conduct. An adopting jurisdiction should substitute a reference to its applicable rule.

### IV. PERIODIC PART-TIME JUDGE

**A periodic part-time judge who serves or expects to serve repeatedly on a part-time basis, but under a separate appointment for each limited period of service or for each matter,**

**(A) is not required to comply:**

**(1) with Rule 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General) (A)(1) through (7), except while serving as a judge; or**

**(2) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.8(A) (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), and 3.11(B) (Financial, Business, or Remunerative Activities); and**

**(B) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.**

[Ed. Note: In August 2010, the ABA House of Delegates amended IV(A) to clarify the application of the rules to periodic part-time judges.]

**V. PRO TEMPORE PART-TIME JUDGE**

**A pro tempore part-time judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard is not required to comply:**

**(A) except while serving as a judge, with Rules 2.4 (External Influences on Judicial Conduct), 3.2 (Appearances before Governmental Bodies and Consultation with Government Officials), and 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General) (A)(1) through (7); or**

**(B) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.8(A) (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), and 3.11(B) (Financial, Business, or Remunerative Activities).**

[Ed. Note: In August 2010, the ABA House of Delegates amended (A) and (B) to clarify the application of the rules to pro tempore part-time judges.]

## § 10.0-4(b) Introduction: The Application Section

The Application section of the ABA Model Code of Judicial Conduct has no Canon number. Instead, it is titled, "Application of the Code of Judicial Conduct." [2]

The Judicial Code makes clear that it applies to all persons who perform "judicial functions," whether or not they are full time judges. The 2007 Judicial Code governs all people who perform judicial functions, such as a justice of the peace, a special master, a referee, a hearing examiner, or an administrative law judge. [3] One can perform a "judicial function" without being a judge of a court of general jurisdiction. For example, referees in bankruptcy, special masters, court commissioners, or magistrates are all "judges" for the purposes of this Code, because they are all performing judicial functions. For example, if the person is a member of the Executive Branch but performs adjudicatory functions, such as a hearing examiner, the 2007 Judicial Code applies. [4]

The Judicial Code also applies to all who perform judicial functions, whether or not they are lawyers. [5] It is surprising but true that not all judges in the United States are lawyers. [6] In 1983, there were approximately 14,000 nonlawyer judges in 44 states. [7]

All persons who fall in this category of "judge" should comply with the Judicial Code, subject to four exceptions: (1) Retired Judge subject to recall; (2) Continuing Part-time Judge; (3) Periodic Part-time Judge; and (4) Pro Tempore Part-time Judge.

## § 10.0-4(c) Retired Judge

A retired judge who is subject to being recalled as a judge, and whom the law does not allow to practice law, is not required to comply with Rule 3.9 [8] except while he is serving as a judge. Rule 3.9 prohibits a judge from serving as an arbitrator and mediator. [9]

This type of retired judge also is not required to comply with Rule 3.8, [10] which governs appointments to fiduciary positions.

Retired judges *not* subject to recall to judicial service are not mentioned in § II of "Application," because, by implication, they are not governed by the Judicial Code.

### § 10.0-4(d) Continuing Part-Time Judges

A continuing part-time judge is a judge who serves repeatedly on a part-time basis by election or who serves under a continuing appointment.

A retired judge who is subject to recall *and* who can practice law is also a continuing part-time judge. [11]

A full-time judge who works for part of the day is not a part-time judge. She is merely under-employed. For example, assume that Alpha is a judge in a court of general jurisdiction who receives the same salary as other judges in that capacity. The law forbids her from engaging in any other occupation but she only works every other morning because she works fast and her docket is up-to-date. She is a full-time judge and must comply with all provisions of the Judicial Code.

If one is a continuing part-time judge, then—except while serving as a judge—that person need not comply with Rule 2.10(A) and Rule 2.10(B), both of which relate to judicial statements concerning pending and impending cases. [12]

The continuing part-time judge also does not have to comply—even while serving as a judge—with a host of other Rules: Rule 3.4 (Appointments to Governmental Positions), Rule 3.8 (Appointments to Fiduciary Positions), Rule 3.9 (Service as Arbitrator or Mediator), Rule 3.10 (Practice of Law), Rule 3.11 (Financial, Business, or Remunerative Activities), Rule 3.14 (Reimbursement of Expenses and Waivers of Fees or Charges), Rule 3.15 (Reporting Requirements), Rule 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), Rule 4.2 (Political and Campaign Activities of Judicial Candidates in Public Elections), Rule 4.3 (Activities of Candidates for Appointive Judicial Office), Rule 4.4 (Campaign Committees), and Rule 4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office). [13]

Finally, the continuing part-time judge may not practice law in the court on which the judge serves. Nor may the continuing part-time judge practice law in any court subject to the jurisdiction on which the judge serves. And, the continuing part-time judge may not act as a lawyer in any proceeding in which the judge has served as a judge, or in any other related proceeding. [14] However, the situation is different if the continuing part-time judge is no longer a continuing part-time judge and will not be a judge again, that is, the judge is no longer subject to recall. Then, this former continuing part-time judge may act as a lawyer in a proceeding in which she has served as a judge, but only if all the parties give their informed consent. [15]

### § 10.0-4(e) Periodic Part-Time Judge

A periodic part-time judge is a judge who serves, or expects to serve, repeatedly on a part-time basis but under a separate appointment for each limited period of service. [16]

A part-time judge—except while serving as a judge—need not comply with Rule 2.10(A), the Rule governing judicial statements on pending and impending cases. [17]

In addition, a part-time judge does not have to comply, anytime, with the followings Rules: Rule 3.4 (Appointments to Governmental Positions), Rule 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities), Rule 3.8 (Appointments to Fiduciary Positions), Rule 3.9 (Service as Arbitrator or Mediator), Rule 3.10 (Practice of Law), Rule 3.11 (Financial, Business, or Remunerative Activities), Rule 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value), Rule 3.15 (Reporting Requirements), Rule 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), and Rule 4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office). [18]

The periodic part-time judge also may not practice law in the court on which the judge serves. Nor may the periodic part-time judge practice law in any court subject to the jurisdiction on which the judge serves. And, the periodic part-time judge may not act as a lawyer in any proceeding in which the judge has served as a judge, or in any other related proceeding. [19]

### § 10.0-4(f) Pro Tempore Part-Time Judge

A *pro tempore* part-time judge is someone who serves or expects to serve as a judge once or only sporadically on a part-time basis under separate appointment for each period of service or case heard.

Unless he is serving as a judge, the *pro tempore* part-time judge need not comply with the following Rules: Rule 1.2 (Promoting Confidence in the Judiciary), Rule 2.4 (External Influences on Judicial Conduct), Rule 2.10 (Judicial Statements on Pending and Impending Cases), or Rule 3.2 (Appearances before Governmental Bodies and Consultation with Government Officials). [20]

In addition, the *pro tempore* part-time judge need not comply with the following Rules at any time: Rule 3.4 (Appointments to Governmental Positions), Rule 3.6 (Affiliation with Discriminatory Organizations), Rule 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities), Rule 3.8 (Appointments to Fiduciary Positions), Rule 3.9 (Service as Arbitrator or Mediator), Rule 3.10 (Practice of Law), Rule 3.11 (Financial, Business, or Remunerative Activities), Rule 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value), Rule 3.15 (Reporting Requirements), Rule 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), and Rule 4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office). [21]

### § 10.0-4(g) Time for Compliance

#### § 10.0-4(g)(1) Text of the Time for Compliance Section

The text of the Time for Compliance section provides as follows:

**VI. TIME FOR COMPLIANCE**

**A person to whom this Code becomes applicable shall comply immediately with its provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.**

**COMMENT**

> [1] If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event longer than one year.

#### § 10.0-4(g)(2) Applying the Time for Compliance Rule

The ABA, when it approved the Model Code of Judicial Conduct, recognized that it would be sensible to give judges a reasonable time to comply with some of the provisions—those dealing with judge as a fiduciary and the judge in a business relationship. This section reflects that view.

Hence, a new judge may—for a time—continue to serve as a fiduciary, notwithstanding Rule 3.8. The time should be no longer than necessary to avoid "serious adverse consequences" to the beneficiaries. In any event, this window of time closes in one year at the maximum.

Similarly, the new judge can in a preexisting business activity, but this window of time also closes in one year at the maximum. [22]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Each jurisdiction should consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying, and enforcing the Code for the administrative law judiciary. *See, e.g.*, Model Code of Judicial Conduct for Federal Administrative Law Judges (1989) and Model Code of Judicial Conduct for State Administrative Law Judges (1995). Both Model Codes are endorsed by the ABA National Conference of Administrative Law Judiciary. [Footnote by the ABA.]

2 The 1990 Code announces, at the end of the Code, after Canon 5: "This section of the Judicial Code, entitled, Application of the Code of Judicial Conduct, is hereinafter called, 'Application.'"
The 2007 Code places the Application after the Terminology and prior to Canon 1.

3 2007 Code, Application, I(B).

4 In contrast, under the 1990 Code, in order for a person to be performing a "judicial function," it is necessary that this person be "an officer of a judicial system." Application, § A. For example, in many jurisdictions it is common that an "administrative hearing officer" (or sometimes called an "administrative law judge") is part of the executive branch, not the judicial branch of government. The 1990 ABA Model Judicial Code did not apply to officers in the executive branch, although a particular jurisdiction may decide to apply some or all of its provisions to these executive branch officers. Application, § A and accompanying footnote.

5 2007 Code, Application, I(A),(B). 1990 Code of Judicial Conduct, Application, § A.

6 *Cf.* North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976).

7 TIME MAGAZINE, Sept. 26, 1983, at 62, col. 1.

8 Rule 3.9 corresponds to Canon 4F of the 1990 Code.

9 Application, II(A).

10 Rule 3.8 corresponds to Canon 4E.

11 2007 Code, Application, III.

12 2007 Code, Application, III(A)(1).

13 2007 Code, Application, III(A)(2).

14 2007 Code, Application, III(B).

15 2007 Code, Application, III, Comment 1. This Comment adds, "An adopting jurisdiction should substitute a reference to its applicable rule."

16 2007 Code, Application, IV. 1990 Code, Terminology ¶14.

17 2007 Code, Application, IV(A)(1).

18 2007 Code, Application, IV(A)(2).

19 2007 Code, Application, IV(B).

20 2007 Code, Application, V(A).

21 2007 Code, Application, V(B).

22 Application, VI, Comment 1.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.1-1.0 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.1. Canon 1 Integrity and Independence

§ 10.1-1.0 Canon 1

## § 10.1-1.0(a) The Text of Canon 1

Canon 1 provides:

**CANON 1. A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.**

## § 10.1-1.0(b) Introductory Analysis of Canon 1

The lofty language of Canon One sets the tone for the rest of the Model Code of Judicial Conduct. Although it uses the verb "shall," this Canon, like the others, presents an axiomatic norm and overarching principle rather than a detailed standard. [1] This norm is useful as a guidepost in interpreting the rest of this ethics code. The disciplinary authorities may discipline a judge "only for violating a Rule," but the Canons "provide important guidance in interpreting the Rules. [2] The public must not only have confidence in the reliability of judicial procedures, but also in the integrity of the judges. The basic purpose of the Code is to "assure that judges will be worthy of … independence and deserving of … confidence." [3] Canon 1 introduces that goal.

## § 10.1-1.0(c) Judicial Independence

Canon 1 emphasizes that an independent judiciary is an indispensable element of justice, and that judges must strive to preserve the independence of the judiciary. [4] An independent judiciary helps ensure a free society. For example, there are substantial risks of conflicts of interest if a judge, under the *control* of the government, were called upon to decide a case in which the government is a party. Similarly, if judges remained members of the legislature, they might not be able to apply impartially the laws they were enacting. [5]

The present view of the need for judicial impartiality grew out of our experience with alternatives. For much of the eighteenth century, early judges in both the United States and Great Britain not only provided extrajudicial advisory opinions to the executive branch, but took administrative assignments, assisted in legislative drafting, and even held offices in other branches of government. [6] But over time, judges in this country came to eschew such roles. The concept of judicial independence has spread throughout the world. Nowadays, even judges in the former Communist empire recognize the importance of independence and thus have strived to emulate the American judiciary, which is widely seen as the model to copy if one seeks judicial independence and impartiality. [7]

## § 10.1-1.0(f) Judicial Integrity

Courts generally do not rely on Canon 1 as the sole basis for disciplinary action, even though the second clause of the second sentence—judges "*shall* personally observe" high standards of conduct [8] —uses the mandatory language of "shall." Courts do,

however, refer to Canon 1 in their opinions when the judge's conduct constitutes a separate violation of a more specific section of the Code. Because any violation of the Judicial Code impairs the "integrity" of the judiciary, courts frequently cite this Canon, though they seldom base their decision primarily upon it. [9] Courts prefer to rely on the specific language of other Canons rather than on the general language of Canon 1.

ABA Informal Opinion 1452 [10] offers an example of conduct that might impair the integrity of the judiciary and violate Canon 1. The issue concerned the propriety of an appellate court bargaining with a union that represented the court's secretaries. The union was also a frequent litigant before the court. The ABA Ethics Committee concluded that the integrity of the court could be compromised because the secretaries were privy to nonpublic information related to undecided cases in which the union was a litigant. "We observe," the Informal Opinion concludes, that some laws pertaining to collective bargaining "exclude from coverage confidential employees." If the law in question excluded "confidential employees"—and most laws governing collective bargaining make that exclusion—then there would be no duty on the part of the judge to bargain, and the ethics issue would not come up. If the law in question did not exclude "confidential" employees, then the Committee's reference to "confidential" employees was irrelevant.

In any event, the Ethics Committee interpreted Canon 1 to prohibit the court from bargaining with the union. With whom, then, are the secretaries to bargain? The Opinion does not inform us. The Committee apparently concluded that the Judicial Code, in effect, prevents judges' secretaries from having a union, at least if the union bargains with the court.

### § 10.1-1.0(e) Appearance of Impropriety

Canon 1 introduces the concept of "appearance of impropriety." Canon 2 of the 1990 Code also used this phrase in its title, but one could not find this language anywhere in the black letter rules. Not so with the 2007 Judicial Code. This Canon presents the concept and the black letter of Rule 1.2 adopts it.

No longer can one argue that the "appearance of the impropriety" is merely the rationale for various black letter rules—which is position that the Model Rules of Professional Conduct adopts for lawyers. [11] Now, the "appearance of impropriety" is an enforceable Rule, violation of which subjects the judge (but not the lawyer) to discipline.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Preamble to 2007 Code, ¶2.

2 Preamble, ¶3.

3 *See*New Standards of Judicial Conduct, 46 FLA.B.J. 268, 269 (1972) (quoting Justice Roger Traynor, Chairman of the ABA Special Committee on Standards of Judicial Conduct).

4 *E.g.*, ABA Commission on Separation of Powers and Judicial Independence, Report Submitted to ABA Annual Meeting, August 1997; John Gibeaut, *Mending Judicial Fences*, 83 A.B.A.J. 92 (Aug. 1997).

5 *See* E. Wayne Thode, Reporter's Notes to [1972] Code of Judicial Conduct 45–46 (1973) [hereinafter cited as *Reporter's Notes* [1972]].

6 STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (Yale Univ. Press, 1997) demonstrates that, prior to 1793 (and the birth of the federal concept of separation of powers), the role of judges was not limited to adjudicating cases. In 1793, however, the U.S. Supreme Court refused to issue an advisory opinion in response to the Washington administration's request for legal advice on American treaty relations with France. Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911). The general historical belief is that the *Muskrat* Court based its refusal on constitutional grounds (an advisory opinion was not a "case or controversy" under Article III of the Constitution). However, Professor Jay argues that the real reasons were more pragmatic and related to the reluctance of the Court to issue a formal advisory opinion during a foreign policy crisis. For whatever reason, federal courts, and many state courts, have since refused to issue advisory opinions and have emphasized the separation of powers as a means of preserving judicial independence.

7 *E.g.*, Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lesson from Romania*, 1991 U. ILL. L. REV. 1065 (1991); Ronald D. Rotunda, *A Czech Window on Ethics*, 18 NATIONAL L. J., at A15 (July 22, 1996); Ronald D. Rotunda, *Legal Ethics, The Czech Republic, and The Rule of Law*, 7 THE PROFESSIONAL LAWYER 1 (A.B.A., No. 8, 1996).

8 1990 Code, Canon 1A (emphasis added).

9 *E.g.*, In re Larkin, 368 Mass. 87, 333 N.E.2d 199 (1975)(judge's repeated attempts to give illegal campaign contributions to the governor violated Canons 1, and other sections).

10 ABA Informal Opinion 1452 (Mar. 20, 1980).

11 Ronald D. Rotunda, *Alleged Conflicts of Interest Because of the "Appearance of Impropriety,"* 33 HOFSTRA L. REV. 1141 (2005).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.1-1.1 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.1. Canon 1 Integrity and Independence

§ 10.1-1.1 Rule 1.1

## § 10.1-1.1 (a) The Text of Rule 1.1

Rule 1.1 provides:

**RULE 1.1. *COMPLIANCE WITH THE LAW***

**A JUDGE SHALL COMPLY WITH THE LAW,* INCLUDING THE CODE OF JUDICIAL CONDUCT.**

**[*Ed. Note:** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology ¶15.**]**

## § 10.1-1.1 (b) Duty to Report Violations

Canon 1 implicitly requires a judge to report any known violations of the Code to the proper disciplinary authority, because judges "must comply with the law, including the provisions of this Code." [1] No court or disciplinary authority, however, has needed to cite Canon 1 when disciplining judges for failure to report violations of the Judicial Code because Rule 2.15 [2] contains an explicit duty to report, discussed below.

## § 10.1-1.1(c) Compliance with the Law

### § 10.1-1.1(c)(1) When Acting in a Judicial Capacity

Rule 1.1 provides that the judge shall "comply with the law," which is defined to include not only "court rules," but also "statutes, constitutional provisions, and decisional law." [3] Thus, *Matter of Cieminski* [4] held that a judge violated Canon 2A for the former Code (now Rule 1.1) when he failed to follow a state rule of criminal procedure that mandated a verbatim record of the initial appearance and arraignment of the defendants. Such conduct was improper even though the judge did not have a court reporter or tape recorder readily available.

*United States v. Long* [5] overturned a defendant's sentence of life imprisonment because the trial judge failed to consider a pre-sentence report before sentencing, in violation of Federal Rules. [6] Although this case did not involve a disciplinary proceeding, the appellate court relied in part on Canon 2A's "compliance with the law" requirement in ordering that the case be sent to another judge on remand. Because the trial judge had stated that no presentence report could change his mind, he in effect had stated that he would not comply with the law and therefore could not make an impartial decision with respect to the defendant's sentence.

Aside from the self-evident requirement that a judge must comply with statutory and procedural law, a judge violates Canon 2 if she interferes with other judicial orders or proceedings. For example, *Matter of Conda* [7] censured a surrogate judge for altering the designation of bank depositories set forth in orders by the county court judges. Apparently, the surrogate believed the county court had no authority to designate the banks where the settlements of minors must be deposited. The New Jersey

Supreme Court held that, even if the county court lacked authority to designate the bank, altering the order without the consent of the signatory judge was inexcusable. The surrogate also violated Canon 2 by using the office facilities and employees for personal political purposes in violation of a New Jersey Supreme Court rule.

### § 10.1-1.1(c)(2) When Not Acting in a Judicial Capacity

One would think it obvious that a judge must respect and comply with the law even when not acting in a judicial capacity. Yet, sometimes even obvious rules are broken in an obvious way. Thus, disciplinary authorities removed a judge from office when he unlawfully entered a neighbor's house and ransacked it while searching for a gun, the judge alleged that was looking for the gun in response to a neighbor's threat that she would use the gun to "blow the brains out" of members of the judge's family. This violation of law was also a violation of what is now Rule 1.1, and was in itself sufficient grounds for removal.[8]

### § 10.1-1.1(c)(3) No Prior Criminal Conviction Is Necessary

It is not necessary that the state first convict a judge of violating the law before he can be disciplined for violating Canon 2A's requirement of "compliance with the law."[9] *In re Conduct of Roth*[10] illustrates this point (and proves that judges, just like everyone else, put on their robes two legs at a time). In *Roth*, a judge discovered his estranged wife together with Allen, a male friend, in a parked car. The judge proceeded to hit the car with his own car, thereby injuring Allen.

The court in *Roth* relied on the "compliance with the law" language found in Canon 2A in censuring the judge. The judge argued that there must be a prior conviction before the disciplinary authority can discipline a judge for not "complying with the law." The court, however, rejected that argument. No prior conviction is necessary because the court can determine for itself whether the judge had committed a crime, using the "clear and convincing evidence" standard of proof. Thus, although the judge had not been convicted of any crime, sufficient evidence existed for the court to determine that the judge did not comply with the law.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.
a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 1990 Model Code of Judicial Conduct, Canon 1, Comment 1.

2 See also 1990 Model Code, Canon 3D(1),(2).

3 2007 Code, Terminology ¶15. 1990 Code, ¶Terminology 11.
*E.g.*, In Matter of Sawyer, 286 Or. 369, 594 P.2d 805 (1979), the judge failed to comply with a state constitutional restriction.

4 Matter of Cieminski, 270 N.W.2d 321 (N.D.1978).

5 United States v. Long, 656 F.2d 1162 (5th Cir.1981).

6 Federal Rules of Criminal Procedure, Rule 32.

7 Matter of Conda, 72 N.J. 229, 370 A.2d 16 (1977) (per curiam).

8 Matter of Duncan, 541 S.W.2d 564 (Mo.1976).

9 Disciplinary Counsel v. Hoskins, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324 (2008), quoting this Treatise.

10 In re Conduct of Roth, 293 Or. 179, 645 P.2d 1064 (1982) (per curiam).

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.1-1.2 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.1. Canon 1 Integrity and Independence

§ 10.1-1.2 Rule 1.2

## § 10.1-1.2(a) The Text of Rule 1.2

Rule 1.2 provides:

**Rule 1.2. *Promoting Confidence in the Judiciary***

**A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.**

**Comment**

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety 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.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

## § 10.1-1.2(b) Judicial Integrity

In the 1990 Judicial Code, the first clause of the second sentence of Canon 1A provided that the judge "*should* participate in establishing, maintaining and enforcing high standards of conduct." [1] The drafters of the 1990 Judicial Code make clear, the

enforcement authority *could not* discipline a judge for violating this sentence, which was only hortatory.[2] Nonetheless, this exhortative statement was further evidence of the Code's goal of assuring public confidence in the judiciary.

The drafters of the 2007 Code kept this exhortation but moved it to the Preamble.[3] They concluded that such hortatory language should not be confused with enforceable standards and that it was confusing to have this language in the black letter Rules.[4]

### § 10.1-1.2(c) Independence

The Rules impose a mandatory duty on judges to be independent, which means the judge must be free of controls or outside influences, other than those that the law establishes.[5] "Law" includes court rules, such as the Judicial Code, as well as statutes, constitutional provisions, and case law.[6]

Judicial independence does not mean that judges are immune from criticism. Litigants and lawyers,[7] other judges,[8] Congressman, and others all have free speech rights to criticize judges.[9]

**Judges Criticizing Other Judges in Their Opinions.** Judges should also have a right to criticize other judges. And, indeed, they do that, often in their opinions. Courts should not discipline a judge because he writes an opinion critical of other judges. Thus, in *State ex rel. Shea v. Judicial Standards Commission*[10] the Court rejected an effort to discipline a judge for what the Judicial Standards Commission called "willful misconduct in office," because he wrote a dissenting opinion characterized as "intemperate," on the theory that this intemperate opinion was prejudicial to the administration of justice. The Court rejected the charge.

> It may not have been pleasant for the majority in McKenzie to have been called "intellectually dishonest" or to have been told that they were "slippery with the facts." Yet it seems nearly every day newspaper editors say something equally derogatory about our decisions. As long as a justice, or a judge, in writing opinions, does not resort to profane, vulgar or insulting language that offends good morals, it may hardly be considered "misconduct in office."[11]

The Court also issued a useful warning. Courts should not use their power of discipline in a way that interferes with the independence of other judges.[12] Indeed, the Model Code itself provides that "The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions."[13]

> The requirement of a majority for any opinion of the Supreme Court does not mean that one in the minority is throttled and may not speak his piece. The right of a minority justice to voice his individual opinion is equal to that of any in the majority, indeed is vital to collegiality among the justices, and proper to furnish for later cases a standard or rule to which the Court may eventually adhere.[14]

Courts sometimes assert an inherent power to strike scandalous language that is deemed inappropriate for judicial decisions,[15] but that is quite different than disciplining a judge.

Nonetheless, one can find cases where judges discipline their colleagues for writing intemperate opinions.[16]

### § 10.1-1.2(d) Impropriety and the "Appearance of Impropriety"

#### § 10.1-1.2(d)(1) Applies Whether Judge Is on or Off the Bench

Rule 1.2 compels a judge to observe high standards of conduct whether on or off the bench because public esteem for the judiciary is affected by the judge's behavior in either situation. This duty to avoid impropriety or its appearance "applies to both the professional and personal conduct of a judge."[17] Interestingly, the Model Judicial Code makes this point several times.[18]

The improper behavior should have a functional relationship to what judges do. Some courts follow that principle, but others do not. Thus, the disciplinary authorities have publicly reprimanded a judge for openly engaging in sexual acts while in an automobile parked in a public parking lot. [19] Some courts, however, take a more liberal attitude toward out-of-court behavior, and hold that such conduct is not punishable unless it affects the judicial role, that is, unless it has a functional relationship to what judges do. [20] The cases in the area of sexual misconduct "are nearly impossible to reconcile." [21]

Courts are more likely to find that "off-bench" conduct affects the judicial role if the conduct is illegal. Thus, the Pennsylvania court that did not discipline a judge for adultery emphasized that the judge's adulterous relationship was not contrary to state law. [22] If the "off-bench" conduct is illegal conduct, it is much more likely that the judge will find himself disciplined. [23] Subsequent case law and constitutional amendment changed that result in that case. [24]

### § 10.1-1.2(d)(2) The Appearance of Impropriety as a Standard of Review

The ABA Model Rules of Professional Conduct—unlike its predecessor, the ABA Model Code of Professional Responsibility [25]—rejected the "appearance of impropriety" standard as too vague to be a useful test. [26] One cannot define "appearance of impropriety" unless one first defines "impropriety" and the purported test does not define either term. Defining "appearance" by referring to another undefined term, "impropriety," is question-begging. A concern about appearances may be a reason why some rules are strict, but it is too vague to be a rule itself. [27]

Although the ABA House of Delegates rejected the "appearance of impropriety" standard as too imprecise and ambiguous for lawyers, it adopted that standard in the 1990 Model Judicial Code, as part of the hortatory Canon. The introductory sentence to Canon 2 read: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." The Judicial Code candidly admitted that this "appearance of impropriety" standard "is necessarily cast in general terms," [28] and therefore it seeks to place some flesh on the bare bones of the phrase by offering this test:

> 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. [29]

Under this standard, the judicial disciplinary authorities should scrutinize objectively judicial conduct under this Canon. The issue is whether the conduct would appear to a reasonable person to demonstrate partiality or prejudice public esteem for the judicial office. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." [30]

Because the "appearance of impropriety" is a vague test, the cases disciplining a judge for engaging in an appearance of impropriety typically rely on standards that are more specific. The cases find these standards elsewhere in the Code. But a court, after relying on a more specific section, will often add the violation of this more general standard as a makeweight. The best way to understand how courts interpret the "appearances" standard is to look at a couple of cases. When we do that, we find that courts have been unable to develop any litmus test.

Consider *Spruance v. Commission on Judicial Qualifications.* [31] The judge conducted court in a "bizarre and unjudicial manner" by treating attorneys in a cavalier and rude manner. He subjected an attorney to an improper cross-examination when he took the stand in support of a motion to disqualify the judge. The judge demeaned the deputy district attorney in open court and placed him under physical restraint because the deputy appealed the judge's disposition of another case. The judge expressed disbelief in the defendant's testimony by creating a sound commonly referred to as a "raspberry," and giving the defendant "the finger" for coming in late in a traffic matter. The Court removed him from judicial office and relied, in part, on the "appearance of impropriety" standard of Canon 2.

*School District of Kansas City, Missouri v. Missouri* [32] involved a different use of the "appearance of impropriety" standard. The trial judge relied on this test in deciding to recuse himself in a case where his former law firm represented the plaintiff.

The firm's personnel had changed over the years during which the judge had been on the bench, so the judge correctly denied the defendant's motion for disqualification based on 28 U.S.C.A. § 455. However, he then disqualified himself for reasons based in part on Canon 2 principles. The judge believed the overriding consideration favoring recusal was the avoidance of the appearance of impropriety. Therefore, he transferred the case to a judge completely removed from any charge of partiality. Note that this judge recused himself on his own motion; neither federal law nor the ABA Model Code of Judicial Conduct required disqualification. [33]

ABA Formal Opinion 08-452 [34] illustrates the malleability of the "appearance of impropriety standard. This Opinion concluded that a judge may participate in fundraising activities to raise private money for a court, including a "therapeutic" or "problem-solving" court that needs private funds in addition to public funds in order to function. However, they must ensure that her conduct does not violate, inter alia, Judicial Code Rule 1.2, forbidding the "appearance of impropriety." How do we know when the judge violates this appearance standard? The ABA advises:

> In situations in which a judge learns that either parties or lawyers who come before the judge have made contributions in response to the judge's solicitations [on behalf of a Therapeutic or Problem-Solving Court], the *judge would need to determine*, according to the test for the appearance of impropriety in Model Code Rule 1.2, *whether* she is able to continue to hear the matter in question. Comment [5] posits as the test for an "appearance" problem whether the conduct in question—here, *presiding over the matter—would "create in reasonable minds a perception that the judge violated [the] Code* or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Although in most instances, contributions of the sort considered in this opinion would be unlikely to constitute so significant a personal benefit to the judge as to raise the question of an appearance of partiality, a judge would be well-advised to take into account both the size and the importance of contributions known by the judge to have been made by lawyers or parties who come before her. [35]

Does that help? The proposed test defines "appearance of impropriety" by using the term "appearance of impropriety." It is like defining a word, such as "cohesive," by using the word, and saying that "cohesive means having the ability to be cohesive."

The only more specific suggestion is that the judge should look at the "size and the importance of contributions known by the judge to have been made by lawyers or parties who come before her." The first part of the test ("size and the importance of contributions") is hardly a bright-line test; the second part is a bright line: the judge is safe if she is ignorant of the contributions.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 1990 Model Code of Judicial Conduct, Canon 1A (emphasis added).

2 ABA's Standing Committee Report on 1990 Code, Legislative Draft (1990), at 8.

3 2007 Code, Preamble, ¶3.

4 Reporters' Explanation of Changes to Rule 1.1, at 8 (ABA 2007).

5 2007 Code, Terminology ¶11, defining "independence."

6 2007 Code, Terminology ¶15.

7 In re Snyder, 472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). In this case, the Court overturned a suspension of a lawyer who had written an intemperate letter to the judge's secretary.

Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman, 55 F.3d 1430 (9th Cir. 1995). The court held that the lawyer's statements (Judge Manuel Real was "drunk on the bench"; judge "anti-Semitic") did not violate rule's prohibition against attorneys impugning integrity of court; and attorney's statements did not violate rule's prohibition against attorneys interfering with administration of justice.

The trial court judge criticized in *Yagman*, is the subject of various reversals and discipline efforts. His exploits are chronicled in, Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector for the Courts*, 41 LOYOLA U. CHICAGO

L. REV. 301, 309-16 (2010). See also In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106 (U.S. Jud. Conf. 2006). The three-person majority refused to discipline Judge Manuel Real for procedural reasons; the two-person dissent found these procedural reasons created out of whole cloth by the majority.

Fieger v. Michigan Supreme Court, 2007 WL 2571975 (E.D. Mich. 2007). The court held that the state's professional conduct rules on courtesy and civility were unconstitutional, because they "reach any criticism of the tribunal whether it is warranted or unwarranted, political or apolitical, truthful or false, vulgar or artful." The acts of judges are the acts of the state. Hence, "it follows that attorney speech concerning a court's action in a case is political speech." 2007 WL 2571975 *3.

8 Gardiner v. A.H. Robbins Co., Inc., 747 F.2d 1180 (8th Cir. 1984), where the appellate court struck from the record intemperate remarks by the trial judge, Miles Lord. Disciplinary Counsel v. Campbell, 623 N.E.2d 24 (Ohio 1993), where the court disciplined a judge for sexist remarks and actions, such as making an overtly sexual response when a female prosecutor announced, at the beginning of the day's docket, that she was "ready to go."

9 Ronald D. Rotunda, *The Courts Need This Watchdog*, WASHINGTON POST, Dec. 21, 2006, at A29, discussing a proposed bill creating an Inspector General for the courts.

10 State ex rel. Shea v. Judicial Standards Commission, 198 Mont. 15, 643 P.2d 210 (1982). See also, Texas State Commission on Judicial Conduct, CJC NO. 08-0687-AP, Public Admonition of Gray, Dec. 18, 2008, http://www.scjc.state.tx.us/pdf/actions/FY09-PUBSANC.pdf. The Commission said:

> "In 2007, the Commission received and investigated numerous complaints relating to the *vitriolic language contained in several dissenting opinions* written by Justice Gray, which opinions contained unprofessional personal attacks against the judge's colleagues on the bench, Justices Bill Vance and Felipe Reyna, and against certain litigants, such as Larry Kelley, involved in cases before the Court. The increasingly *acerbic opinions of Justice Gray* became media fodder and were the subject of *growing criticism and ridicule in editorials*, on internet blogs, and at judicial conferences. [T]he negative media coverage and denigration among certain segments of the legal community *likely had the effect of diminishing public confidence in the integrity and impartiality of the judiciary* and cast discredit on the administration of justice …. [T]he Commission determined, *in deference to the principle of judicial independence, that Justice Gray should not be disciplined for the content of his dissents*." (emphasis added).

11 198 Mont. 15, 39, 643 P.2d 210, 223 (1982).

12 198 Mont. 15, 38–39, 643 P.2d 210, 223 (1982).

13 ABA Model Judicial Code, Scope, ¶5.

14 198 Mont. 15, 39, 643 P.2d 210, 223 (1982).

15 Nadeau v. Texas Co., 104 Mont. 558, 576–577, 69 P.2d 593, 595–596 (1937); State ex rel. Shea v. Judicial Standards Commission, 198 Mont. 15, 39, 643 P.2d 210, 223 (1982).

16 In re Allen, 998 So. 2d 557 (Fla. 2008) (per curiam). The Court attempted to distinguish State ex rel. Shea v. Judicial Standards Commission, 198 Mont. 15, 643 P.2d 210 (1982). It argues that "Judge Allen's reliance on his case is misplaced because Shea did not personally attack another justice in his opinion nor did he write the opinion out of animus for another justice. Rather, the opinion used intemperate language towards the majority's decision."

The charges in *Allen* grew out of Judge Allen's concurring opinion in Childers v. State, 936 So. 2d 619 (Fla. Dist. Ct. App. 1st Dist. 2006). The Florida Judicial Qualifications Commission accused Judge Allen "of being motivated by ill will in writing his concurring opinion and personally attacking First District Court of Appeal Judge Charles Kahn in that opinion." The Florida Supreme Court seemed to find it important that "Allen generally never had anything nice to say about Judge Kahn." Judge Allen's colleagues testified in this judicial discipline case. "Although two judges believed that the opinion was a reasonable explanation of why Judge Allen voted for an en banc consideration and was not a personal attack on Judge Kahn," the Court was unmoved.

A majority of the judges believed that the opinion was inappropriate and that it suggested that Judge Kahn was corrupt." The Judicial Qualifications Commission found that "Judge Allen's concurring opinion clearly *implied* that Judge Kahn cast a corrupt vote as a payback to friends" (emphasis added) and thus the Court upheld the discipline of a public reprimand for Judge Allen.

17 Rule 1.2, Comment 1, provides that judges must avoid the appearance of impropriety in "both the professional and *personal conduct* of a judge." (emphasis added).

18 Preamble, ¶2: "Judges should maintain the dignity of judicial office *at all times*, and …. should *aspire at all times* to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." (emphasis added).

Preamble, ¶3, states that judges "are governed *in their judicial and personal conduct* by general ethical standards as well as by the Code." The Judicial Code will "provide guidance and assist judges in maintaining the *highest standards of* judicial and *personal conduct* …." (emphasis added).

19 In re Lee, 336 So.2d 1175 (Fla.1976).

20 *See, e.g.*, Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979). The Court did not discipline the judge for having open adulterous relationship. However, he did not commit the acts of adultery in the open, or in a parking lot, unlike the situation of In re Lee, 336 So.2d 1175 (Fla.1976).

21 STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 40 (American Judicature Society 1984).

22 Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979).

23 Matter of Sawyer, 286 Or. 369, 594 P.2d 805 (1979). Sawyer disciplined a judge for teaching part-time in a state college in violation of a state constitutional provision. The court suspended the judge from office during the period that he was a teacher.
If otherwise allowed by law, Canon 4A and Canon 4B of the 1990 Code permit a judge to teach on subjects concerning the law, the legal system, and the administration of justice; Canon 4B also allows a judge to teach nonlegal subjects if teaching does not demean the judicial office or interfere with the performance of judicial duties. The related provisions of the 2007 Code is Rule 3.1

24 Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979) appeared to conclude that matters in one's personal life which legitimately reflect upon the jurist's professional integrity are immune from censure. Later, the court rejected that position, arguing that only two members of the Court joined that opinion in the appeal and therefore it did not represent a binding precedent. Matter of Cunningham, 517 Pa. 417, 417 n.12, 538 A.2d 473, 480 n.12, *appeal dismissed sub nom.*, White v. Judicial Inquiry & Review Bd., 488 U.S. 805, 109 S.Ct. 36, 102 L.Ed.2d 16 (1988). However, the *Cunningham* court did warn: "the test of the appearance of impropriety is not to be given an overly scrupulous gloss. The overly suspicious mind often assigns guilt where none exists." *Id.*
Moreover, Pennsylvania later amended its Constitution to include some nonjudicial actions.

> "A justice, judge or justice of the peace may be suspended, removed from office or otherwise disciplined for conviction of a felony; violation of section 17 of this article; misconduct in office; neglect or failure to perform the duties of office or *conduct* which prejudices the proper administration of justice or *brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity* or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court."

Pa. Const. Art. V, § 18(d)(1) (emphasis added). See discussion in, In re Disciplinary Proceedings against Turco, 137 Wash.2d 227, 242, 970 P.2d 731, 739 (1999)(en banc).

25 ABA Model Code of Professional Responsibility, Canon 9, states: "A lawyer should avoid even the appearance of professional impropriety." The title of DR 9-101 states: "Avoiding even the appearance of impropriety." However, even in the ABA Model Code, the reference to the "appearance of impropriety" was only in the title of Canon 9 and the title of the first Disciplinary Rule of that Canon. It was never in a Disciplinary Rule itself. See, Ronald D. Rotunda, *Alleged Conflicts of Interest Because of the "Appearance of Impropriety,"* 33 HOFSTRA L. REV. 1141 (2005).

26 1983 ABA Model Rules of Professional Conduct, Rule 1.9, Comment 5. The drafters of the 2002 Model Rules deleted this Comment as no longer necessary because the concept of appearance of impropriety was no longer in the text of the Rules.

27 Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 HOFSTRA L. REV. 1337 (2006).

28 1990 Model Code of Judicial Conduct, Canon 2A, Comment 2.

29 1990 Model Code of Judicial Conduct, Canon 2A, Comment 2.

30 Public Utilities Commission of District of Columbia v. Pollak, 343 U.S. 451, 467, 72 S.Ct. 813, 823, 96 L.Ed. 1068, 1079 (1952) (separate statement of Frankfurter, J.), quoted in, School District of Kansas City, Missouri v. Missouri, 438 F.Supp. 830, 835 (W.D.Mo.1977). *See also* Ronald D. Rotunda, *Thomas' Ethics and the Court*, 13 LEGAL TIMES (of Washington, D.C.) 20 (Aug. 26, 1991).

31 Spruance v. Commission on Judicial Qualifications, 13 Cal.3d 778, 119 Cal.Rptr. 841, 532 P.2d 1209 (1975).

32 School District of Kansas City, Missouri v. Missouri, 438 F.Supp. 830 (W.D.Mo.1977).

33 Under Canon 3E(1)(b) of the 1990 Code, disqualification is not mandatory when the presiding judge's former law firm merely represents a party in the case. Canon 3E(1)(b) compels disqualification in such a case only when the judge had been a member of the firm *while* the firm was representing the party in the very matter now pending before the judge. The corresponding provision in the 2007 Code is Rule 2.11(A).

34 ABA Formal Opinion 08-452 (Oct. 17, 2008).

35 ABA Formal Opinion 08-452 (Oct. 17, 2008) (emphasis added).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.1-1.3 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.1. Canon 1 Integrity and Independence

§ 10.1-1.3 Rule 1.3

## § 10.1-1.3(a) The Text of Rule 1.3

The text of Rule 1.3 provides:

**RULE 1.3.** ***Avoiding Abuse of the Prestige of Judicial Office***

**A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others, or allow others to do so.**

**COMMENT**

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

## § 10.1-1.3(b) Introduction: Some General Principles

Canon 2B provides that a judge should not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. The 1990 Code added the reference to “political” relationships to highlight the need for judges to be immune to influence by political relationships. [1] Thus, a judge demonstrates “improper influence” when he fixes a ticket for a friend. [2]

A judge should also not allow "other relationships to influence his judicial conduct or judgment." This principle prohibited a judge from giving legal advice to a person outside of the courtroom where that person later brought suit based on the judge's advice and the case came before the same judge. [3]

### § 10.1-1.3(c) Delaying Publication of Opinion to Help a Judge's Confirmation

The Connecticut Judicial Review Council suspended former Chief Justice William Sullivan for 15 days, making him the first judge in the nation disciplined for delaying a decision for improper reasons. The council found that Chief Justice Sullivan had "allowed his social or other relationships to influence his judicial conduct." Sullivan did not deny that he held up publication of a controversial ruling on public access to court documents. He also did not deny that he delayed publication "to save Associate Justice Peter T. Zarella from having to answer for the ruling during his confirmation hearings to be chief justice." Chief Justice Sullivan testified before the Council, "If I thought I was doing anything wrong I wouldn't have done it." He also said that he would have delayed the opinion for any member of the court facing confirmation proceedings. [4]

However, a judge may provide a *pro se* litigant with a legal memorandum explaining procedural requirements, provided the other party also receives the memorandum. [5] If counsel represented both parties, and, if the judge offered the memorandum to one party only, that would be unnecessary and would probably demonstrate partiality.

### § 10.1-1.3(d) Preserving the Prestige of Office

Rule 1.3 provides that a judge shall not lend the prestige of judicial office to advance her private interests or the private interests of another person, nor should she convey the appearance that others are in a special position to influence her. [6]

For example, a full time judge may not become an honorary director of a bank, even though he has only advisory powers and no power to vote. [7] This appointment is likely to convey the impression that others are in a position of influence and lend the prestige of the judicial office to the advancement of the private ventures. [8] If the judge writes a book, he should retain control over advertising the book in order to insure that the advertising does not exploit his judicial office. [9]

The judge also conveys the impression that others are in a position to influence him when the judge fixes traffic tickets at the request of a police chief, even if one finds credible the judge's claim—that he had good intentions and wanted to alleviate a heavy court calendar. [10]

Consider these examples.

> Judge who writes a letter on judicial stationery to the City Council complaining about a proposal to widen the street in front of Judge's house acted improperly because he used judicial letterhead for his personal business. [11]
>
> Judge *#1* writes a letter to Judge *#2*, who is sentencing a former business associate of Judge #1. Judge #1 urges Judge #2 to take into account the former business associate's ill health. Judge #1 has acted improperly because he *initiated* the communication. [12] Judge *#1*, however, may reply to a formal request from Judge *#2*. [13]
>
> A part-time judge would violate this standard if—in a jurisdiction where the law permits the judge (such as a part time judge) to practice law—the judge has her private law office receptionist answer her telephone with: "Judge X's office, may I help you?" [14]

On the other hand, Rule 1.3 and Canon 2B do not prevent a state Supreme Court justice's public support for a United States Supreme Court nominee. The Rule and Canon refer to "private interests" but life tenure and the power and prestige of the office are public interests, rather than private interests. [15] When Rule 1.3 and Canon 2B refer to "private interest," they mean

a personal or individual advantage or benefit gained by use of judicial office. Rule 1.3 and Canon 2B focus on "the judge's use of his or her office to obtain a financial or other advantage, either for himself or herself personally or for a third party." [16]

Similarly, *In re Jimenez*, [17] the Texas Commission on Judicial Conduct admonished a judge for violating Canon 2B—what is now Rule 1.3—, but the Texas Special Court of Review reversed. It conducted a trial de novo, and held that the judge's private letters to the chief of police and district attorney were proper. These letters accused a police officer within their jurisdiction of perjury and selective prosecution. The judge wrote the letters, and gave subsequent testimony and media interviews to advance public interest. Thus, what are now Rule 1.2 and Rule 3.2(A) permit judges to consult with executive officials on matters concerning the administration of justice. The judge also wrote a letter to the chief of police stating that the police officer had criticized the judge in a private telephone conversation. This letter, too, was not using the prestige of judicial office to advance the judge's *private* interest (retaliation against officer). There was a public interest because the judge already had expressed concerns about the officer's credibility before the letter. Others in the criminal justice system also suspected the officer of crimes.

The judge may apply to a private nonprofit foundation for a financial grant to support the judiciary because the purpose of the court's support or endorsement of its own grant applications submitted to government agencies or to private foundations for court-related projects, is not to advance the private interests of the judge. [18] This conclusion is supported by the language of Rule 3.7(A)(5). While that Rule generally prohibits judges from soliciting contributions on behalf of an organization, Rule 3.7(A)(5) specifically allows judges to make recommendations to "a public or private fund-granting organization or entity in connection with its programs and activities" if the organization is concerned with the law. [19]

Judges and retired judges may not use the title of "judge" when filing briefs. In *Boumediene v. Bush*, [20] a group of former federal judges sought leave to file an amicus brief in a case challenging the Military Commissions Act of 2006. The court denied the motion for the sole reason that the former judges had used the term "Judge" to describe themselves in their brief. Advisory Opinion No. 72 of the Committee on Codes of Conduct of the U.S. Judicial Conference comes to the same conclusion. "Judges should insure that the title 'judge' is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to describe accurately a person's status at a time pertinent to the lawsuit." [21] As the Opinion noted, there used to be very few former federal judges. Now there are more. It is unfair for a party to have to oppose someone who can call themselves "Judge" while other lawyers are not able to do so. The former judges were trading on their title, and they should not do that.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 ABA Standing Committee Report on 1990 Code, Legislative Draft 9 (1990).

2 Matter of Del Rio, 400 Mich. 665, 256 N.W.2d 727 (1977), *appeal dismissed*, 434 U.S. 1029, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978). *See also* Cuyahoga County Bd. of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded, 47 Ohio App.2d 28, 351 N.E.2d 777 (1975). The court required the judge under Canons 2B and 3E(1)(d)(i) of the 1990 Code [that is, Canon 3C(1)(d)(i) of the 1972 Code; Rule 2.11(A)(2)(a) of the 2007 Code], to disqualify himself where his brother was a member of the Board of Mental Retardation, a party to the proceedings.

3 Scogin v. State, 138 Ga.App. 859, 227 S.E.2d 780 (1976). Although not discussed by the court, this conduct also may have violated the prohibition against a judge practicing law, discussed below.

4 Lynne Tuohy, *A Reputation Stained: Review Council Punishes Former Chief Justice For Delaying Opinion, A First In Judicial History*, THE HARTFORD COURANT, Nov. 18, 2006. Chief Justice Williams of the Rhode Island Supreme Court testified on behalf of Sullivan. Williams was "adamant that a chief justice has the authority to delay release of a ruling even when the motive is to aid a colleague during confirmation proceedings."

5 ABA Informal Opinion 1311 (Mar. 11, 1975).

6 The corresponding provision of the 1990 ABA Model Code of Judicial Conduct, is Canon 2B, 2nd sentence.

7 ABA Informal Opinion 1385 (Feb. 17, 1977). This Informal Opinion emphasizes that even the *appearance* of lending prestige is a violation of Canon 2.

8 The propriety of a judge as an officer or director of a business is discussed below, in examining Canon 4D(1)(a) of the 1990 Code [which is Canon 5C of the 1972 Code, on which this Opinion also relied]. The relevant provision in the 2007 Code is Rule 3.11.

9 1990 Model Code of Judicial Conduct, Canon 2B, Comment 2.

10 Matter of Holder, 74 N.J. 581, 379 A.2d 220 (1977).

11 1990 Model Code of Judicial Conduct, Canon 2B, Comment 1.

Raymond J. McKoski, Ethical Considerations in the Use of Judicial Stationery for Private Purposes, 112 PENN. ST. L. REV. 471 (2007). Judge McKoski carefully studies the limits on a judge's use of official stationery. Using official court stationery for personal correspondence exploits the judicial office by creating the impression that the judge expects the communication to carry extra weight because of the judge's status as a judge.

12 Model Code of Judicial Conduct, Canon 2B, Comment 3.

13 *See also* 1990 Code, Canon 2B: "A judge shall not testify voluntarily as a character witness." The same provision is now in the 2007 Code, Rule 3.3.

14 ABA Informal Opinion 1473 (July 20, 1981).

15 In re Hecht, 213 S.W.3d 547, 576 (Tex. Spec. Ct. Rev.) (Tex. Spec. Ct. Rev. 2006).

16 In re Sanders, 135 Wash.2d 175, 955 P.2d 369, 376 (1998).

17 In re Jimenez, 841 S.W.2d 572 (Tex. Spec. Ct. Rev. 1992).

18 Arizona Supreme Court Judicial Ethics Advisory Committee, Advisory Opinion 97-01 (February 7, 1997), Endorsing or Writing Letters of Support for Court-related Projects, http://www.supreme.state.az.us/ethics/ethics_opinions/1997/97-01.pdf (12 Feb. 2009).

19 ABA Formal Opinion 08-452 (Oct. 17, 2008).

20 Boumediene v. Bush, 476 F.3d 934 (D.C. Cir. 2006)(per curiam).

21 Advisory Opinion No. 72 of the U.S. Judicial Conference Committee on Codes of Conduct states in full:

> "A judge has inquired respecting use of the title "judge" by former judges who have returned to the practice of law and whether sitting judges have any ethical responsibilities relating to such use. Historically, former judges have been addressed as "judge" as a matter of courtesy. Until recently there have been very few former federal judges. With federal judges returning to the practice of law in increasing numbers, ethical considerations are implicated. The prospect of former federal judges actively practicing in federal courts raises what otherwise might be an academic question into a matter of practical significance. A litigant whose lawyer is called 'Mr.,' and whose adversary's lawyer is called 'Judge,' may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary. Moreover, application of the same title to advocates and to the presiding judicial officer can tend to demean the court as an institution. Judges should ensure that the title "judge" is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to describe accurately a person's status at a time pertinent to the lawsuit."

February 2, 1982, Reviewed January 16, 1998, reprinted in 476 F.3d 934, 936 n.1 (Rogers, J., dissenting).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.0 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.0 Canon 2

## § 10.2-2.0(a) The Text of Canon 2

Canon 1 provides:

**CANON 2. A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.**

## § 10.2-2.0(b) Introduction

Canon 2 of the 2007 Judicial Code corresponds to Canon 3 of the 1990 Judicial Code.

Canon 2 includes rules on judicial discipline, administration, and reporting. This Canon contains many of the rules that govern a judge's conduct while she presides in the courtroom, but it is not limited to that. Canon 2 focuses on what the framers call "core judicial functions" that are "at the heart of the Rules." [1] Core functions include more than the adjudication of cases. The scope of judicial functions has "changed over time and logically reaches such matters as administration, discipline, and some forms of outreach." [2]

The framers of the 2007 Code added the requirement that the judge perform judicial duties "competently." Canon 3B(2) of the 1990 Code similarly required that the judge maintain professional competence. This section requires judges to keep abreast of recent developments and changes in the law. The Board of Governors of the New Hampshire Judges Association relied on this provision in adopting a resolution requiring judges to attend a minimum of one judicial education conference each calendar year, unless excused for good cause. [3]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.
a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Reporters' Explanation of Changes to Canon 2, at 12 (ABA 2007). The "Reporters' Explanations of Changes" have not been approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. The Commission's Reporters drafted this Explanation based on the proceedings and record of the Commission, solely to inform the ABA House of Delegates about each of the proposed amendments to the Model Code prior to the ABA House of Delegates considering them at the ABA 2007 Midyear Meeting. The ABA advises, "They are not to be adopted as part of the Model Code."

2 Reporters' Explanation of Changes to Canon 2, at 12 (ABA 2007).

3 In re Proposed Rule Relating to Continuing Education for Dist. & Municipal Court Judges, 115 N.H. 547, 345 A.2d 394 (1975).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.1 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.1 Rule 2.1

## § 10.2-2.1(a) The Text of Rule 2.1

Rule 2.1 provides:

**RULE 2.1.** ***Giving Precedence to the Duties of Judicial Office***

**The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.**

**[*** Ed. Note: "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology, ¶15**]**

**COMMENTARY**

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

## § 10.2-2.1(b) "Judicial Duties" Take Precedence

Rule 2.1 declares that a judge's "judicial duties" take precedence over *all* of the other activities of a judge. This declaration is significant in light of the nonjudicial duties that Canon 3 (governing extra-judicial duties) permits. The judge must always be aware that her nonjudicial duties, whether or not Canon 3 specifically authorizes them, are subordinate to her judicial duties.

The drafters of the 1990 Code based this section (with minor changes) on the 1972 Code. The task of defining "judicial duties" proved elusive to the drafters of the 1972 Code. [1] "Judicial duties" obviously includes the traditional adjudicative duties such as presiding in court, but it might also include other duties that are not adjudicative although essential to an efficient judicial system, such as administrative duties or appointment of members of local boards or agencies.

The ABA decided to define "judicial duties" to include "all the duties of … office prescribed by law." This definition includes duties provided by the constitution, statutes, rules, regulations, or the common law. "If the activity is one that is prescribed in a judge's jurisdiction as a duty of the judicial office, it is a judicial duty for the purposes of the Code." [2]

In the 2007 Code, the drafted language included the mandatory word, "shall," to emphasize that this Rule does not merely state that judicial functions take precedence, but also that the Rule imposes the ethical duty on a judge to give priority to the duties

of judicial office.[3] The judge's personal and extrajudicial activities are secondary to her judicial duties. Hence, a judge must rearrange such activities to avoid conflicts that would result in frequent disqualification.[4]

The judge's participation in activities that promote public understanding of, and confidence in, the judicial system is a positive good. Even if other law does not require a judge to promote this understanding, judges should do that, and the 2007 Judicial Code encourages such judicial outreach.[5]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 *See* Reporter's Notes [1972] at 50–51.

2 *See* Reporter's Notes [1972] at 50–51.

3 Reporters' Explanation of Changes to Rule 2.1, at 12 (ABA 2007).

4 Rule 2.1, Comment 1.

5 Rule 2.1, Comment 2; Reporters' Explanation of Changes to Rule 2.1, at 13 (ABA 2007).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.2 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.2 Rule 2.2

## § 10.2-2.2(a) The Text of Rule 2.2

Rule 2.2 provides:

**RULE 2.2. *Impartiality and Fairness***

**A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.***

**[*** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology ¶15.

**[*** "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. Terminology ¶8.**]**

**COMMENTARY**

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

## § 10.2-2.2(b) Upholding the Law

Canon 3B(2) of the 1990 Code required the judge to be "faithful to the law." The Judicial Code defines "law" broadly to include statutes, state and federal constitutions, court rules, and case law. [1] This phrase—"faithful to the law"—reminds judges that they are part of a system that places limits and obligations on them.

The 2007 Code kept this sentiment but changed the language to "uphold and apply the law," because the drafters thought that "faithfulness" or "fidelity" lacked clear meaning. [2]

An interesting case discussing those limits is *Matter of Hague*. [3] A trial judge heard several complaints filed under the city's firearm control ordinance. The judge, in dismissing the complaints, held that the firearm control ordinance was unconstitutional because of the state's preemption doctrine. On appeal, the court reversed these dismissals. Nonetheless, the trial judge thereafter

dismissed similar complaints, again holding that the firearm control ordinance was unconstitutional. This time he claimed to base his decisions on the Second Amendment to the United States Constitution. Again, the appellate court reversed his dismissals.

Undaunted by the appellate court, the judge continued to dismiss similar complaints using rationales that the appellate court had consistently rejected in the previous cases. For this conduct, and other alleged violations of the Judicial Code, the state's disciplinary tribunal recommended that the court suspend the judge from office for 60 days without pay, and the Michigan Supreme Court agreed.

As to the dismissals of the firearm control complaints, the Supreme Court remarked that failure to follow *stare decisis* is not necessarily judicial misconduct. However, a judge must be "faithful to the law," as required by Canon 3B(2)—now, Rule 2.2—, and cannot impose his personal view of an issue simply to thwart the law clearly and repeatedly announced by an appellate court. And that is what the trial judge did here.

The conduct in this case presented an easy fact situation for the imposition of discipline. The trial judge had publicly argued that the appellate court did not make the law in the state and that he did not have to follow any appellate decision. Judges do not necessarily violate Canon 3B(2) merely by deciding cases contrary to appellate decisions. The state Supreme Court emphasized that the dismissals involved in *Hague* were not the result of reasoned judgment, but rather the product of personal prejudices. If the judge frames his decision in the context of reasoned decision making, a decision contrary to the apparent state of the law should not violate the "faithful to the law" standard of Canon 3B(2).

In *Matter of Bennett*,[4] the Court held that a judge violated Canon 3 when he improperly sought to terminate the appointment of public defenders and appointed substitute counsel in their places. The terminations were improper because the judge interfered with the attorney-client relationship by cutting off the indigent defendants from their counsel without request or explanation. In addition, the terminations were "further evidence of a lack of judicial temperament. It gave the appearance not of a judiciously reasoned decision, but rather of an arbitrary exercise of judicial power."[5]

### § 10.2-2.2(c) Applying the Law Impartiality

In order for the judge to apply the law "impartially" and "fairly," the judge must be objective and open-minded.[6] The judge must have lack of bias towards any participant in the judicial process, and the judge must be open-minded.[7]

The judge does not have to have a blank mind about the law. Her background and personal philosophy, education and life experience may influence her honest understanding of the law. Those factors are "neither avoidable nor improper," but that does not mean that the judge may disregard the law.[8]

"Open-mindedness" does not restrict the Judge from talking about the law outside of the courtroom. Indeed, another part of the 2007 Judicial Code, like the 1990 Code,[9] encourages judges to engage in appropriate extrajudicial activities, such as speaking, teaching, and writing about the law.[10]

The judge must, in good faith, apply and interpret the law. Judges can make good faith errors—that is why we have courts of appeal. Reasonable people can make reasonable mistakes. Such good faith errors do not violate this Rule.[11]

### § 10.2-2.2(d) *Pro Se* Litigants

The judge's duty to apply the law "impartially" does not require the judge to treat *pro se* litigants the same as litigants whom counsel represents. The judge may make reasonable accommodations for *pro se* litigants.[12]

For example, a judge may provide a *pro se* litigant with a legal memorandum explaining procedural requirements, provided the other party also receives the memorandum.[13] If counsel represented each party, and, if the judge offered the memorandum to one party only, that would be unnecessary and would probably demonstrate partiality.

On the other hand, judges should not tilt the playing field and give the *pro se* litigant an unfair advantage. [14] The judge, in other words, should not be the lawyer for the *pro se* litigant. That would place the *pro se* litigant in the enviable position of having his "counsel" (the overly helpful judge) know exactly what the judge thinks.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 ABA 1990 Model Code of Judicial Conduct, Terminology 11; ABA 2007 Model Code of Judicial Conduct, Terminology 15.

2 Reporters' Explanation of Changes to Rule 2.2, at 13 (ABA 2007).

3 Matter of Hague, 412 Mich. 532, 315 N.W.2d 524 (1982).

4 Matter of Bennett, 403 Mich. 178, 267 N.W.2d 914 (1978).

5 267 N.W.2d at 921. The facts of *Bennett* are somewhat similar to a fact pattern discussed in the Reporter's Notes to the 1972 Code, relating to the obligations placed upon judges under Canon 3B(2) of the 1990 Code [Canon 3A(1) of the 1972 Code]. The ABA Committee drafting the Judicial Code had received complaints that some judges did not uphold the attorney-client relationship between attorneys and their indigent clients, and that the judges applied different substantive legal standards to indigent litigants than those applied to nonindigent litigants. The ABA Committee decided not to define a specific standard to address this problem, believing that the phrase "faithful to the law" meant that, whatever the standard involved, it should be administered the same, whether or not the litigant is indigent. Reporter's Notes [1972] at 51.

6 Rule 2.2, Comment 1.

7 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

8 Rule 2.2, Comments 2 & 3.

9 Canon 4B & Comment 1 ("encourage[ing]" the judge to participate in such activities).

10 Rule 3.1, Comment 1.

11 Rule 2.2, Comment 3.

12 Rule 2.2, Comment 4.

13 ABA Informal Opinion 1311 (Mar. 11, 1975).

14 Reporters' Explanation of Changes to Rule 2.2, at 14 (ABA 2007).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.3 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.3 Rule 2.3

## § 10.2-2.3(a) The Text of Rule 2.3

Rule 2.3 provides:

**RULE 2.3. *Bias, Prejudice, and Harassment***

**(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.**
**(B) 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.**
**(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.**
**(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.**

**COMMENTARY**

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

### § 10.2-2.3(a) Performing Judicial Duties without Bias or Prejudice or Harassment

Rule 2.3(A) of the 2007 Code requires the judge to perform judicial duties "without bias or prejudice." Judges who manifest such prejudice bring the judiciary into disrepute. [1]

Sexual harassment is a particular type of bias or prejudice, which is why the drafters of the 2007 Judicial Code decided to list it specifically in black letter of Rule 2.3(B). Hence, Rule 2.3(B) now reads that the judge, while performing judicial duties, "shall not," by words or conduct "manifest bias or prejudice, or harassment, based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status, or political affiliation." In addition, the judge "shall not permit staff, court officials, or others subject to the judge's direction and control to do so."

Notice that this litany of the types of bias that the judge must guard against is broader than the list in the former Canon 2C. It adds gender, so the Rule now prohibits discrimination based on sex or gender. The framers argued that "'sex' is a term of art employed in sex discrimination statutes, but may not capture bias, prejudice, or harassment against trans-gendered individuals." [2]

In addition, Rule 2.3 prohibits discrimination based on "ethnicity" because the framers of the 2007 Rules thought that "ethnicity" is different from "national origin." The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct believed if the judge discriminated against an Arab-Canadian, any discrimination "based on Arab ancestry would relate to ethnicity, while discrimination based on Canadian derivation would relate to national origin." [3]

The expanded list includes "marital status," so that a judge should not berate a party for cohabiting or having a child out of wedlock. [4] The ABA Joint Commission did not explain if this restriction should apply if the party is violating the law, because some states still forbid open and notorious fornication. Adultery is a crime in the U.S. military.

Finally, the expanded list includes political affiliation. A judge would violate this section if he "displays animus toward plaintiffs affiliated with a political party." [5] Presumably, the same rule applies to defendants.

This catalog of prohibited conduct expands from the 1990 Code, but it is not an exclusive inventory. The Rule explicitly provides that the general prohibition is against bias, prejudice, or harassment. The specific items—e.g., race, sex, gender, religion, etc.—are not an exhaustive category. The Rule makes that clear; this list by using the boilerplate caveat, "including but not limited to." [6]

Notice that this litany of the types of bias that the judge must guard against is broader than the list in Rule 3.6(A). [7] This difference occurs because Rule 3.6(A) governs the off-bench behavior, *i.e.*, the types of organizations that the judge must not join. Rule 2.3(B) governs the judge "in the performance of judicial duties." Because the judge must perform these duties impartially and fairly, any manifestation of bias "impairs the fairness of the proceeding and brings the judiciary into disrepute." [8]

The judge must guard against facial expression and body language that might communicate an appearance of bias to the parties, the lawyers, jurors, the media, and others. [9] Similarly, the judge must avoid demeaning nicknames, humor based on stereotypes, and "irrelevant references to personal characteristics." [10]

In short, the judge "must avoid conduct that may *reasonably* be perceived as prejudiced or biased." [11] The significance of "reasonably" is that framers of this Rule wanted to be consistent with Title VII and to separate "the merely vulgar from the deeply offensive." [12]

The judge also "shall not permit court staff, court officials, and anyone subject to his direction and control" to manifest bias or to engage in harassment in any of the listed categories of Rule 2.3.

Rule 2.3(B) is not applicable if the references to sex, ethnicity, or other factors listed in that Rule are "legitimate" and "relevant" to an issue in the proceeding. That raises an interesting and difficult question—determining when an issue is "legitimate" and "relevant." That issue is the topic of the next section.

Courts and disciplinary authorities have disciplined judges who have engaged in sexist behavior, such as offensive sexual remarks and touching. [13]

For example, the Illinois Courts Commission reprimanded a judge for disparaging remarks directed to three women defense lawyers. He told one pregnant lawyer, for example, "if your husband had kept his hands in his pockets, you would not be in the condition you are in." He told another, "Ladies should not be lawyers." [14]

### § 10.2-2.3(b) Judges Regulating Bias and Harassment of Lawyers Appearing Before Them

Rule 2.3(C) requires the judge to require the lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias, prejudice, or harassment "based upon attributes."

The list of attributes is the same list found in Rule 2.3(B), and, like the list in Rule 2.3(B), it is not exhaustive.

### § 10.2-2.3(c) Bias, Harassment, and "Legitimate Advocacy"

Notice that Rule 2.3(B) specifically deals with "words *or* conduct." [15] The Comment offers examples that include mere words. [16] Rule 2.3(C) similarly deals with words, because the Comment makes clear that harassment can be verbal. [17]

Rule 2.3(D) tries to deal with this issue when it provides that the restrictions of Rules 2.3(B) & (C) "do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding." When are words that reflect bias, prejudice, or harassment "relevant to an issue in the proceeding"? When are such words "legitimate" references? When are the words illegitimate? Rule 2.3(D) raises interesting First Amendment questions when it specifically targets words and the list of prohibited words includes such vague references like "socioeconomic status."

Some cases are easy. If the case raises issues of bias and prejudice, the judge can discuss these issues without fear of violating this Rule. [18] But other situations present a more difficult interpretation of this Rule.

For example, assume that defendant's lawyer, in the course of a proceeding, asks the judge to postpone a hearing so that he can compete in a regatta, and the plaintiff's lawyer says in response that he objects to the court accommodating the "idle rich" and postponing his client's day in court. Is the plaintiff's lawyer "manifesting by words," his bias based on "socioeconomic status"? [19] Rule 2.3(D) specifically does not preclude "legitimate advocacy" when those factors are at issue.

Rule 2.3(D) appears to protect a lawyer who makes prejudicial statements when he does so as a hired gun, an advocate. But, if the lawyer genuinely believes in what he says and he is not acting as an advocate, then it appears that the law offers him no protection.

The reference to "legitimate" advocacy raises additional questions. What makes the advocacy "illegitimate"? If the advocacy is not frivolous or misleading—in other words, if it does not violate any of the ethics rules, civil procedure rules, or other law—then does the mere use of the prejudicial phrase, "the idle rich," make the advocacy "illegitimate"? Does the mere introduction of the concept of "legitimate advocacy" invite a court to engage in a McCarthy-like inquiry into whether it is "legitimate" for the lawyer to engage in certain representations? In the 1950s, many people argued that it was "illegitimate" for lawyers to represent alleged communists. In modern times, others argue that it is "illegitimate" to represent alleged racists. [20]

Lawyers are officers of the court, and therefore judges have the power—and Canon 3B(6) gives judges the duty—to prevent attorneys from engaging in improper tactics that will prejudice the jury during the course of the judicial proceedings. The judge's

duty to "require" means that the judge must exercise "reasonable direction and control over the conduct of those persons subject to the judge's direction and control." [21] The passage of time and the accumulation of case law will let us know if judges exercise this power in a way that accommodates free speech.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 2.3, Comment 1.

2 Reporters' Explanation of Changes to Rule 2.3, at 15 (ABA 2007).

3 Reporters' Explanation of Changes to Rule 2.3, at 15 (ABA 2007).

4 Reporters' Explanation of Changes to Rule 2.3, at 15 (ABA 2007).

5 Reporters' Explanation of Changes to Rule 2.3, at 15 (ABA 2007).

6 Rule 2.3(B).

7 Rule 3.6(A) corresponds to Canon 2C of the 1990 Code.

8 2007 Code, Rule 2.3, Comment 1; 1990 Code, Canon 3B(5), Comment 1.

9 Rule 2.3, Comment 2.

10 Rule 2.3, Comment 2.

11 Rule 2.3, Comment 2 (emphasis added).

12 Reporters' Explanation of Changes to Rule 2.3, at 16 (ABA 2007).

13 Disciplinary Counsel v. Campbell, 68 Ohio St.3d 7, 623 N.E.2d 24 (Ohio 1993) (judge suspended as lawyer for one year for offensive sexual remarks and touching).
*See also* Geiler v. Commission on Judicial Qualifications, 10 Cal.3d 270, 110 Cal.Rptr. 201, 515 P.2d 1 (1973), *cert. denied*, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1974). The court removed the judge for "willful misconduct" and conduct "prejudicial to the administration of justice." The judge, among other things, approached the court commissioner from behind in a public corridor and grabbed his testicles. He made lustful references to female clerks, and used vulgar and profane language in conversations with clerks. He invited two female attorneys into his chambers where he discussed the salacious nature of evidence in several rape cases, using profane terms to describe bodily functions.

14 In re Circuit Judge Arthur J. Cieslik, 2 Ill. Courts Commission 111 (1987).
*See* Nancy Blodgett, *"I Don't Think That Ladies Should be Lawyers,"* 72 ABA Journal 48 (Dec. 1, 1988). The title of this article is a quotation from Judge Anthony Cieslik, who was speaking to a woman attorney appearing in his courtroom. *See also* Marina Angel, *Sexual Harassment by Judges*, 45 U.MIAMI L.REV. 817 (1991).

15 Rule 2.3(B). *See* Ronald D. Rotunda, *Can You Say That?*, 30 TRIAL MAGAZINE 18 (Dec. 1994); Ronald D. Rotunda, *Racist Speech and Attorney Discipline*, 6 THE PROFESSIONAL LAWYER 1 (A.B.A., No. 6, 1995); Ronald D. Rotunda, *What Next? Outlawing Lawyer Jokes?*, WALL STREET JOURNAL, Aug. 8, 1995, at A12, col. 3–5 (Midwest ed.).

16 Rule 2.3, Comment 2 (slurs, nicknames, humor, etc.)

17 Rule 2.3, Comments 3 & 4.

18 Reporters' Explanation of Changes to Rule 2.3, at 15 (ABA 2007).

19 *See also* ABA Model Rules of Professional Conduct, Rule 8.4, Comment 3. This Comment provides that a lawyer, in the course of representing a client, "knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates" Model Rule 8.4(d). Rule 8.4(d), in turn, prohibits "conduct prejudicial to the administration of justice"—a rather vague test.

20 *Compare* Monroe Freedman, *Must You Be the Devil's Advocate*, LEGAL TIMES (of Washington, DC), Aug. 23, 1993, *with* Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES (of Washington, DC), Sept. 6, 1993. John Demjanjuk was an alleged Nazi accused of being involved in the mass murder of Jews during World War II. Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir.1993), *cert. denied, sub nom.* Rison v. Demjanjuk, 513 U.S. 914, 115 S.Ct. 295, 130 L.Ed.2d 205 (1994).

21 1990 Model Code of Judicial Conduct, Terminology 20. The 2007 Model Judicial Code does not offer a specific definition of this term because the drafters believed that this word "is easily understood." Reporters' Explanation of Changes to Terminology, at 3 (ABA 2007).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.4 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.4 Rule 2.4

## § 10.2-2.4(a) The Text of Rule 2.4

The text of Rule 2.4 is as follows:

**RULE 2.4. *External Influences on Judicial Conduct***

**(A) A judge shall not be swayed by public clamor or fear of criticism.**
**(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.**
**(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.**

**COMMENTARY**

> [1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

## § 10.2-2.4(b) Unswayed by Fear of Criticism

Rule 2.4(A) advises that a judge must be unswayed by partisan interests, public clamor, or fear of criticism in making his or her decisions. [1] This principle reemphasizes the requirement of judicial independence earlier articulated in Canon 1, discussed above.

The judge must resist the temptation to be popular, which is difficult for judges subject to public election. However, even judges with lifetime tenure have found themselves tempted by an effort to secure their 15 minutes of fame. [2]

## § 10.2-2.4(c) Avoiding Improper Influences

Rule 2.4(B) [3] provides that the judge must not permit family, social, political, financial, or other interests or relationships to influence her judicial conduct or judgment. The 1990 Judicial Code added the reference to “political” relationships to highlight the need for judges to be immune to influence by political relationships. [4] In 2007, the framers of Rule 2.4(B) added “financial” to the inventory of prohibited influences in order to highlight its importance. [5]

This list is illustrative, not exclusive, because it refers to “other” influences that should not influence a judge's judicial conduct or judgment.” Thus, an improper influence, not listed in Rule 2.4(B), occurred when a judge gave legal advice to a person outside of the courtroom and that person later brought suit based on the judge's advice and the case came *before the same judge*. [6]

A judge violates Rule 2.4(B) and demonstrates "improper influence" when he fixes a ticket for a friend. [7]

**Delaying Publication of Opinion to Help a Judge's Confirmation.** The Connecticut Judicial Review Council suspended former Chief Justice William Sullivan for 15 days, making him the first judge in the nation disciplined for withholding a ruling. The council found that Chief Justice Sullivan had "allowed his social or other relationships to influence his judicial conduct."

Sullivan did not deny that he held up publication of a controversial ruling on public access to court documents. He also did not deny that he delayed publication "to save Associate Justice Peter T. Zarella from having to answer for the ruling during his confirmation hearings to be chief justice." Chief Justice Sullivan testified before the Council, "If I thought I was doing anything wrong I wouldn't have done it." He also said that he would have delayed the opinion for any member of the court facing confirmation proceedings. [8]

### § 10.2-2.4(d) Avoiding Improper Influences

Rule 2.4(C) prohibits the judge from conveying or permitting "others to convey" the impression that a person or organization is in a position to influence the judge. The purpose of this Rule is obvious. The public will not have confidence in the judicial process if people believe that inappropriate outside influences can sway or pressure the judge. [9] A lawyer can argue that they are in the best position to persuade a judge because the case involves a legal issue that is the lawyer's specialty.

This Rule seeks to ban corrupt influence or the appearance of corrupt influence on a judge. Indeed, the title of this Rule emphasizes the point when it speaks of "*external* influences on judicial conduct." If judges act properly, the judicial branch of government is really our most open branch. Everything that goes into the decision—the briefs and motions and evidence—is open. The decision itself (the ruling) and the reasons for the decision (the opinion) are also public.

The 2007 Judicial Code changed the prior language in the 1990 Code [10] in order to make clear that its prohibition extends to the case where a person conveyed the impression that yet another person was in a position to improperly influence the judge. [11]

For example, assume that a lawyer says, "My husband was the roommate of the judge while they were both in college. My husband can call the judge on your behalf. You are lucky that you hired me." The lawyer would be violating Rule 8.4(e) of the Model Rules of Professional Conduct. The judge would also be violating Rule 2.4(c) if she "permitted" the lawyer to say that.

The Rule does not explain how the judge knows what the lawyer is telling the lawyer's clients. Presumably, the judge happens to find out.

Next, the Rule does not tell us what the judge should do in order to stop "permitting" the lawyer from making the improper claim in circumstances where the lawyer is not under the judge's direction. At a minimum, the judge must tell the lawyer to stop making the claim. In addition, because the lawyer's claim violates Rule 8.4(e) of the Model Rules of Professional Conduct, the judge must report the lawyer to the disciplinary authorities *if* the lawyer's conduct "raises a substantial question regarding the lawyer's honesty …" The lawyer's conduct should raise a substantial question, because she would be violating Rule 8.4(e) and causing the public to lose confidence in the judicial process if the public thinks that inappropriate outside influences can sway or pressure the judge. [12]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 2.4(A) corresponds to Canon 3B(2).

2 See discussion in Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions – A Case Study of the Microsoft Litigation*, 2001 U. ILL. L. REV. 611 (2001).

3 Rule 2.4(B) corresponds to Canon 2B of the 1990 Judicial Code.

4 ABA Standing Committee Report on 1990 Code, Legislative Draft 9 (1990).

5 Reporters' Explanation of Changes to Rule 2.4, at 17 (ABA 2007).

6 Scogin v. State, 138 Ga.App. 859, 227 S.E.2d 780 (1976). Although the court did not discuss this issue, this conduct also may have violated Rule 3.10, which restricts a judge from practicing law. See § 10.3-3.10, below.

7 Matter of Del Rio, 400 Mich. 665, 256 N.W.2d 727 (1977), *appeal dismissed*, 434 U.S. 1029, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978). *See also* Cuyahoga County Bd. of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded, 47 Ohio App.2d 28, 351 N.E.2d 777 (1975). In this case, the Court required the judge (under Canons 2B and 3E(1)(d)(i) of the 1990 Code [that is, Canon 3C(1)(d)(i) of the 1972 Code, and Rule 2.4(B) of the 2007 Code], to disqualify himself where his brother was a member of the Board of Mental Retardation, a party to the proceedings.

8 Lynne Tuohy, *A Reputation Stained: Review Council Punishes Former Chief Justice For Delaying Opinion, A First In Judicial History*, THE HARTFORD COURANT, Nov. 18, 2006. Chief Justice Williams of the Rhode Island Supreme Court testified on behalf of Sullivan; Williams was "adamant that a chief justice has the authority to delay release of a ruling even when the motive is to aid a colleague during confirmation proceedings."

9 Rule 2.4, Comment 1.

10 This Rule corresponds to the second half of the second sentence of Canon 2B of the 1990 Judicial Code.

11 Reporters' Explanation of Changes to Rule 2.4, at 17 (ABA 2007).

12 Rule 2.4, Comment 1.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.5 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.5 Rule 2.5

## § 10.2-2.5(a) The Text of Rule 2.5

Rule 2.5 provides:

**RULE 2.5. *Competence, Diligence, and Cooperation***

**(A) A judge shall perform judicial and administrative duties, competently and diligently.**
**(B) A judge shall cooperate with other judges and court officials in the administration of court business.**

**COMMENTARY**

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

## § 10.2-2.5(b) Performing Judicial and Administrative Duties with Competence and Diligence

The judge must diligently and competently discharge her administrative responsibilities. [1] Competence requires the legal knowledge, skill, preparation, and thoroughness that is reasonably necessary for the judge to perform the duties of her judicial office. [2] Judges must also maintain professional competence in the law and keep abreast of recent developments and changes in the law. [3]

A judge violates her duty of diligence if she flagrantly and persistently disregarded a local rule requiring judges to compile and file accurate and complete records on pending matters. [4] In that case, the discipline authorities suspended a judge without pay for one month.

A judge also violated Rule 2.5(A) when he fined traffic violators more than the amount officially reported as paid to the county. [5] It is amazing, is it not, what some people try to get away with?

Rule 2.5(A) requires the judge to dispose of all judicial and administrative matters competently and diligently, *i.e.*, promptly, efficiently, and fairly. This Canon is the ABA's response to reports of judges who procrastinated in deciding proceedings ripe for decision, judges with heavy dockets who were very irregular in their court appearances, and judges who, by regularly arriving late to court, unreasonably delayed jurors, witnesses, parties, and lawyers. [6]

Prompt disposition does not mean that the judge must decide quickly. Complex cases take more time than simple ones, and haste can make waste. "Prompt disposition" only means that the judge must devote "adequate time to judicial duties" and be "punctual in attending court and expeditious in determining matters under submission." [7] The judge must also insist on similar conduct by court officials, litigants, and their lawyers. [8]

The judge's duty of prompt disposition of judicial business is not contrary to the judge's duty to be patient and deliberate. [9] A good judge is both prompt and courteous.

If a judge fails to conclude matters within a statutorily prescribed time limit, he is not disposing of business promptly, within the meaning of Rule 2.5(A). [10] Rule 2.5 is not limited, however, to statutorily prescribed limits. [11] A court can resolve what "adequate" time is and what is "punctual," or "expeditious," only in the context of a particular proceeding.

Rule 2.5(B) provides that a judge must cooperate with other judges and court officials in administrating court business. [12]

A judge will violate Rule 2.5(B) [13] if she fails to supervise her staff. For example, a judge violates this rule if she fails to maintain court records and conduct court proceedings in a professional manner. In addition, a judge violate, this rule if she fails to require her staff to observe the same standards of fidelity and diligence that apply to the judge. [14]

A judge violated the requirements of Rule 2.5(B) when he refused his administrative superior's order to file weekly and monthly reports of his activities; obstinacy was the only apparent reason for his conduct. [15] This judge also violated Rules 2.5(A) and 2.5(B) by failing to get along with his administrative superior to the extent necessary to carry out judicial duties. The judge apparently accused his superior of lying, making false assumptions, and being grossly ignorant. The judge also cursed at and was generally disrespectful to his superior. [16]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 2.5(A), which corresponds to Canon 3C(1).

2 Rule 2.5, Comment 1.

3 Hence, the Board of Governors of the New Hampshire Judges Association required judges to attend a minimum of one judicial education conference each calendar year, unless excused for good cause. In re Proposed Rule Relating to Continuing Education for District & Municipal Court Judges, 115 N.H. 547, 345 A.2d 394 (1975).

4 Matter of Carstensen, 316 N.W.2d 889 (Iowa 1982).

5 In re Anderson, 412 So.2d 743 (Miss.1982) (judge removed from office). The Court relied on what became Canon 3C of the 1990 Judicial Code.

6 *See* Reporters Notes to 1990 Model Code of Judicial Conduct, at 54.

7 Rule 2.5, Comment 3.

8 2007 Code, Rule 2.5, Comment 4; 1990 Code, Canon 3B(8), Comment 2.

9 Rule 2.5, Comment 4; 1990 Code, Canon 3B(4), Comment 1. *See* Ronald D. Rotunda, *Remembering Judge Walter R. Mansfield*, 53 BROOKLYN L. REV. 271, 274–76 (1987).

10 1990 Code, Canon 3B(8).
Matter of Anderson, 312 Minn. 442, 252 N.W.2d 592 (1977).

11 Reporter's Notes to ABA Model Code of Judicial Conduct (1972).

12 The corresponding provision in the 1990 Code, Canon 3C(1), said, “should” instead of “shall.”

13 Rule 2.5(B) corresponds to Canon 3C(1) of the 1990 Code.

14 Matter of Briggs, 595 S.W.2d 270 (Mo.1980).

15 In re McDonough, 296 N.W.2d 648 (Minn.1979).

16 In re McDonough, 296 N.W.2d 648 (Minn.1979).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.6 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.6 Rule 2.6

## § 10.2-2.6(a) The Text of Rule 2.6

Rule 2.6 provides:

**RULE 2.6.** ***Ensuring the Right to Be Heard***

**(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.***

**[*** Ed. Note: "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology ¶15**]**

**(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement**.

**COMMENTARY**

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

### § 10.2-2.6(b)(1) Basic Principles

Rule 2.6(A)[1] requires a judge to accord every person "who has a legal interest in a proceeding" (or that person's lawyer) full right to be heard according to law.

Thus, a judge violates Rule 2.6(A) when he denies the state an opportunity to be heard in a criminal case. In *Matter of Edens*,[2] the judge violated this Rule when the defendant did not give his guilty plea in open court in the presence of the assistant district attorney or prosecuting officer. Furthermore, the judge accepted the guilty plea without giving prior notice to the assistant district attorney. Finally, the judge signed the judgment in the court clerk's office, out of the presence of (and without notice to) the assistant district attorney.[3]

### § 10.2-2.6(b)(2) Settlement Conferences

Rule 2.6(B)[4] and Rule 2.9(A)(4)[5] deal with settlement conferences. Rule 2.6(B) advises that the judge "*may* encourage" settlement, but "*shall not* act in a manner that coerces any party into settlement."[6] The judge, in short, may encourage a settlement, but may not, in effect, coerce settlement. Judges must not be overzealous in pushing the parties to agree to an out-of-court resolution of a case.

Consequently, the Comments warn the judge to keep in mind the effect that the judge's participation in settlement discussions may have on (1) the judge's own view of the case and, (2) the view of the lawyers and the parties if the case remains with the judge after settlement efforts prove to be futile.[7]

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, which drafted the 2007 Code, heard testimony that some judges were pressuring the parties to settle. Some witnesses urged the Commission to adopt a rule that would prohibit a judge from presiding over a case at trial where he had previously conducted settlement negotiations that ultimately proved unsuccessful. Although several members of the Commission agreed that, as a general matter, "it was the better practice for judges not to try cases they had attempted to settle given the risk that statements the judge made during settlement negotiations might later be construed as lack of impartiality, the Commission declined to adopt such a rule."[8] The Commission concluded that rules of practice and procedure rather than rules of ethics should deal with that issue.

Still, there may be circumstances where the Judicial Code would require the judge to recuse himself because of his involvement in settlement talks. If the judge learns information during settlement discussions could influence his decision-making during trial, then the judge should consider whether disqualification may be appropriate.[9]

The 2007 Code advises that when the judge considers what would be appropriate for settlement in a particular case, he should consider factors such as the following:

- whether the parties have requested the judge to participate in settlement discussions,
- whether the parties and their counsel are relatively sophisticated in legal matters,
- whether the fact-finder will be a judge or jury;
- whether the parties, or just the counsel, participate in settlement discussions,
- whether any party is unrepresented, and
- whether the civil is civil or criminal.[10]

Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 2.6(A) corresponds to 1990 Code, Canon 3B(7).

2 Matter of Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

3 **Notice and Presence of the Party's Lawyer.** If Rule 2.9(A) [or Canon 3(B)(7) of the 1990 Code] requires the presence of a party, or requires that notice be given to a party, and if that party is represented by counsel, then this rule means that the party's *lawyer* is the person who is to be present or to whom notice must be given. Rule 2.9, Comment 2 [Canon 3B(7), Comment 3.]

4 2007 Code, Rule 2.6(B) corresponds to the 1990 Code, Canon 3B(8), Comment 1.

5 2007 Code, Rule 2.9(A)(4) corresponds to the 1990 Code, Canon 3B(7)(d).

6 Rule 2.6(B) (emphasis added).

7 Rule 2.6, Comment 2.

8 Reporters' Explanation of Rule 2.6, at 19 (ABA 2007).

9 Rule 2.6, Comment 3. See Rule 2.11(A)(1), which requires disqualification if the judge has personal knowledge of facts that in are in dispute in the proceeding.

10 Rule 2.6, Comment 2.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.7 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.7 Rule 2.7

## § 10.2-2.7(a) The Text of Rule 2.7

Rule 2.7 provides:

**RULE 2.7. *Responsibility to Decide***

**A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.***

**[*** Ed. Note: "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology ¶15**]**

**COMMENTARY**

> [1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

## § 10.2-2.7(b) Affirmative Duty to Hear Cases

The principle found in Rule 2.7 corresponds to Canon 3B(1) of the 1990 Code. This principle was new to the 1990 Code, where it made its first appearance.

It should be improper for a judge, out of an abundance of caution, always to grant a party's motion seeking the judge's disqualification, when the law does not really require the judge's disqualification. If Rule 2.11 of the 2007 Code, or Canon 3E of the 1990 Code (both sections deal with "Disqualification") requires disqualification, then, the judge must disqualify herself. Otherwise, there is a duty to sit.

The drafters of the 1990 Code added Canon 3B(1), and the framers of the 2007 Code kept it in order to "emphasize *the judicial duty to sit* and to minimize potential abuse of the disqualification process." [1] Public policy forbids a judge to disqualify himself for frivolous reasons, because unnecessary disqualifications delay the proceedings, overburden other judges, and encourage improper judge-shopping. Judges should not recuse themselves for no reason, because "the parties in a judicial proceeding do not choose their judges, as they do in arbitration." [2]

The drafters of the 2007 Code reaffirmed this position. They emphasized that judges should not abuse disqualification as a tool to avoid deciding cases that the judge may regard as to difficult, unpleasant, or unpopular. [3]

In some circumstances, the court will even mandamus a lower court judge and order him to sit. [4]

### § 10.2-2.7(c) The Duty to Sit under Federal Law

Prior to the 1974 amendment to 28 U.S.C.A. § 455, federal courts generally held that a judge had a "duty to sit" in cases where there was no technical violation of the disqualification statute, although there may have been a "question" of impartiality. [5] The amended section 455 modifies the "duty to sit" rule by requiring disqualification if there is a reasonable question as to the judge's impartiality.

The test is objective: would a "reasonable person" knowing all the circumstances conclude that the judge's "impartiality might reasonably be questioned." Thus, judges should not disqualify themselves merely to avoid difficult or controversial cases. [6]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 ABA Standing Committee on 1990 Code, Legislative Draft 15 (1990) (emphasis added).

2 Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.), 579 F.2d 691, 699 (2d Cir.1978).

3 Rule 2.7, Comment 2. Reporters' Explanation of Changes to Rule 2.7, at 19 (ABA 2007).

4 **Writ of Prohibition Ordering a Judge to Sit.** Ham v. Eighth Judicial Dist. Court, 93 Nev. 409, 566 P.2d 420 (1977) issued a writ of prohibition to prevent judge from voluntarily disqualifying himself. The court held that the trial judge was without authority to disqualify himself where he did not explain the nature of claimed bias or prejudice and where the trial judge had already ruled on certain litigated matters.

5 Prior to the 1974 amendment to 28 U.S.C.A. § 455, federal courts generally held that a judge had a "duty to sit" in cases where there was no technical violation of the disqualification statute, although there may have been a "question" of impartiality. In 1974, Congress amended 28 U.S.C.A. § 455(e), so that federal judges no longer have a duty to sit unless they must disqualify themselves. On the prior version, *see, e.g.*, Tynan v. United States, 376 F.2d 761, 764 (D.C.Cir.1967) ("if the statutory requirements are not met, it is the duty of the judge to refuse to disqualify himself."), *cert. denied*, 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d 111 (1967).

6 *See, e.g.*, H.R. Rep.No.1453, 93d Cong., 2d Sess. 5 (1974). *E.g.*, United States v. Wolfson, 558 F.2d 59, 63 (2d Cir.1977).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.8 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.8 Rule 2.8

## § 10.2-2.8(a) The Text of Rule 2.8

**RULE 2.8.** ***Decorum, Demeanor, and Communication with Jurors***

**(A) A judge shall require order and decorum in proceedings before the court.**
**(B) A judge shall 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, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.**
**(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.**

**COMMENTARY**

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

## § 10.2-2.8(b) Courtroom Decorum

Rule 2.8(A) [1] requires a judge to maintain order and decorum in the courtroom. To some extent, this Rule corresponds to Rule 3.5 of the Model Rules of Professional Conduct. That Rule governs lawyers and concerns the "impartiality and decorum of the tribunal." [2]

A judge violated what is now Rule 2.8(A) when he held criminal arraignments in his chambers in circumstances where the procedures created security problems, crowded the courtroom, and were therefore inconsistent with the proper conduct of the court. The court censured the judge for this violation and other violations of the Judicial Code. [3]

The "maintaining order and decorum" standard justified a judge ordering the defendant to be quiet when the defendant was conversing with his attorney in a loud voice that others in the courtroom could easily overhear. The defendant in that case asserted on appeal that the judge's comments prejudiced the jury. The appellate court did not agree, citing what corresponds to Rule 2.8(A) as authority justifying the judge's actions. [4]

Rule 2.8(A) also grants judges the power to preserve or restore order in the courtroom by temporarily ejecting disruptive and disorderly persons, including attorneys. A judge may not, however, have attorneys removed from the courtroom merely because of a professional or personal disagreement with the attorney. [5] Judges are not tin gods in a narrow world; their right to maintain order and decorum and to be efficient and businesslike is consistent with their duty to be patient and deliberate, and treat lawyers, the parties, and others, with dignity and respect. [6] To that topic we now turn.

### § 10.2-2.8(c) Courteousness to Litigants and Others

Rule 2.8(B) [7] requires the judge to be courteous to litigants, jurors, witnesses, lawyers, court state, court officials, and others with whom the judge deals in an official capacity.

The judge must balance his duty to "maintain order and decorum" in court proceedings, with the judge's obligation, under Rule 2.8(B), to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in his official capacity." The duty to hear proceedings with patience "is not inconsistent with the duty to dispose promptly of the business of the court." [8] This Rule also imposes a duty on the judge to require similar conduct of the lawyers and of staff and others subject to the judge's direction and control.

Proper judicial temperament is probably one of the most, if not the most, important qualities of a judge. That rare breed of lawyer, the trial litigator, often expresses admiration for those judges who by inclination or careful self-control exhibit the proper judicial character. They treat all parties with patience and with fairness, and handle the case load with reasonable dispatch. [9]

The "patience and dignity" standard of Rule 2.8(B) speaks in broad and ambiguous terms not susceptible to precise definition. We can begin to define the term by looking at examples of behavior that courts have found to violate this standard.

*Matter of Ross* [10] involved a judge who used abusive and vulgar language against persons appearing before him. For example, in one such case, the judge told a defendant, "[T]he Court could really be a 'dink,'" and, "Young man, you will remember that the likes of you I chew up and spit out before breakfast, and I never have breakfast until 8:00 o'clock at night." The court said that intemperate language is on occasion understandable, but vile, obscene, and abusive language is inexcusable. The court suspended the judge for 90 days without pay.

*In re Rome* [11] involved a judge who granted a convicted prostitute two years probation. In granting probation, the judge wrote a humorous opinion in poetic verse. The local newspaper reprinted the opinion, and the prostitute became the primary topic of conversation around town. Although neither the prostitute nor her parents complained, the disciplinary commission censured the judge! The court upheld the censure, not because the judge wrote his opinion in verse, but because the prostitute was portrayed in a "ludicrous or comical situation." The judge responded that the First Amendment protected his conduct. The state Supreme Court held that the Code of Judicial Conduct limited the judge's right to free speech, and that First Amendment rights do not exempt a judge from discipline for proven judicial misconduct. [12]

That argument assumes the point in dispute. If what the judge said in the opinion was true, why does it make a difference that the words rhymed? The *Rome* court did not appear attentive to the free speech problems inherent in its decision. In other cases, judges—without being subjected to any discipline or criticism—have written opinions in verse that appear to make light of someone's problems. [13]

*In re Jordan* [14] involved a sentencing hearing. At the defendant's sentencing, the judge told the defendant, "I know why you won't tell me why you've been drinking. It's because you're chicken shit." The court removed the judge from office for this remark and other violations of the Code.

Consider the fact pattern in *Matter of Del Rio*. [15] The judge, whom the court suspended for five years without pay for his behavior, constantly subjected attorneys, spectators, litigants, and witnesses appearing before him to discourtesy, harassment,

unjust criticism, and abuse. In one bench trial, the judge persisted in talking on the telephone during critical testimony from the complainant and another witness. When the prosecutor requested the judge's attention, the judge ordered him into chambers where he gave the prosecutor an insulting tongue-lashing.

This judge also boasted about his sex life to female attorneys and asked them for dates. When the attorneys refused, the judge often treated them with disdain when they later appeared professionally before the judge. The same judge had ordered an 11-year-old youngster to be locked up alone for one half hour in the "bullpen" for causing a disturbance in the courtroom during a field trip.

Because judges realize the importance of judicial temperament, sometimes they sue the press for defamation. It is hard, but not impossible, for plaintiffs to win such cases. In one rare case, where the trial judge won compensatory damages of $2.01 million dollars against the Boston Herald and one of its reporters is *Murphy v. Boston Herald, Inc.* [16]

Murphy, the plaintiff-judge, sued the newspaper and its reporter, claiming that they had published a series of false statements that held him up to public disgrace and that they published those statements "either with actual knowledge that the statements were false, or with a high degree of awareness of their probable falsity." One of the articles said, "According to several courthouse sources, Judge Ernest B. Murphy said of a teenage rape victim, 'She can't go through life as a victim. She's [fourteen]. She got raped. Tell her to get over it.'" This alleged exchange occurred in a lobby conference, and no court reporter was there to transcribe the exchange. The Court emphasized that there should be a recording made of all such exchanges:

> If there ever was a case that demonstrates the need for lobby conferences, where cases or other court matters are discussed, to be recorded, this is the case. This litigation, with all its unfortunate consequences for those involved, might not have occurred if the critical lobby conference (that involving the robbery case) had been transcribed. We trust that the lesson learned here will be applied by trial judges to prevent unnecessary problems that often arise from unrecorded lobby conferences. [17]

The Court concluded that the evidence below supported finding that the newspaper article about the judge that quoted that judge as saying "She is [fourteen]. She got raped. Tell her to get over it," was defamatory and false. The reporter stated that the assistant district attorney informed him of the judge's "get over it" statement, and that he interviewed the prosecutor who heard the statement and verified it. However, five of the six participants in the conference during which the judge was alleged to have made the "get over it statement" denied that anything had been said about the rape victim. The sixth participant (the prosecutor) testified that the judge had said words to the effect of "she needs to get on with her life and get over it."

### § 10.2-2.8(d) Courteousness to Court Staff

The 2007 Rules added the term "court staff" to the first part of Rule 2.8(B) because the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct heard testimony of abusive behavior by judges. [18] The new Rule deals with that situation.

Rule 2.8(B) also imposes a duty on the judge to require his staff, court officials, and others subject to his discretion and control to conform to the same standards of patience and dignity required of the judge.

This requirement does not mean, however, that the judge must be the "keeper" of his staff or attorneys appearing in his courtroom. A judge does not violate Canon 3A(3) if his staff is rude or undignified toward others *if* the judge does not have knowledge of such instances of rudeness; if he had knowledge, he is not liable if he acted reasonably in trying to correct the problem, even though his efforts were to no avail. [19]

### § 10.2-2.8(e) Commending or Criticizing Jurors

Rule 2.8(C) [20] instructs judges not to criticize or commend jurors for their verdict other than in a court order or opinion in a proceeding. They may, however, express appreciation to jurors for their service to the judicial system and the community.

This section first appeared in the 1990 Judicial Code. Its purpose is to "protect jurors from improper influence by judges and to preserve the appearance of fairness in judicial decision-making." [21] If the judge either praises or criticizes jurors for their verdict outside the courtroom, e.g., to the media, the judge's comments may impair the jurors' ability to be fair and impartial in future cases where they may serve. [22]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 28(A) corresponds to Canon 3B(3) of the 1990 Code.

2 These rules, because they deal with speech, raise First Amendment issues. *E.g.*, Fieger v. Michigan Supreme Court, 2007 WL 2571975 (E.D. Mich. 2007). This court declared the state's professional conduct rules on courtesy and civility unconstitutional. The rules, as interpreted, "reach any criticism of the tribunal whether it is warranted or unwarranted, political or apolitical, truthful or false, vulgar or artful." 2007 WL 2571975 *9. Actions of the judiciary are actions of the state. Hence, "it follows that attorney speech concerning a court's action in a case is political speech." 2007 WL 2571975 *3.

3 In re Dwyer, 223 Kan. 72, 572 P.2d 898 (1977).

4 State v. Lovelace, 227 Kan. 348, 607 P.2d 49 (1980).

5 Matter of Hague, 412 Mich. 532, 315 N.W.2d 524 (1982).

6 Rule 2.8(B) & Comment 1.

7 Rule 2.8(B) corresponds to Canon 3B(4).

8 2007 Code, Rule 2.8(A), (B), & Comment 2. 1990 Code, Canon 3B, Comment 1; Canon 3B(8).

9 Ronald D. Rotunda, *Remembering Judge Walter R. Mansfield*, 53 BROOKLYN L.REV. 271 (1987).

10 Matter of Ross, 428 A.2d 858 (Me.1981) (per curiam).

11 In re Rome, 218 Kan. 198, 542 P.2d 676 (1975).

12 *See also* Halleck v. Berliner, 427 F.Supp. 1225, 1241 (D.D.C.1977) ("The need for public confidence in and respect for the judiciary requires some reasonable limits on the freedom of a judge to say what he pleases from the bench …").

13 *E.g.*, Fisher v. Lowe, 122 Mich.App. 418, 333 N.W.2d 67 (1983) (both the opinion by the judge and the headnotes by West Publishing Co., are in verse).

*See also* Brown v. State, 134 Ga.App. 771, 216 S.E.2d 356 (Ga. App. Ct. 1975). The first lines read:

> "The D. A. was ready His case was red-hot.
>
> "Defendant was present, His witness was not."

West wrote the headnotes in verse as well. *E.g.*, headnote 4:

> To continue civil cases the judge holds all aces;
>
> but it's a different ball game in criminal cases.

Wheat v. Fraker, 107 Ga.App. 318, 130 S.E.2d 251 (Ga.App. 1963), is yet another opinion in rhyme.

14 In re Jordan, 290 Or. 303, 314, 622 P.2d 297, 308 (1981).

15 Matter of Del Rio, 400 Mich. 665, 256 N.W.2d 727 (1977), *appeal dismissed*, 434 U.S. 1029, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

16 Murphy v. Boston Herald, Inc., 449 Mass. 42, 865 N.E.2d 746 (2007).

17 449 Mass. at 57, n.15, 865 N.Ed.2d at 758 n.15.

18 Reporters' Explanation of Changes to Rule 2.8, at 20 (ABA 2007).

19 Matter of Kohn, 568 S.W.2d 255 (Mo.1978).

20 2007 Code, Rule 2.8(C) corresponds to the 1990 Code, Canon 3B(11).

21 ABA Standing Committee Report on 1990 Judicial Code, Legislative Draft 22 (1990).

22 2007 Code, Rule 2.8, Comment 2.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.9 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.9 Rule 2.9

## § 10.2-2.9(a) The Text of Rule 2.9

Rule 2.9 provides as follows:

**RULE 2.9. *Ex Parte Communications***

**(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:**

**[*Ed. Note:** "Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. Terminology ¶20.

**[*Ed. Note**: "Impending matter" is a matter that is imminent or expected to occur in the near future. Terminology ¶9**]**

**(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:**

**(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and**

**(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.**

**(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.**

**(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes 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.**

**(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.**

**(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.**

**[*** Ed. Note: "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology ¶15.**]**

**(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.**

**(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.**

**(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.**

**COMMENTARY**

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

## § 10.2-2-9(b) Introduction

Rule 2.9(A) [1] imposes a general prohibition against the judge initiating, permitting, or considering *ex parte* communications, unless one of the exceptions in Rule 2.9(A) applies concerning any pending or impending matter.

A judge violates Rule 2.9(A), or Canon 3B(7), if he imposes sentence without affording the defendant the hearing to which that defendant is entitled by law. [2] The judge also violates these sections if he considers *ex parte* communications from a person with the defense's interests at heart. For example, in *State v. Valencia*, [3] the trial judge had sentenced the defendant to death, but the court reversed that judgment because of an *ex parte* communication between the victim's brother and the trial judge prior to sentencing. The victim's brother told the judge that the family wanted the death penalty imposed. The court reversed even though the judge had not committed himself to a position after his conversation with the victim's brother. The judge merely had stated that he had a difficult decision to make and would consider all the facts. The appellate court cited what is now Rule 2.9(A) in support of reversal.

A judge violated Rule 2.9(A), and the Ohio Supreme Court publicly reprimanded him (and assistant prosecutor Christopher Becker) for *ex parte* collaboration on a sentencing order in *Disciplinary Counsel v. Stuard*, [4] Judge Stuard asked Assistant Prosecutor Becker to prepare the court's opinion sentencing Roberts to death. Stuard gave Becker his notes on the aggravating and mitigating factors, reviewed the 17-page draft opinion that Becker had written and left on his desk, and then relayed corrections to Becker. Defense counsel discovered what was going on when Judge Stuard read his opinion from the bench.

Defense counsel, who did not have a copy of the sentencing order, noticed that one of the prosecutors was silently "reading along" with the judge, turning pages of a document in unison.

Judge Stuard sentenced the defendant to death. In the appeal of that criminal case, the Ohio Supreme Court held that Judge Stuard committed prejudicial error by delegating to the prosecutor the responsibility for the content and analysis of his sentencing opinion. The Court vacated the death sentence and remanded the case, instructing Judge Stuard to personally review and evaluate the appropriateness of the death penalty. [5] In a separate opinion, the Court publicly reprimanded Judge Stuard and the prosecutor, Christopher D. Becker, for violating what corresponds to Rule 3.5(b) of the Model Rules of Professional Conduct. [6]

A judge also violates the *ex parte* rule if he communicates with a party's lawyer by using "Facebook," an internet social utility program. In a child custody and support hearing, the judge and the father's lawyer designated themselves as "friends" on their "Facebook" accounts so that they could view each other's account. The judge also used Google to research one of the parties. [7] Note that the Comments to Rule 2.9 make clear: "The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." [8]

The remainder of Rule 2.9(A) focuses on the various exceptions to Rule 2.9(A). Unless one of these exceptions applies, the judge must refrain from making or receiving *ex parte* communications. The following sections discuss and analyze these various exceptions.

For example, as discussed more fully below, the judge may engage in *ex parte* communications about scheduling, or for administrative purposes or emergencies that do not deal with substantive issues; in all these cases, the judge must promptly notify all of the other parties of the substance of the conversation and give them an opportunity to respond. [9] The judge may also obtain the advice of a "disinterested expert on the law" if the judge gives notice to the parties of the person consulted and the substance of the advice and also gives the parties a reasonable opportunity to respond. [10]

The judge may also consult with court personnel who aid the judge in carrying out her judicial duties. [11] The judge may also consult with other judges. [12] If the parties consent, the judge may confer separately with the parties or their lawyers in an effort to mediate or settle the case. [13] The judge may also initiate or consider any *ex parte* communication if other law expressly authorizes her to do so. [14]

### § 10.2-2-9(c) Impending Proceedings

Note that Rule 2.9(A) covers both pending and "impending" proceedings.

A "pending" matter is any matter that has begun. "A matter continues to be pending through any appellate process until final disposition." [15] An "impending" matter is any matter that is about to begin, that is, is "imminent or expected to occur in the near future." [16]

For example, in one case—at the conclusion of a preliminary hearing—the court talked privately to a potential witness about her testimony at a future trial. [17] The judge did not communicate with a party, only a witness, but this communication was improper because it was concerning an impending matter and the conversation occurred outside of the presence of the parties.

The "impending proceeding" limitation intended to discourage forum shopping by a party or lawyer who tries to assess the judge's predilections on a particular fact situation before filing a claim. [18]

If the *ex parte* communication concerns a matter that is not pending or even impending, the judge should be aware that if a proceeding related to the communication subsequently comes before her, that earlier communication may require her

disqualification under Rule 2.11(A) [19] because her "impartiality might reasonably be questioned." Thus, the judge must recuse himself when he has previously given advice on a legal problem casually explained to the judge. [20]

Consider *In re Dekle*, [21] where the attorney for one party (after oral argument before the Florida Supreme Court) handed Justice Dekle a legal memorandum. Justice Dekle said that he erroneously thought the memorandum was a duly filed amicus submission because the attorney mentioned that he had already presented the memorandum to another justice for use in preparing the majority opinion. When the justice originally assigned to write the majority opinion decided to join the dissent, Justice Dekle was assigned to write for the majority. In drafting his opinion, he relied on the memorandum that had not been filed.

When these facts became known, the Florida Judicial Qualifications Commission instituted proceedings to discipline this Florida Supreme Court Justice. The majority in *Dekle* held that use of the memorandum violated Canon 3B(7)(a) even though Justice Dekle thought, erroneously, that this memorandum had been duly filed. The court found that Dekle's conclusion was not reasonable. The Court ruled that when one uses, without corrupt motive, an ex parte memorandum in the preparation of a judicial opinion, that action constitutes impropriety and laxness. Therefore, judging Justice Dekle by objective and not subjective intent, the court held that his misconduct warranted judicial discipline. The court, in effect, concluded that Justice Dekle should have known that the memorandum was beyond his power to consider. Even if there is no actual harm to any party, a judge who intentionally commits an act that he knew or *should have known* was beyond his power is guilty of misconduct. The court reprimanded the judge, adding in dicta that removal would have been proper if there had been a clear showing of corrupt motive or a deliberate wrong. [22]

The Massachusetts Supreme Judicial Court, in *Matter of Bonin*, [23] embraced a very broad view of the *ex parte* prohibition. The Court held that a judge violates what is now Rule 2.9(A) [24] if he attends a public meeting when he should have known that its purpose was to raise money for criminal defendants whose cases were then pending before the superior court where the judge sat, but *not* before this particular judge, who was the chief judge. The public meeting included a lecture by Gore Vidal on "Sex and Politics in Massachusetts." The state had indicted the defendants in the criminal case for alleged sexual acts between men and boys. The court argued that the judge, by attending the meeting, heard *ex parte* statements and arguments on matters pending before his court.

This reasoning of *Bonin* is overly broad and has unsettling implications. Judges are human beings who cannot divorce themselves from the real world, public discussions, newspapers, and the like. [25] The Massachusetts Court acknowledged that normally "any judge would be entirely free to attend a public lecture about sex and politics whether or not sponsored by a 'gay' group." Yet the Court claimed that Judge Bonin's actions were different because the lecture concerned cases pending in the Superior Court where he was chief justice.

The Massachusetts Court showed little sensitivity to First Amendment concerns. Court procedures had not assigned Judge Bonin to hear the case and he would make no ruling regarding it, so the reference to hearing "one sided argumentation" was not too relevant. When he was on the bench, he made no comment concerning the case. And when he was off the bench (when he was at the large meeting), he also made no remarks or statements about the case. Some people might infer from Bonin's attendance at the meeting that he supported the cause, but it was "at least equally likely that it would be interpreted as being motivated by curiosity or interest in the remarks of the well-known featured speaker." [26]

Contrast an incident involving Justice Benjamin N. Cardozo. Shortly before he had authored the leading tort decision of *Palsgraf v. Long Island R.R. Co.*, [27] Justice Cardozo attended a meeting of The American Law Institute (ALI). The ALI *used the facts of that very case* as the focus for a debate at its meeting. Cardozo attended the ALI meeting and listened to the discussion on unforeseeable plaintiffs, but he did not vote on the question. By a single vote, and after a "long and lively debate," the American Law Institute voted that there should be no liability. Obviously, no court ever reprimanded Cardozo for attending the ALI discussion, even though he later decided *Palsgraf*. [28] The mere fact that the American Law Institute had exposed him to a discussion did not require his recusal.

It is improper for judges to hear new versions of the facts of a case before them, *ex parte*, out of the presence of the lawyers. But, as the Cardozo incident illustrates, judges often hear arguments about the governing law outside of the lawyers' presence, because they are supposed to be looking at principles larger than issues facing particular litigants in a particular case. Thus, it is perfectly proper for law schools to ask judges to judge moot court cases about issues that may be or come before them. Judges may also read law review articles arguing about what the law should be, or read dissents, concurring opinions, and majority opinions that discuss the law even though the judges have similar cases before them.

### § 10.2-2-0(d) Scheduling, Administrative, or Emergency Communications

Rule 2.9(A)(1) and its two subsections [29] provide that the judge *may* engage in *ex parte* conversations of matters for "scheduling, administration, or emergency purposes" *if* these conversations do not involve substantive matters. Even then, the judge, first, must reasonably believe that no party will gain any procedural, substantive, or tactical advantage from the conversation. Second, the judge (either personally or by delegating the duty to another [30]) must promptly notify all of the other parties of the substance of the conversation and give them an opportunity to respond.

### § 10.2-2-9(e) Disinterested Experts on the Law

Rule 2.9(A)(2) provides:

> "A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, *if* the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received." [31]

Under the 1990 Code, the requirement of "notice" did not mean "prior notice." The 2007 revisions changed that and now the judge must give "advance notice." The judge only must also inform the parties the name of the person consulted and the subject matter of the advice. The judge must also give the parties a reasonable opportunity to respond. This exception accommodates both the judge's interest in seeking expert legal advice to help her decide complex questions of law and the interest of the parties in the adversary system.

This rule, permitting *ex parte* communications if there is notice to the parties, applies only to disinterested experts o*n the law*. This rule, by its own terms, only applies to experts *on the law*, not to all experts. It does not apply, for example, to economists. [32] A judge cannot absolve any other *ex parte* communication from impropriety merely by giving notice to the parties and an opportunity for them to respond. When the judge seeks a disinterested expert *on the law*, the judge does not need to secure the parties' consent in such circumstances, but the judge must give the parties advance notice.

The restrictions on *ex parte* communications also include communications from law teachers and other lawyers. [33] A law professor has no more right than any other expert on the law to engage in *ex parte* conversations with a judge about a particular case unless in accordance with the Canons.

The Reporter's Notes to the 1972 Judicial Code suggested that the *ex parte* advice need not even be in writing. The judge could receive the advice in a telephone conversation. [34] The 1990 Code did not specifically require a writing. However, the 2007 Code makes clear that it is referring to "written advice." [35]

An appropriate and desirable procedure for obtaining the advice of a disinterested expert is to have the expert file an amicus curiae before compliance with the Code. When the disinterested expert files a brief, all the parties will know exactly what the expert told the judge, and will therefore be able to respond appropriately.

The 1990 Code specifically recommended the use of this brief filing procedure. [36] The 2007 Code deleted the Comment recommending the amicus brief procedure, because it said that this procedure was "not an ethical concern." [37] Yet, in other

sections, the 2007 Code concerns itself with procedure and administration.[38] Whether or not the drafters of the 2007 Code consider the amicus brief to be "administration," and outside the purview of the Judicial Code, it is still a good procedure to implement.

However, judges may consult with an ethics advisory committee, or her own outside counsel, or any legal ethics expert in an effort for the judge to determine if she is complying with the Code of Judicial Conduct.[39] This Comment is new to the 2007 Judicial Code, and it corresponds, roughly, to Rule 1.6(b)(4) of the Model Rules of Professional Conduct for lawyers, which allows lawyers to confer with other lawyers in order to secure legal advice on how to comply with the ethics rules. The framers viewed this Comment as simply confirming existing practice. "Judges routinely consult ethics advisory committees, counsel and outside experts concerning their obligations under the Code in a given context."[40]

### § 10.2-2-9(f) Consulting with Court Personnel

Rule 2.9(A)(3)[41] makes clear that the *ex parte* rule does not preclude a judge from consulting with court personnel "whose functions are to aid the judge to carry out the judge's adjudicative responsibilities or with other judges." Thus, a judge may communicate with his law clerks, other judges, and other court personnel who aid him in carrying out his adjudicative responsibilities. It is not necessary for the judge in such cases to give the parties either notice or an opportunity to respond. The judge and his or her law clerks routinely confer in confidence about matters related to the judge's duties.[42]

ABA Informal Opinion 1346[43] examined the scope of the phrase "court personnel." The judge wanted to obtain answers to specific criminal law issues through law students working in the law school's legal information center. The Opinion concluded that "court personnel" refers only to immediate employees of the court over whose activities the judge exercises supervision. Therefore, the judges could only obtain and use the answers in a pending proceeding if the judge gave notice to the parties of the person whom the judge had consulted and the substance of the advice received, and then afforded the parties a reasonable opportunity to respond.

Rule 2.9(A)(3) also authorizes the judge to consult with "other judges." There is a caveat. First, the judge who consults must make reasonable efforts to avoid receiving "factual information" that is not part of the record. For example, it would be improper for an appellate judge to talk to the trial judge in order to confirm facts that are not part of the record. Second, the last clause of Rule 2.9(A)(3) provides that the judge who consults must be sure not to abrogate his responsibility to decide the matter personally.

*Matter of Cunningham*[44] illustrates the restriction found in the last clause of Rule 2.9(A)(3). The court censured an appellate judge who wrote two letters to a trial judge that referred to several pending cases by name; the appellate judge, among other things, assured the trial judge that there "is no way I would ever change a sentence that you had imposed. You can do whatever you want to whenever you want to and I'll agree with you. … I take the position that you know the case and as sentencing judge you can do whatever you damn well please." He also wrote, if "I catch the appeal, I will affirm as always, on a judge's discretion." It is amazing what some people write down.

In the 1990 Code, Canon 3B(7)(c) also broadly authorized the judge to consult "with other judges." However, it added an unusual caveat: "If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties."[45] This statement was new to the 1990 Code. One wonders how judges interpreted this provision in practice, particularly in jurisdictions where appellate and trial judges are in the same building, and often eat and socialize together, talk informally, and keep no records of their conversations.

The 2007 Code omitted this particular Comment about keeping records of written and oral communications. The drafters of the 2007 Code simply announced that it deleted this Comment because it "is an administrative, rather than an ethical matter."[46]

However, the 2007 Code advises that the judge "must avoid" ex parte communications with either judges who have already been disqualified in a matter, or judges "who have appellate jurisdiction over the matter." [47] It obviously defeats the purpose of disqualification if the new judge could confer with his disqualified colleague.

Although a judge may confer with his law clerks regarding a pending matter, certain communications and activities are still prohibited under Rule 2.9(A)(3), because the judge must not independently investigate the facts in a case and must consider only the evidence presented. [48]

Moreover, the judge may not use his law clerks to do that which he may not do, for the judge must make reasonable efforts to supervise law clerks and other personnel on the judge's staff. [49] These principles are illustrated in *Price Brothers Co. v. Philadelphia Gear Corp.*, [50] where the judge's law clerk became a factual witness. In that case, the trial judge's law clerk visited the plaintiff's manufacturing plant to view some machines alleged to be malfunctioning in breach of the defendant's warranties. The defendant's attorney requested the judge to amend his findings of fact to reflect the visit by the law clerk. The judge refused the request without commenting on whether his clerk actually made the trip.

The appellate court reversed and remanded, ordering the district court to consider whether there was any *ex parte* communication in violation of Canon 3B(7). The trial court was to determine (1) whether the clerk had visited the plant, (2) whether the trip had been at the direction of the judge, (3) whether the clerk had conversations with the plaintiff's employees, (4) whether any observations had been made at the plant, (5) whether the information had been reported to the judge, and (6) when the defense counsel had learned of the trip and whether the defendant had expressly or tacitly approved of the trip.

In *Kennedy v. Great Atlantic and Pacific Tea Co.*, [51] the judge's law clerk acted without the judge's knowledge. The clerk visited the defendant's store after a rainstorm to determine whether the floor was wet at the place the plaintiff alleged that he had fallen. The floor was indeed wet, and then the clerk informed the judge. The judge, in turn, instructed his clerk to inform the defendant's lawyer to foster a settlement. The parties did not settle, and at trial, the judge informed the plaintiff's lawyer of the clerk's observation. The plaintiff's counsel subsequently called the judge's clerk as a witness, and court rendered judgment in favor of the plaintiff.

On appeal, the court in *Kennedy* vacated the judgment because the clerk's visit to the site of the accident was an *ex parte* "communication" that "infected" the jury, the members of whom may have thought that the clerk's observation had some special importance if the clerk had taken the trouble to visit the property. One might add that the jury might give special credence or imprimatur to the witness because the judge presiding in that very case was the one who employed him.

### § 10.2-2-9(g) Settlement Conferences

Rule 2.9(A)(4) [52] provides that a judge may, "with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge." This section did not have a counterpart in the 1972 Model Judicial Code.

This exception to the normal *ex parte* rule should not be interpreted to give the judge *carte blanche* to receive, from one of the parties, evidence about the merits of the case, or privately tell one of the parties how she will rule in the case if the parties do not settle. Rather, the purpose of this limited exception is simply to allow the judge to mediate a settlement. It has long been the rule that the judge may not cajole a settlement. [53] If the judge's participation in settlement is so extensive that she becomes a witness to important fact issues, she must disqualify herself. [54]

Unless the client waives her right under Rule 1.6 of the ABA Model Rules of Professional Conduct [55] to keep the information confidential, a lawyer may not reveal to a judge the limits of his settlement authority or the lawyer's advice to the client regarding settlement. And the judge, even when participating in pretrial settlement discussions, may not require the lawyer to reveal such information, although she may make a simple inquiry. If the lawyer, in response, expresses reticence to disclose this information

on ethical grounds, the judge should not pursue the inquiry further, and the lawyer must decline to answer. She may refuse to answer, but she must not lie to the judge. [56]

### § 10.2-2.9(h) *Ex parte* Communications Authorized by Law

Rule 2.9(A)(5) [57] allows the judge to initiate, permit, or consider any *ex parte* comment *if* the law "expressly" authorizes an exception to the typical prohibition against *ex parte* communications. "Law" includes court rules, statutes, constitutional provisions and case law. [58]

For example, civil procedure rules allow the judge, in appropriate circumstances, to issue an *ex parte* temporary restraining order (TRO). Many states have enacted domestic abuse statutes, specifically authorizing *ex parte* protective orders for the protection of the petitioners. Some states by court rule authorize a judge to consider police reports at arraignments. [59] Courts sometime read statutes broadly to come within the "expressly authorized" language, particularly if they conclude that no one was prejudiced in the matter. [60]

The 2007 Code calls special attention to the existence of therapeutic or problem-solving courts, mental health courts, or drug courts. [61] If other law expressly authorizes the judge to permit, initiate, or consider *ex parte* communications when serving on such problem-solving courts, Rule 2.9 offers no obstacle.

### § 10.2-2.9(i) Inadvertent *Ex Parte* Communications

Rule 2.9(B) made its first appearance in the 2007 Model Code. It provides that if the judge inadvertently receives an unauthorized *ex parte* communication, the judge must notify all the other parties of the substance of the communication and give then them an opportunity to respond.

This provision has a parallel in the Model Rules of Professional Conduct, in the section dealing with misdirected faxes. [62] "In an age when misdirected faxes and email are common, the need for some provision to deal with inadvertent disclosures of ex parte information impressed the Commission as necessary." [63]

### § 10.2-2.9(j) Investigating Facts Independently

Rule 2.9(C) provides that the judge "shall not investigate facts in a matter independently." He should only reply on the evidence presented and any facts that are subject to judicial notice. [64]

An unusual case that illustrates this principle, but which does not purport to rely on it, is, *In re Disciplinary Proceeding Against Sanders*. [65] Justice Sanders had visited a special facility for sexually violent predators and had conversations with facility residents who had matters pending before the Supreme Court. The Court affirmed the admonishment and agreed that the Justice's conduct violated the Code of Judicial Conduct, but it did not rely on this section. Instead, it relied on the catch-all rule prohibiting the failure to enforce high standards of judicial conduct and the failure to promote public confidence in the integrity and impartiality of the judiciary. The court said:

> By asking questions of inmates who were litigants or should have been recognized as potential litigants on issues currently pending before the court, Justice Richard B. Sanders violated the Code of Judicial Conduct. His conduct created an appearance of partiality as a result of ex parte contact. [66]

Note that the Court did not rely on what is now Rule 2.9(C), although it could have done so. What makes this case unusual is that the Judicial Commission decided that Justice Sanders did not violate the Canon that prohibits the judge from considering *ex parte* or other communications concerning a pending or impending proceeding. [67]

Instead, the Court used the rather vague requirement that a judge must avoid the appearance of impropriety. The court noted the obvious argument—that "Justice Sanders claims that a violation of Canons 1 and 2(A) cannot be found without a concomitant violation of a proscribed act or canon and thus the Commission's failure to find a direct violation of Canon 3(A)(4) precludes it from finding a violation of the other canons." [68] The court, without offering any real analysis, simply responded, pithily: "We disagree." [69]

### § 10.2-2.9(i) Judicial Supervision of Court Personnel

In the 1990 Code, a Comment to Canon 3B(7) provided that a judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff. [70] The 2007 Code keeps this very logical proposition and elevates it to the black letter of Rule 2.9(D).

This provision mirrors the requirement that supervisory lawyers must make reasonable efforts to assure that other lawyers conform to the Rules of Professional Conduct. [71]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 The corresponding provision in the 1990 Judicial Code is the second sentence of Canon 3B(7).
Mark I. Harrison & Keith Swisher, *When Judges Should Be Seen, Not Heard: Extrajudicial Comments Concerning Pending Cases and the Controversial Self-Defense Exception in the New Code of Judicial Conduct*, 64 N.Y.U. ANN. SURVEY AM. L. 559 (2009).

2 Matter of Ross, 428 A.2d 858 (Me.1981). *See also* In re Conduct of Jordan, 290 Or. 669, 672, 624 P.2d 1074, 1076 (1981) (per curiam) (judge disciplined because, inter alia, he began criminal trial and entered a finding of "guilty" in the absence of defendant). The due process requirement embodied in the United States Constitution supports this ethical requirement.

3 State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979).

4 Disciplinary Counsel v. Stuard, 901 N.E.2d 788.

5 State v. Roberts, 110 Ohio St.3d 71, 850 N.E.2d 1168, ¶164 (2006).

6 901 N.E.2d 788 (Ohio 2009). *See also* In re Price, 899 N.E.2d 645 (Ind. 2009). The Indiana Supreme Court publicly reprimanded a lawyer who filed an ex parte petition for temporary custody with Judge Banina. The lawyer gave no prior notice to the custodial parent or an opportunity for her to be heard. In a companion case, the Indiana Commission on Judicial Qualifications publicly admonished Judge Daniel Banina, the judge who granted that ex parte petition for temporary custody without prior notice to the custodial parent or an opportunity for her to be heard. The petition had not alleged an emergency or certified the petitioner's efforts to give notice to the mother or reasons why notice should not be required. Indiana Commission on Judicial Qualifications, Public Admonition of the Honorable Daniel C. Banina, Miami Superior Court, Jan. 20, 2009, http://www.in.gov/judiciary/jud-qual/docs/admonitions/banina-1-20-09.pdf.

7 Public Reprimand of B. Carlton Terry, Jr., Judicial Standards Commission Inquiry No. 08-234 (April 1, 2009), http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf. The Commission publicly reprimanded Judge Terry. See also, *id*. at ¶12: "Judge Terry never disclosed to counsel or the parties at any time during the four days of trial that he had conducted independent research on Mrs. Whitley or had visited any web site belonging to Mrs. Whitley."

8 Code of Judicial Conduct, Rule 2.9, Comment 6.

9 2007 Code, Rule 2.9(1)(a),(b); 1990 Code, Canon 3B(7)(a)(i), (ii);.

10 2007 Code, Rule 2.9(A)(2); 1990 Code, Canon 3B(7)(b).

11 2007 Code, Rule 2.9(A)(3); 1990 Code, Canon 3B(7)(c).

12 2007 Code, Rule 2.9(A)(3); 1990 Code, Canon 3B(7)(c).

13 2007 Code, Rule 2.9(A)(4); 1990 Code, Canon 3B(7)(d).

14 2007 Code, Rule 2.9(A)(5); 1990 Code, Canon 3B(7)(3).

15 Terminology, ¶20. See Rules 2.9, 2.10, 3.13, and 4.1, all of which use the term, "pending."

16 Terminology, ¶9. See Rules 2.9, 2.10, 3.13, and 4.1, all of which use the term, "impending."

17 In re Conduct of Jordan, 290 Or. 669, 671, 624 P.2d 1074, 1075 (1981) (per curiam):

> "The [judge's] petition contends that it is not wrong for a judge to talk to a witness after 'the conclusion of a judicial proceeding.' We agree. That is not what happened in this case, however. This case involved a criminal prosecution against Mr. Kueninger in which his wife was an important witness. At the conclusion of the preliminary hearing, Judge Jordan talked to Mrs. Kueninger at the request of the District Attorney. Also, he talked to her about what she knew about the facts relating to the charge against her husband. At that time there had been no 'conclusion' of the criminal proceedings against Mr. Kueninger. The trial had not yet been held and Mrs. Kueninger was a potential witness in that trial. Under these facts, it was improper for Judge Jordan to talk with her."

In re Conduct of Jordan, 290 Or. 669, 671, 624 P.2d 1074, 1075 (1981).

*Cf.* 2007 Code, Rule 2.9(C): "A judge shall not investigate facts in a matter independently". 1990 Code, Canon 3B(7), Comment 5: "A judge must not independently investigate facts in a case. …"

18 *See* Reporter's Notes to 1990 Code [1972] at 54.

19 2007 Code, Rule 2.11(A) corresponds to 1990 Code, Canon 3E(1).

20 Scogin v. State, 138 Ga.App. 859, 227 S.E.2d 780 (1976).

21 In re Dekle, 308 So.2d 5 (Fla.1975) (per curiam).

22 The dissent objected: "It is admitted by the Commission that Justice Dekle was not influenced to change his vote in any way by the memorandum; that the memorandum did not contain any matters not already contained in the briefs filed in the cause, and that his final opinion was taken from the briefs filed and not from the memorandum." 308 So.2d at 13 (dissenting opinion).

23 Matter of Bonin, 375 Mass. 680, 378 N.E.2d 669 (1978).

24 1990 Code, Canon 3B(7).

25 2007 Code, Rule 3.1, Comment 1; 1990 Code, Canon 4A, Comment 1.

26 STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 44 (American Judicature Society, 1984).

27 Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

28 *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 147–49 (University of California Press, 1976).

29 2007 Code, Rule 2.7(A)(1) corresponds to 1990 Code, Canon 3B(7)(a). Rule 2.7(A)(1)(a) corresponds to Canon 3B(7)(a)(i); Rule 2.7(A)(1)(b) corresponds to Canon 3B(7)(a)(ii).

30 Rule 2.7(A)(1(b)("the judge makes provision promptly to notify"). The 2007 Code added this provision allowing the judge to delegate the notification duty.

31 Emphasis added. 2007 Code, Rule 2.9(A)(2), corresponds to the 1990 Code, Canon 3B(7)(b).

32 *See* E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 57, 97 S.Ct. 2229, 2235, 53 L.Ed.2d 100, 110 (1977). The Court held that it was error for the Court of Appeals to employ a Professor of Business Administration to assist him in understanding the record in the case, including economic observations, even though parties had an opportunity to respond. The Court did not cite Canon 3B(7)(b).

33 Rule 2.9, Comment 3. *Accord* 1990 Code, Canon 3B(7), Comment 1.

34 *See* Reporter's Notes [1972] at 54.

35 Rule 2.9(A)(2) ("obtain the written advice").

36 1990 Code, Canon 3B(7), Comment 4.

37 Reporters' Explanation of Changes to Rule 2.9, at 23 (ABA 2007).

38 *E.g.*, Rule 2.6, Comment 1. Rule 2.12, Comment 2. Rule 3.1(E) & Comment 1. Rule 3.2(A) & Comment 1. Rule 3.4 & Comment 1. Rule 3.7(A). Rule 3.13(C). Rule 4.1, Comment 14.

39 Rule 2.7, Comment 7.

40 Reporters' Explanation of Changes to Rule 2.9, at 23 (ABA 2007).

41 2007 Code, Rule 2.9(A)(3), corresponds to 1990 Code, Canon 3B(7)(c).

42 **Clerk Confidentiality.** For a thorough discussion of the rationale for, and extent of, a law clerk's duty of confidentiality to the judge for whom the law clerk is an agent, see Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430 (1999), which is also an extensive book review of EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (New York Times Books, 1998)

43 ABA Informal Opinion 1346 (Nov. 26, 1975).

44 Matter of Cunningham, 57 N.Y.2d 270, 273, 456 N.Y.S.2d 36, 37, 442 N.E.2d 434, 435 (1982).

45 1990 Code Canon 3B(7), Comment 9.

46 Reporters' Explanation of Changes to Rule 2.9, at 24 (ABA 2007).

47 Rule 2.9, Comment 5.

48 Rule 2.9(C), which corresponds to Canon 3B(7), Comment 6.

49 2007 Code, Rule 2.9(C). 1990 Code, Canon 3B(7), Comment 8.

50 Price Brothers Co. v. Philadelphia Gear Corp., 629 F.2d 444 (6th Cir.1980), *cert. denied*, 454 U.S. 1099, 102 S.Ct. 674, 70 L.Ed.2d 641 (1981).

51 Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593 (5th Cir.1977).

52 2007 Code, Rule 2.9(A)(4), corresponds to the 1990 Code, Canon 3(B)(7)(d).

53 Brooks v. Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir.1937).

54 Collins v. Dixie Transport, Inc., 543 So.2d 160 (Miss.1989).

**Subsequent Disqualifications of a Judge Who Mediated a Conflict and Then Joins a Law Firm.** In Cho v. Superior Court, 39 Cal.App.4th 113, 45 Cal.Rptr.2d 863 (Cal.App.1995), a judge who had presided over settlement discussions in another incarnation of this case then left the bench and became "of counsel" to the defendant's firm. He had received confidential information from the plaintiff during attempts to mediate the case, although he said he now remembered none of it. The court held:

> "[A]lthough mediators function in some ways as neutral coordinators of dispute resolution, they also assume the role of a confidant, and it is that aspect of their role that distinguishes them from adjudicators."

The 1983 version of ABA Model Rule 1.12 allowed a law firm to use screening for former judges or arbitrators who only see what each side shows the other, but did not allow screening for former mediators. Thus, when a mediator joined a firm, the firm would be disqualified if the mediator was disqualified. *See also* Poly Software Int'l, Inc. v. Su, 880 F.Supp. 1487 (D.Utah.1995).

The drafters of the 2002 Model Rules added mediators and other third-party neutrals to Rule 1.12 and extended the concept of screening to apply to mediators and third-party neutrals.

55 Or, under its predecessor, DR 4-101, ABA Model Code of Professional Responsibility.

56 ABA Formal Opinion 93-370 (Feb. 5, 1993). Ronald D. Rotunda, *"Lawyers' Ethics in an Adversary System"* (Book Review), 89 HARV. L. REV. 62 (1976); Ronald D. Rotunda, *Client Fraud: Blowing the Whistle, Other Options*, 24 TRIAL MAGAZINE 92 (Nov. 1988); Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waiving the Red Flag*, 63 OREGON L. REV. 455 (1984), reprinted in, 1985 CRIMINAL L. REV. 533, and excerpted in 34 LAW REVIEW DIGEST 14 (Mar./Apr. 1985).

57 Rule 2.9(A)(5) corresponds to the 1990 Code, Canon 3B(7)(e).

58 Terminology, § 15 defines law. In the 1990 Code, law is defined in Terminology, ¶11.

59 A judge violates Rule 2.9(A), or Canon 3B(7), if he imposes sentence without affording the defendant the hearing to which that defendant is entitled by law. The judge also violates these sections if he considers *ex parte* communications from a person with the defense's interests at heart.

60 San Carlos Apache Tribe v. Bolton ex rel. County of Maricopa, 194 Ariz. 68, 977 P.2d 790 (1999), held that a judge's *ex parte* communications with the Department of Water Resources and its legal counsel were authorized by statute, and hence there was no need to disqualify the judge. The statute in question specifically stated that the adjudication judge or the water master "shall request technical assistance from the director in all aspects of the general adjudication with respect to which the director possesses hydrological or other expertise."

61 Rule 2.9, Comment 4.

62 ABA Model Rules of Professional Conduct, Rule 4.4(b).

63 Reporters' Explanation of Changes to Rule 2.9, at 22 (ABA 2007).

64 Rule 2.9(C) of the 2007 Code corresponds to the 1990 Code, Canon 3B(7), Comment 6.

65 In re Disciplinary Proceeding Against Sanders. 159 Wash.2d 517, 145 P.3d 1208 (2006).

66 In re Disciplinary Proceeding Against Sanders, 145 P.3d 1208, 1209 (2006).

67 145 P.3d at 1210, citing Canon 3(A)(4) of the Washington State Judicial Code, corresponding to Canon 3B(7) of the ABA Model Judicial Code.

68 145 P.3d at 1211.

69 145 P.3d at 1211.

70 Canon 3B(7), Comment 8.

71 ABA Model Rules of Professional Conduct, Rule 5.1.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.10 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.10 Rule 2.10

## § 10.2-2.10(a) The Text of Rule 2.10

Rule 2.10 provides:

**RULE 2.10.** ***Judicial Statements on Pending and Impending Cases***

**(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.**

**[*Ed. Note:** "Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1. Terminology ¶20.

**[*Ed. Note:** "Impending matter" is a matter that is imminent or expected to occur in the near future. Terminology ¶9**]**

**(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.**

**[*Ed. Note:** "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. Terminology ¶8.**]**

**(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).**

**(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.**

**(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.**

**COMMENTARY**

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, or represents a client as permitted by these Rules. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

[Ed. Note: In August 2010, the ABA House of Delegates amended Comment [2] to add a clause referring to a judge who represents a client.]

### § 10.2-2.10(b) The Rationale for the Restrictions on Public Statements about Pending Cases

Under Rule 2.10(A), [1] a judge shall not make any public comment that "*might* substantially be expected to affect the outcome or impair the fairness of a matter" that is "pending or impending in any court." [2] In addition, the judge must not make any *nonpublic* comment "that might substantially interfere with a fair trial or hearing." [3]

The policy and rationale behind the rule forbidding a judge from making any ex parte comments about a case is easy to explain, particularly as applied to judges who are commenting about a case before them or likely to come before them. Rule 2.10(A)—and also Rule 2.10(B) [4] —reflect the *raison d'être* and rationale of this prohibition.

First, consider the typical instruction that any judge will give to jurors. Judges routinely instruct jurors not to discuss the case with each other until the end of the trial. As a matter of fairness, we do not want jurors to start deliberating with themselves as to what the verdict should be until both sides have had the opportunity to present all of their evidence.

Assume there is a juror (let us call him Juror Loquacious) who starts explaining to (and trying to persuade) a fellow juror why he thinks one side should win. The explanations of Juror Loquacious may start to appear like arguments. Later, Juror Loquacious may be reluctant to back off, admit that he had been in error, and that he should change his mind when faced with other evidence.

These principles apply to judges too, particularly when they are presiding in bench trials. As a matter of fairness, the ethics rules do not allow judges to comment publicly about pending cases outside the courtroom and to announce their views prior to the close of the evidence.

If Judge Loquacious (our counterpart to Juror Loquacious) talks to reporters about a case pending personally before him, he may also talk himself into a mind set. Like Juror Loquacious, he may well be reluctant to admit that he had misjudged some testimony, or that he had been in error in asking the parties to explore a particular issue, or that his initial instincts were fatally wrong.

If the judge discussed his deliberative processes, or his thought-process, or his evaluation of the evidence with a news reporter, those statements are part of the published newspaper interview, but are not part of the record. Should a party be able, on appeal, to argue that the judge's factual assumption was wrong, or that the party should have a right to have the case remanded so that it can counter the judge's evaluation of the evidence, as reported in the newspaper interview? If so, should the other party be able to show (by cross-examining the judge or the reporter) that the judge never really relied on that thought-process or evaluation to the extent or in the way that the reporter believed? Or, should the appellate court determine that it should ignore what the judge said, even though the trial judge apparently told several reporters the same story? All these problems are avoided if judges refrain from extra-judicial comments to the press, but, alas, that is not always so.

The *ex parte* comments of Judge Loquacious to the press during the trial are more troubling than the communications of Juror Loquacious for another reason. Juror Loquacious will be talking to other jurors. But Judge Loquacious will be communicating with reporters, and these reporters, unlike the jurors, will have been exposed to information that is outside the record. The problem is not simply that the judge is talking to reporters; it is that reporters are talking to the judge. If Judge Loquacious engages in conversations with reporters about the pending case, the very nature of a "conversation" is that there is give and take. The judge will not only be communicating information to the reporters, they will be communicating information to him. A conversation is a dialogue, a spoken exchange.

The reporters will, at the very least, be asking questions and those questions may include information that is not part of the record. For example, a reporter might say, "Judge Loquacious, did you know that Expert Witness Number 1 acted very nervous in the hallway after his cross-examination?" Or, "I overheard a lawyer for the defendant admit that she is unhappy with the way that they are presenting the testimony of their witness yesterday afternoon. Are you surprised?" No party can respond to, and refute, the information that a reporter may have given the judge, because the lawyers were not present. Those conversations,

after all, are ex parte and not on the record. We will never know—after the trial—exactly what was said months earlier when the judge engaged in ex parte communications with reporters whom the judge favored by granting interviews.

These reporters may also relay to the lawyers for one party or the other some of the information gleaned from the judge, thus granting that party an advantage in the litigation. The reporter's communications with a lawyer for one of the parties is also off the record, so we will never really know precisely who said what. The reporter's remarks may be inadvertent, and the lawyers with whom they discuss the case may not even be aware of the origins of the reporter's insights about the trial judge. But the other lawyers will still have been disadvantaged.

### § 10.2-2.10(c) Judges Sued in Their Personal Capacity

The breadth and seriousness of the *ex parte* prohibition of Rule 2.10 is reflected in the Canon's carefully articulated and limited exceptions. A prime exception is the case of a judge who is a plaintiff or defendant in a personal capacity.

Rule 2.10, Comment 2, explains that Rule 2.10 does not apply to a judge who is a litigant in a *personal* capacity. That person has the same rights of any other litigant in a proceeding to comment outside the courtroom. Yet, even then this Rule makes clear that if the judge is party to litigation in her official capacity, such as in a mandamus action (where the judge is technically a litigant), "the judge must not comment publicly." [5]

Thus, if the judge is suing someone who crashed into her car, she is a litigant in a personal capacity. If a party is suing the judge in order to comply with the rules of mandamus, the litigant is *not* suing the judge in a personal capacity and thus the broad "no comment" rules apply. In cases, such as a writ of mandamus, where the judge is a litigant in her official capacity, the judge must not comment publicly.

### § 10.2-2.10(d) Time Period

Rule 2.10(A) demarcates the time period for its restriction on public statements. The no comment rule can come into play even *before* a party files a complaint. The prohibition begins when the case is about to be brought or its filing is imminent or expected to occur in the near future (it is "impending"). [6] And it continues as long as the case is not final (it is "pending"). [7]

A proceeding is not final until the appellate process is over or the time for appeal has passed. The requirement that judges refrain from making any public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition of the case. [8]

### § 10.2-2.10(d) The Court in Which the Case Is Pending

The language of the no public comment rule of Rule 2.10(A) uses the phrase, "any court." One might argue that "any court" only refers to any court in the judge's jurisdiction. However, the policies behind this no comment rule are so strong that it is easy to find case law that interprets "any court" to mean, literally, "any court." [9] One should not read this prohibition too broadly. Its rationale is that judicial comments on cases pending in courts of other jurisdictions could affect outcome, could appear to exert pressure on the judge to decide a certain way, and could undermine public confidence in judicial decisions. [10]

In general, a judge should not normally make public, extra-judicial or ex parte comments about cases pending in courts within her jurisdiction. There are free speech concerns if one applies this prohibitory language too broadly. The ABA Model Judicial Code does not intend to prevent judges "in their extra-judicial teaching and writing" to "refer to pending or impending cases in other jurisdictions" when doing so does not diminish "the fairness of those cases or the appearance of judicial impartiality." [11] Indeed, the Judicial Code *encourages* judges to write and teach about the law. [12]

Notwithstanding the free speech interests, some courts do apply the language too broadly. Consider, for example, the incident where a municipal court judge in New Jersey appeared as an uncompensated guest commentator on Court TV and CNBC to

discuss the O.J. Simpson murder trial, which was pending in California.[13] The case was obviously not pending in his court in New Jersey.

In that case, the state Supreme Court, in the opinion of *In re Broadbelt*,[14] ruled that this conduct violated Canon 3B(9)—what is now Rule 2.10(A)—, *i.e.*, it constituted commentary on a pending case, albeit one that was not before the judge and could *never* have come before that judge. The court argued that it should read the ethics prohibition broadly because the judge's comments could have had special weight in view of his position as a judge and "had the potential to compromise the integrity of the judiciary in New Jersey."[15] The court made no effort to substantiate that empirical assertion. One wonders why the ethics rules should prohibit a judge from commenting (for purposes of instructing the public) about a California case that was not pending, and could never be pending, in the judge's New Jersey courtroom.

The unusually broad rule in the *Broadbelt* case may not represent the trend in the law, raises significant First Amendment problems, and, in practice, has not been followed by other judges.[16] Yet, it is not a judicial orphan. Thus, a New York judicial ethics opinion interpreted "any court" to include literally *any* court. It argued that a judge's comments and observations about a pending case "could prove troublesome" because of the "immediacy" of the ongoing litigation. "These comments and observations are being made solely in the context of and with special reference to an ongoing litigation," which had been telecast that day. Laypeople might see the judge's remarks "as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined. Such remarks would constitute public comment about a pending matter and, therefore, are not permitted."[17]

The First Amendment problems associated with an unusually broad reading of *Broadbelt* should be solved by reading "any court" to mean any court over which the judge presides or reasonably may preside. Hence, a judge should not make any prohibited public comment on the merits of a case if there is a reasonable possibility that the issue may be contested in a case that may come before a court where the judge sits, either on the trial or appellate level.

### § 10.2-2.10(e) The Proper Way for a Judge to Communicate with the Press

Rule 2.10(A) limits the judge's ability to make public statements. Rule 2.10(D) modifies that Rule. Rule 2.10(D)[18] provides that —notwithstanding Rule 2.10(A)—the judge may make public statements in the course of her official duties, and may explain court procedures.

If the judge is concerned that the press misunderstands the case and the judge would like to rectify the situation, the proper way to communicate her views, explain court rulings, and educate the public and news media is to write an opinion, not to give press conferences or engage in extrajudicial comments. If a judge believes that the press misunderstands or distorts some aspect of the case, she can put her version into her opinion, or make a statement in open court, where the parties can dispute it and the Court of Appeals can review it based on facts in the record. Even if her comments are not relevant, she can still write what she wants in her opinion, where it becomes part of the record. Then, the litigants and the appellate court can respond to it.

Hence, the rule on public comments specifically allows judges to make "public statements in the course of official duties," and to explain the procedures of the court for public information.[19] For example, the judge may say to the press, "the defendant has 30 days to file a notice of appeal." The judge may also repeat to the media what she has already said in open court.[20]

The purpose of the "official duties" exception is not to give a judge *carte blanche* authority to say whatever she wants. As the Alabama Supreme Court carefully noted, a "judge is strictly prohibited from public comment on the merits of a pending case. On the other hand, a judge is encouraged to explain a pending case in *abstract terms*. Obviously, judges walk a fine line between the duties and prohibitions of [this canon]."[21] In that case, the Alabama Court suspended the judge for two months without pay for, among other things, making some comments to a reporter (who had initiated the contact by calling the judge in the evening before a hearing) about the merits of a case over which this judge was presiding.[22] In the New Jersey case discussed above, where the state judge commented on television about the O.J. Simpson murder trial in California, the state

court concluded that the fact that the judge's appearances were educational did not excuse the violations.[23] This education exception, the court argued, only authorizes the judge to *explain* legal terms and procedures; it does not authorize judges to *comment* specifically on the merits of a pending case.[24]

Later, the Arkansas Supreme Court ordered the clerk of the court to forward a copy of its opinion to the Arkansas Judicial Discipline and Disability Commission to investigate a state judge who had made statements to news outlets defending his conduct in a case involving the rape prosecution of a former Boy Scout leader. The judge, in an effort to defend himself, made extrajudicial statements to several television stations and to the victims, but the judge's motivation to respond to criticism in the media did not justify the judge's ex parte comments.[25]

In *United States v. Garwood*,[26] a trial judge gave press and media interviews to national outlets such as Nightline, and the Associated Press. In those interviews, the judge discussed his opinion about the defense's tactical decisions, the relevance of certain discovery items, and his view as to whether the defendant should take the stand in a pending case. The reviewing court found the judge's conduct "inexcusable" and concluded that the judge's comments, even if made with the best intention, violated the ethics rules governing judges.[27]

If a judge thinks it necessary to explain his rulings and to educate the public and news media, he or she is not without any refuge: the proper recourse is for the judge to write an opinion, not to give press conferences or engage in extrajudicial comments.[28] Or, the judge could wait until the case is no longer pending before engaging in any extrajudicial comments.[29]

### § 10.2-2.10(f) Making Pledges, Promises, or Commitments Inconsistent with Judicial Impartiality

Rule 2.10(B)[30] says that the judge, in connections with cases or issues that are "likely to come before the court," must not make any "pledges, promises, or commitments that are inconsistent with the impartial performance" of the judge's adjudicative duties.

"Impartiality" is an important concept in the Judicial Code. The very first sentence of the Preamble states, "An independent, fair and impartial judiciary is indispensable to our system of justice."[31] The Code defines "Impartial," "impartiality," and "impartially" to mean an "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[32]

Rule 2.10(B) parallels and replicates much of Rule 2.10(A). If a judge promises to decide a particular case or a particular issue in a predetermined way, without regard to the facts and the law, there is the appearance that the judge is no longer impartial. The judge, obviously however, may make statements in cases that are holdings and these holdings will bind the judge to the extent that precedent binds any judge. Judges freely write dictum in cases, and that does not compromise their partiality because dictum does not bind a judge.

Similarly, judges write articles, speeches, and books on legal issues. These prior writings do not bind the judge, although his earlier legal commentary may influence his own thought on a particular legal issue. In practice, judges are not as influenced by their own writings as one might think.

Consider the case of Judge Henry Friendly on the Second Circuit. Friendly was a great judge and prolific author. In one case, one of the parties cited to him one of his own articles indicating how an issue should be decided. Judge Friendly decided that he disagreed with what he himself had earlier written. The genius of the common law system, he recognized, is that judges must make the decisions in the context of concrete cases, not in the context of law review articles. Judge Friendly dissented,[33] while the majority relied on Friendly's law review article.[34]

Judge Friendly did not know how he would rule on the legal issue until he had to decide the legal issue, even though the Judge had thought about the problem and had written an article about it coming to a firm conclusion, a conclusion that he later rejected.[35]

The fact that a judge has published his views prior to his confirmation does affect his ability to sit on a case raising a similar legal issue. For example, Justice Jackson participated in the decision of one case that raised an issue on which he had earlier written an opinion as Attorney General. [36] Jackson concurred in the opinion of the Court even though it was contrary to his opinion as Attorney General. [37] As Lord Westbury who had earlier stated (when his Lordship repudiated one of his previous opinions): "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." [38] After all, for most of us, wisdom too often never comes, "so one ought not to reject it merely because it comes late." [39]

Consider the situation where the U.S. Supreme Court, on occasion, has cited foreign law as a reason to declare that a state or federal statute is unconstitutional. [40] In response to complaints from commentators, who have criticized this practice, [41] Justice Breyer explicitly "promised" the American Bar Association that the Court (or, at least, he personally) will never treat foreign law as binding, even though he may cite it. At the 2005 Annual Meeting of the American Bar Association, he unequivocally promised, with respect to foreign law, that—

> In some of these countries, they're just trying to create these independent judicial systems to protect human rights and contracts and all these other things. And if we cite them sometimes, *not as binding, I promise*, not as binding, well, that gives them a little boost sometimes with their legislators, I might say. [42]

Rule 2.10(B) would not preclude Breyer's "promise," because that would raise free speech issues. [43] Breyer's "promise" should not prevent him from deciding a case or legal issue impartially. People understand that his statement does not preclude him from deciding a case on the merits. A national public opinion poll conducted for the ABA in August 2002 showed that by a two-to-one margin (61% to 32%), voters concluded that a judge who has voiced "opinions about legal and political issues" can later "still be fair and impartial" on those same issues. [44]

On the other hand, if a judge does bind himself to decide a case or issue a certain way and not on the merits, the judge would violate Rule 2.10(B). In *Matter of Cunningham*, [45] the court censured an appellate judge who wrote two letters to a trial judge. These letters referred to several pending cases by name and then assured the trial judge that there "is no way I would ever change a sentence that you had imposed. You can do whatever you want to whenever you want to and I'll agree with you. … I take the position that you know the case and as sentencing judge you can do whatever you damn well please." He also wrote: if "I catch the appeal, I will affirm as always, on a judge's discretion."

The appellate judge in the *Cunningham* decision had written these private letters to the trial judge to calm that judge and to avoid criticism from him. But when these letters became public because of "bizarre circumstances," reasonable people would conclude that the judge acted improperly so that there was an appearance of impropriety. [46]

The Pennsylvania Court publicly reprimanded and placed on probation a judge, who campaigned for office by making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," and making "statements that commit the candidate with respect to cases, controversies, or issues that are likely to come before the court …." [47] Judge Singletary said to a small group wearing the colors of a motorcycle club:

> There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. I got some stuff that I got to do, but if you all can give me twenty ($20) dollars you 're going to need me in Traffic Court, am I right about that? [And,]
>
> Now you all want me to get there, you 're all going to need my hook-up, right? [And,]
>
> It costs money. I have to raise $15,000 by Friday, I just hope you have it, because I have to raise $15,000 dollars by Friday. [48]

The Court also disciplined the judge for personally soliciting and accepting campaign funds.

### § 10.2-2.10(g) Judge's Obligation Regarding Court Personnel

Rule 2.10(C) [49] obligates the judge to require similar abstention on the part of court personnel subject to her direction and control, *e.g.*, court staff, court officials. [50] Court personnel do *not* include attorneys who are in the proceeding before the judge. The 1990 Code made this point clear, with its definition of "court personnel." [51] The 2007 Code deletes this definition, but this deletion does not indicate a substantive difference. The framers of the 2007 Code explained:

> "Court personnel," which in the 1990 Code was not, in fact, a definition, but a statement that the term did not include lawyers in a proceeding before the judge. The Commission believed this was too evident to need statement, and otherwise believed that the term "court personnel" is clear enough that it does not need definition. The term "court personnel" has been replaced with "court staff, court officials, and others subject to the judge's direction and control." [52]

That fact that the Rules do not treat "lawyers" as court staff or as others under the judge's direction does not mean that there are no restrictions on lawyers. Separate ethics rules governing lawyers regulate their professional conduct. [53] And judges, in a few limited circumstances, can impose gag orders on lawyers. [54]

### § 10.2-2.10(h) Judge's Right to Respond to Criticism

The 2007 Model Judicial Code adds a new section, Rule 2.10(E), that gives the judge the right to respond to criticism from the media "or elsewhere" involving allegations "concerning the judge's conduct in a matter." This new right to respond is subject to the general restriction of Rule 1.10(A). In other words, "when a judge's conduct is called into question, the judge may respond as long as the response will not affect the fairness of the proceeding." [55]

This right of reply finds an analogy in Rule 3.6(c) of the Model Rules of Professional Conduct, governing lawyers. Rule 3.6(g) gives a lawyer the right to make a statement to protect his client from bad publicity that neither the lawyer nor the client had initiated.

There is one unusual difference between the rule governing lawyers and the rule governing judges. The rule governing judges encourages the judge to use a surrogate. The black letter Rule refers to a third party who will be a speaker, and the associated Comment advises that it may be "preferable" for a third party rather than the judge to respond to allegations concerning the judge's conduct in matter. [56]

### § 10.2-2.10(i) The Remedy

In a state system, if a judge violates the no comment rules, judicial discipline is often available. The state appellate court might disqualify a judge (or the trial judge could recuse himself). For example, in *Massie v. Commonwealth*, [57] the judge knew that there was a "rabid and unhealthy feeling against defendant." Knowing that, the judge expressed in the presence of crowds, his opinion as to defendant's guilt. In those circumstances, the failure of the judge "to vacate the bench, and give place to a special judge" was error. [58] The court noted that, in such circumstances, it is not necessary for the party to show that the judge issued rulings that were prejudiced:

> *there are many ways that a partial or prejudiced judge may knife a party that he is trying, without it appearing from the record,* or without his being able to ascertain the act. So, when the fact is made to appear by proper affidavits, the judge should then vacate, and it is a reversible error if he does not. [59]

In addition, as a remedy for improper contacts with the press, state disciplinary authorities might deprive a judge of a salary for a stated period. For example, *In re Sheffield* [60] suspended the judge for two months without pay.

In appropriate cases, the state disciplinary authorities may remove the judge.[61] Removal was the remedy in *State ex rel. Commission on Judicial Qualifications v. Rome*,[62] a case that illustrates the adage that truth can be stranger than fiction. The court removed a judge from office for various violations, including the fact that the judge wrote a memorandum decision that stated as conclusions various disputed factual matters that two criminal cases were then contesting. The judge then tried to get his statement publicized by hand-delivering a copy of the memorandum to one reporter and mailing other copies to two news stations.

Discipline in the federal system is different because no administrative body has the power to remove an Article III federal judge.[63] Only Congress can remove a judge after impeachment and a trial in the Senate.[64]

However, the federal appellate court may disqualify the judge if the extrajudicial comments indicate that his "impartiality might reasonably be questioned."[65] That is what happened in *United States v. Cooley*.[66] In that case, the convicted defendants were abortion protesters found guilty of violating a federal law.[67] The appellate court not only assigned the case to a different judge on remand,[68] but it also overturned the convictions and ordered a new trial because of the trial judge's interview on ABC's Nightline, a nationally televised evening program. The very fact that the judge had appeared on this show, coupled with his other comments, indicated that his "impartiality might reasonably have been questioned."[69]

*Cooley* cited the relevant provisions of the Code of Conduct for United States Judges and warned:

> Two messages were conveyed by the judge's appearance on national television in the midst of these events. One message consisted of the words actually spoken regarding the protesters' apparent plan to bar access to the clinics, and the judge's resolve to see his order prohibiting such actions enforced. The other was the judge's expressive conduct in *deliberately making the choice to appear in such a forum* at a sensitive time to deliver strong views *on matters which were likely to be ongoing before him*. Together, these messages unmistakenly conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator.[70]

Because of the judge's decision to appear on national television to state his views," a "reasonable person would harbor a justified doubt as to his impartiality in the case involving these defendants."[71]

Even if the reviewing court concludes that a judge's extrajudicial comments did not impugn his impartiality, the appellate court, in exercise of its supervisory powers, might still disqualify the judge. Judges have disqualified prosecutors for giving interviews in violation of court rules, even when there is no finding that the remarks could affect a jury.[72] If a court can impose that sanction on a *prosecutor*, who does not have the same responsibilities as a judge to be impartial, it should be able to impose a similar sanction on a judge.

Reversal solely for an ethical violation is a permissible remedy, but some courts are reluctant to impose it[73] because it appears to penalize the party that would otherwise have prevailed but for the judge's conduct. On the other hand, one should not take this argument too far: Courts routinely reverse judges for error that is not the fault of either party, just as when a judge who makes prejudicial comments to the jury. Reversal serves to discourage judges from engaging in such conduct in the future.

In *United States v. Microsoft*,[74] the D.C. Circuit agreed that disqualification is "*mandatory* for conduct that calls a judge's impartiality into question."[75] But then the Court granted what it called "*partially retroactive disqualification*." The Court disqualified the trial judge only to the date he had entered the order breaking up Microsoft.

The issue is whether the disqualification is prospective only (disqualification of the judge from participation in any further hearings on the matter), or retroactive (overturning the decision because of the judge's improper participation). The *Microsoft*

court decided that "partially retroactive disqualification" was appropriate in the special circumstances of this complex case. The court decided:

> disqualification of the District Judge [is] retroactive only to the date he entered the order breaking up Microsoft. We therefore will *vacate that order in its entirety and remand this case to a different District Judge*, but will *not* set *aside the existing Findings of Fact or Conclusions of Law* (except insofar as specific findings are clearly erroneous or legal conclusions are incorrect). This *partially retroactive disqualification* minimizes the risk of injustice to the parties and the damage to public confidence in the judicial process. [76]

The D.C. Circuit agreed that the violations of the Code of Conduct and 28 U.S.C.A. §§ 455(a) were serious, but it concluded that full retroactive disqualification "would unduly penalize plaintiffs." The plaintiff was the United States. Its lawyers "were innocent and unaware of the misconduct," and, the Court argued, disqualification would have "only slight marginal deterrent effect."

One wonders if the Court's speculation on deterrent effect was realistic. We know now that the trial judge hardly felt chastised or deterred by the D.C. Circuit. Andy Warhol said once, "In the future everyone will be world-famous for fifteen minutes." Some people are not satisfied with their 15 minutes and want more time in the sun. And so it was with Judge Thomas Penfield Jackson, who still justified his extra-judicial speaking and continued to argue and to speak his view that the D.C. Circuit was wrong. [77]

Indeed, in an earlier case, the D.C. Circuit has criticized this same judge for extra-judicial comments to the press in a criminal case, but the Court did not reverse. [78] In that case, the defendant moved to disqualify Judge Jackson based on remarks he made at a speech at Harvard Law School after the original sentencing. The judge "evidently asserted that he had never seen a stronger government case, that some jurors had their own agendas and would not convict under any circumstances, and that some jurors were determined to acquit regardless of the facts." [79]

In the *Barry* case, Judge Harry T. Edwards filed a lengthy and strong dissent. He pointed out:

> The integrity of the judicial process would be seriously doubted if judges were free to air their views on pending cases outside of the appropriate judicial forum. Whenever such an occurrence arises, a judge should recuse himself to protect the sanctity of the judicial process. It does not matter whether the judge intends to act with bias or otherwise to prejudice the defendant. What matters is that there has been a breach of a code of conduct by an officer of the court such that the integrity of the process has been called into question. That is enough to warrant recusal. [80]

The *Microsoft* Court was not willing to go that far. The most important factor for the *Microsoft* Court in reaching its decision allowing only partial retroactive disqualification in the circumstances of this case was that "full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication. The District Judge's conduct destroyed the appearance of impartiality. Microsoft neither alleged nor demonstrated that it rose to the level of actual bias or prejudice." [81]

The Court drew the line at this point in the proceedings despite the serious nature of the misconduct because he had engaged in this misconduct "near or during the remedial stage." Therefore, the court decided that its remedy should "focus on that stage of the case."

The district judge's comments to the press that analogized "Microsoft to Japan at the end of World War II," [82] his other comments, "plus the Judge's evident efforts to please the press," would "give a reasonable, informed observer cause to question his impartiality in ordering the company split in two." [83] Nonetheless, in the Court's view, there "is no reason to presume that everything the District Judge did is suspect." [84]

Note that the trial judge interviewed in the *Microsoft* litigation was, of necessity, having a conversation with the reporters. They would ask questions of him and he would respond, without counsel being present. The judge was not simply giving information about his thought processes to the reporters; inherently, they were giving him information. A conversation is a two-way street.

For example, the reporter might ask the judge, “Did you notice that the expert witness for the defense was nervous when he was testifying? When I saw him in the hall after his testimony, he acted fidgety and I was wondering if you picked up his unease during his testimony.” The lawyers representing either party cannot really respond to, or refute, the information that a reporter may have given the judge, because the lawyers were not present. Those conversations, after all, are ex parte and not on the record. We will never know—after the trial—exactly what was said earlier because there was no court reporter to transcribe the dialogue when the judge preferred some reporters by granting interviews to his favored reporters.

Notwithstanding the Court of Appeals decision in the *Microsoft* case and its criticism of the trial judge, some judges have admitted, anonymously, that sometimes they speak to the press about cases in their courtroom. During a 1999 conference of federal judges and reporters sponsored by the Freedom Forum, a free-speech group, some judges vowed never to speak about cases before them, while others admitted that they had talked anonymously, even about pending trials, to ensure that media reports were “accurate.” One judge even admitted that once he had released an opinion to reporters a day early “with the understanding they would not publish it, to help them describe the complicated decision.” [85]

In August of 2000, a court of appeals judge admitted that he had been the inadvertent source of a leak involving the grand jury's investigation of President Clinton, [86] but such admissions are rare.

Another example involved the trial judge in *Hamdi v. Rumsfeld*, [87] a case involving a U.S. citizen captured in Afghanistan with an assault rifle while American forces were fighting. The Court said that the trial judge's earlier habeas hearing was not deferential enough to the Government, and it remanded the case to him for further proceedings. While the litigation was ongoing, Judge Doumar, the trial judge, gave an interview to the press in which he justified his position and attacked the Government.

Judge Doumar said, among other things, that he thought the Government's position was “idiotic” and akin to the “Star Chamber.” He commented on the evidence and he saw “a lot of mediocrity in the government's case.” He even said that he was “delighted” [88] when he read the Supreme Court decision, which was a surprise statement because it indicated that he did not know that the Court had reversed him. [89] He said, in the course of commenting on the case, that he “cannot comment on the case.” [90] He recognized the ethics rule; he just did not understand that he was violating it. [91]

Other judges have said that they would never talk to the press directly, but they do admit to speaking through law clerks, or court officials, “or on the condition of anonymity.” Thus, it is “difficult to say precisely how many judges are willing to share factual information and opinions with the public.” [92]

The court's harsh criticism of a judge's extrajudicial conversations with the media in *United States v. Microsoft* [93] should make judges more sensitive to their ethical responsibilities in this area. Given these cases, it should be clear that a judge should not engage in extrajudicial comments about cases that are pending before the judge or before the court where the judge presides.

### § 10.2-2.10(j) Media in the Courtroom and Cameras in the Courts

The Judicial Code no longer includes a prohibition of media in the courtroom. When the ABA first published the Model Code of Judicial Code in 1972, it contained a provision—Canon 3A(7)—that imposed an almost absolute prohibition of the broadcast media in the courtroom. The Canon first stated the general rule that a “judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions …” Then, this old Canon delineated only a few several narrow exceptions.

Constitutional law did not emulate this Canon. In *Chandler v. Florida*, [94] the United States Supreme Court held that there is no *per se* constitutional prohibition against media coverage in the courtroom, and the courts must review each case on its own facts. [95]

In reaction to *Chandler*'s rejection of a *per se* approach against media in the courtroom, the ABA amended Canon 3A(7) on August 11, 1982. The revised version, like its previous counterpart, began with a general prohibition of media coverage in the courtroom. However, the revised version contains a more expansive exception to the general prohibition.

Finally, when the ABA adopted the 1990 Code, it *eliminated* any reference to the issue of media in the courtroom. The drafters of the 1990 Code explained that they deleted former Canon 3A(7) "because it addresses a matter of court administration, not judicial ethics," and that this issue "is more appropriately regulated by separate court rules." [96]

The 2007 Judicial Code, like its immediate predecessor, has no ethical prohibition against cameras in the courts. The matter is one for each court to consider under its own rules of administration.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 2.10(A), corresponds to the 1990 Code, Canon 3B(9).

2 2007 Code, Rule 2.10(A) (emphasis added).

3 2007 Code, Rule 2.10(A).

4 2007 Code, 2.10(B), corresponds to Canon 3B(10) 1990 Code.

5 2007 Code, Rule 2.10, Comment 1; 1990 Code, Canon 3B(9), Comment 1.

6 2007 Code, Terminology, ¶8; 1990 Code, Canon 3B(9), Comment 1.

7 2007 Code, Terminology, ¶20; 1990 Code, Canon 3B(9), Comment 1.

8 2007 Code, Terminology, ¶20; 1990 Code, Canon 3B(9), Comment 1.

9 *See* In re Broadbelt, 146 N.J. 501, 507, 683 A.2d 543, 546 (N.J. 1996), *cert. denied*, 520 U.S. 1118, 117 S.Ct. 1251, 137 L.Ed.2d 332 (1997). In re Hey, 188 W.Va. 545, 425 S.E.2d 221, 222–24 (1992) (Hey I). Both cases concluded that the phrase "any court" includes courts in addition to commenting judge's court.

10 DAVID M. ROTHMAN, CALIFORNIA JUDICIAL CONDUCT HANDBOOK 1–39 (California Judges Assoc., 1990). The author explains that judicial comments on cases pending in courts of other jurisdictions could affect outcomes, could appear to exert pressure on the judge to decide a certain way, and could undermine public confidence in judicial decisions); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEORGETOWN J. LEGAL ETHICS 589, 598 (1989).

11 *Cf.* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 21–22 (1992). Milord points out that the ABA Model Judicial Code does not intend to prevent judges "in their extra-judicial teaching and writing" to "refer to pending or impending cases in other jurisdictions" when doing so does not diminish "the fairness of those cases or the appearance of judicial impartiality." *Id*. at 21. The way the 2007 Judicial Code seeks to deal with this issue is by adding the language, "might reasonably be expected to affect the outcome or impair the fairness of a matter," in Rule 2.10(A). The corresponding language in the 1990 Code is: "*that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing*." Model Code of Judicial Conduct Canon 3B(9) (1990).

12 Rule 3.1, Comment 1: "To the extent that time permits, and judicial independence and impartiality are not compromised, judges *are encouraged* to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, *such as by speaking, writing, teaching,* or participating in scholarly research projects." (emphasis added).

13 *See* Ronald D. Rotunda, *Reporting Sensational Trials: Free Press, a Responsible Press, and Cameras in the Courts*, 3 COMMUNICATIONS LAW & POLICY 295 (1998) (discussing the O.J. Simpson murder trial and its press coverage).

14 In re Broadbelt, 146 N.J. 501, 683 A.2d 543 (N.J. 1996). This case described Judge Broadbelt as a well-respected municipal judge, who had appeared as a guest commentator on *Court TV* in excess of fifty times from 1992 to 1996. "Since November 1994, [he] appeared on CNBC on three occasions to provide guest commentary on the O.J. Simpson case. He also appeared on a local television program in 1994 to discuss generally the jurisdiction and procedures of the municipal courts. Judge Broadbelt did not receive compensation for any of those television appearances." *Id*. at 544–45.

15 683 A.2d at 548. In addition, the court maintained that the judge's conduct violated Canon 2B—what is now Rule 1.3—because his regular appearances caused him to become identified with the programs and used the prestige of his judicial office to further the interests of the television producers. *See* 683 A.2d at 550.

16 **Posner's Book on President Clinton.** Judge Richard Posner of the Seventh Circuit published a book, RICHARD POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND THE TRIAL OF PRESIDENT CLINTON (Harvard University Press, 1999). At that time, there was a criminal investigation of President Clinton, bar discipline proceedings were certainly possible—and eventually did occur, with the President agreeing to a five year suspension in Arkansas, followed by his disbarment from the U.S. Supreme Court bar. In re Discipline of Bill Clinton, 534 U.S. 806, 122 S.Ct. 36, 151 L.Ed.2d 254 (2001), *President Would Drop High Court Privilege*, WASHINGTON POST, Nov. 10, 2001, at p. A3. Posner argued, among other things, that President Clinton engaged in a patter of criminal behavior and "obsessive" public lying.

Many commentators criticized Judge Posner's judicial ethics in publishing this book. *E.g.*, Steven Lubet, *On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings*, COURT REVIEW 4 (Summer, 2000). Oddly enough, Judge Posner engaged in further stirring of publicity and wrote a vigorous response defending his writings. Richard A. Posner, *The Ethics of Judicial Commentary: A Reply to Lubet*, COURT REVIEW 7 (Summer, 2000). For a defense of Judge Posner from someone who is more detached than Posner, see Monroe H. Freedman, *Free Speech for Judges: A Commentary on Lubet et al. v. Posner*, COURT REVIEW 4 (Winter, 2001).

17 N.Y. Advisory Committee on Judicial Ethics, Opinion 93-133 (1994).

18 2007 Code, Rule 2.10(D) corresponds to the 1990 Code, Canon 3B(9), fourth sentence.

19 2007 Code, Rule 2.10(D) corresponds to the 1990 Code, Canon 3B(9), fourth sentence.

20 2007 Code, Rule 2.10(D) corresponds to the 1990 Code, Canon 3B(9), fourth sentence.

21 In re Sheffield, 465 So.2d 350, 355 (Ala.1984) (emphasis added).

22 465 So.2d at 354–55. The court held that clear and convincing evidence did not establish that the judge acted in bad faith in issuing a show cause order or in erroneously finding an individual guilty of contempt of court. However, the judge's failure to abstain from public comment about a pending proceeding and his failure to disqualify himself where one might reasonably question his impartiality warranted two months' suspension without pay. 465 So.2d at 359.

23 In re Broadbelt, 146 N.J. 501, 683 A.2d 543, 547 (N.J. 1996).

24 *In re Sheffield*, 465 So.2d at 355 (emphasis added), quoting from the National Conference of State Trial Judges Committee on News Reporting and Fair Trial, *Judicial Guidelines for Dealing with News Media Inquiries and Criticism* (5th Draft, 1984).

> "While *judges may not comment on the merits of a pending case*, a judge may and should *explain legal terms, and concepts, procedure*s, and the issues involved in the case so as to permit the news representatives to cover the case more intelligently. … Often there is no one, other than the judge, who is in a position to give a detailed and impartial explanation of the case to the news media."

25 Walls v. State, 341 Ark. 787, 20 S.W.3d 322, 325 (2000). The trial judge spoke to the media concerning appellant's case and reportedly met with appellant's victims apart from appellant's counsel. After remand of the sentence, the judge again spoke to the media concerning the case. Then he denied appellant's motions to recuse, to withdraw his pleas, and to have a hearing in which appellant showed evidence of the judge's media comments. In considering the remedy for the judge's improper actions, the appellate court refused to overturn the sentence, which was within the statutory limits, because the trial judge's extrajudicial comments reflected disagreement with the appellate court, not bias by the particular judge. The appellate court, however, did refer the matter to disciplinary authorities.

26 United States v. Garwood, 16 M.J. 863, 868 (N.M.C.M.R. 1983), *aff'd*, 20 M.J. 148 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 456 (1985).

27 16 M.J. 863, 869.

28 *E.g.*, In re Boston's Children First, 244 F.3d 164, 170–71 (1st Cir.2001): "Whether counsel for petitioners misrepresented the facts or not is irrelevant: the issue here is whether a reasonable person could have interpreted [the judge's] comments as doing more than correcting those misrepresentations and creating an appearance of partiality." In re Benoit, 523 A.2d 1381, 1382–83 (Me.1987) held that it was unethical for a judge, after a case was remanded to him, to write a letter to the editor of a local newspaper defending his original sentences. Shapley v. Texas Department of Human Resources, 581 S.W.2d 250, 253 (Tex.App.1979) held that a judge violated the Judicial Canon that corresponds to Rule 2.10 when he spoke to reporters about a pending case.

29 Wenger v. Commission on Judicial Performance, 29 Cal.3d 615, 635, 175 Cal.Rptr. 420, 431, 630 P.2d 954, 965 (1981); Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 830 P.2d 107, 136–37 (1992).

30 2007 Code, Rule 2.10(B) corresponds to the 1990 Code, Canon 3B(10).

31 2007 Code, Preamble, ¶1.

32 2007 Code, Terminology, ¶8.

33 Williams v. Adams, 436 F.2d 30, 35 (2d Cir. 1970) (Friendly, J., dissenting). Judge Friendly (the Judge, not the author) found vindication when the Second Circuit, *en banc*, reversed the panel decision, in 441 F.2d 394 (2d Cir. 1971) (per curiam). But the U.S. Supreme Court agreed with Henry Friendly, the author, and not Henry Friendly, the judge. It reversed the Second Circuit. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

34 Williams v. Adams, 436 F.2d 30, 34 n.2 (2d Cir. 1970), quoting Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952 (1965).

35 Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEORGETOWN JOURNAL LEGAL ETHICS 127 (2001).

36 McGrath v. Kristensen, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173 (1950).

37 *Compare* 340 U.S. at 176, 71 S.Ct. at 233, *with* 39 Op.Atty.Gen. 504 (1940). *See* Ronald D. Rotunda, *Statement before the Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 523 (2002)(discussing inability to predict how a judicial nominee will vote based on his or her past statements and conduct).

38 Jackson quoted Lord Westbury. 340 U.S. at 178, 71 S.Ct. at 233.

39 Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting)

40 *E.g.*, Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The majority held that the Eighth and Fourteenth Amendments prohibit the execution of individuals less than 18 years of age at time of their capital crimes. The Court overruled one of its own recent opinions, from 1989. The new majority opinion relied on the UN Convention on the Rights of the Child, which the United States did *not* ratify. It also cited the International Covenant on Civil and Political Rights, although the United States, when it ratified that treaty, specifically *reserved* the right to impose capital punishment on people less than 18 years of age. The Court said, it "is proper" for the Court to acknowledge "the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." 543 U.S. at 577, 125 S.Ct. at 1200.

*See also, e.g.*, Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003), which held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home. In the course of this opinion, Kennedy, J., for the Court, said:

> "And, to the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the *European Court of Human Rights*, and that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." (emphasis added.)

Lawrence v. Texas, 539 U.S. 558, 560, 123 S.Ct. 2472, 2474, 156 L.Ed.2d 508, on remand to, 2003 WL 22453791 (Tex. App. Houston 14th Dist. 2003).

41 See discussion in, 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 23.37 ("Looking to Foreign Law and Sociological Data")(Thomson–West, 4th ed. 2008) (6 volumes).

42 Steven Breyer, speech, ABA Annual Meeting, "Is the Independence of the Judiciary at Risk?" Aug. 9, 2005, http://www.abanet.org/media/docs/judiciarydebatetrans8905.pdf, at p. 13 (emphasis added).

43 See, Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).
Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEORGETOWN J. LEGAL ETHICS 1059 (1996); Ronald D. Rotunda, *Judicial Campaigns in the Shadow of Republican Party v. White*, 14 THE PROFESSIONAL LAWYER 2 (ABA, No. 1, 2002).

44 Seth Andersen, *An Interdisciplinary Examination of State Courts, State Constitutional Law, and State Constitutional Adjudication Perspectives: Judicial Elections Versus Merit Selection, Examining the Decline in Support For Merit Selection in The States*, 67 ALB. L. REV. 793, 798 (2004).

45 Matter of Cunningham, 57 N.Y.2d 270, 273, 456 N.Y.S.2d 36, 37, 442 N.E.2d 434, 435 (1982) (per curiam).

46 The appellate court concluded that Judge Cunningham's misconduct "was rooted not in the actual prejudgment of cases but in the creation of the appearance that he might be prejudging certain matters." The court concluded, "we do not believe that the record supports the conclusion that Judge Cunningham actually abrogated his appellate duty to review matters before him on the basis of their merits alone." 57 N.Y.2d 270, 275. Judge Cunningham engaged in misconduct, but the court concluded that, "after a careful review of the facts and circumstances in this case, we believe that petitioner should be censured for his conduct rather than removed from office." 57 N.Y.2d 270, 276.

47 In re Singletary, 967 A.2d 1094, 1097 (Pa. Ct. Jud. Disc. 2008).

48 In re Singletary, 967 A.2d 1094 (Pa. Ct. Jud. Disc. 2008). It was a mitigating factor that Singletary was not a lawyer at the time and had not had the opportunity to attend any classes required for magisterial district judges once they are elected.

49 2007 Code, Rule 2.10(C) corresponds to the 1990 Code, Canon 3B(9).

50 Rule 2.10(C).

51 ABA Model Code of Judicial Conduct (1990), Terminology ¶5.

52 Reporters' Explanation of Changes to Terminology, at 3 (ABA 2007).

53 ABA Model Code of Judicial Conduct, Canon 3B(9), Comment 1. *See* Model Rules of Professional Conduct, Rule 3.6, and ABA Model Code of Professional Responsibility, DR 7-107. The Commentary to Canon 3A(6) of the 1972 Model Judicial code read:

> "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by D.R. 7-107 of the Model Code of Professional Responsibility and by Rule 3.6 of the Model Rules of Professional Conduct.

54 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCES & PROCEDURE § 20.25 ("Judicial Protective Orders and the Press") (Thomson-West, 4th ed. 2008). See, in particular, § 20.25(c)(iii) ("The *Gentile* Case—Controlling Lawyers and the 'Substantial Likelihood of Material Prejudice' Test"), (c)(iv) ("Attorney Discipline Cases"), & (c)(v) ("The 'Public Record' Exception and the Safe Harbor of ABA Model Rule 3.6").

55 Reporters' Explanation of Changes to Rule 2.10, at 25 (ABA 2007).

56 2007 Judicial Code, Rule 2.10, Comment 3.

57 Massie v. Commonwealth, 93 Ky. 588, 20 S.W. 704 (1892)

58 Massie v. Commonwealth, 93 Ky. 588, 20 S.W. 704 (1892).
*See also, e.g.,* Papa v. New Haven Federation of Teachers, 186 Conn. 725, 444 A.2d 196 (1982). The court held that a judge's interview with a newspaper concerning proceeding pending before him involving a teachers' strike violated the Code of Judicial Conduct, and because the interview and the judge's finding in response to it raised reasonable questions about his ability to remain fair and impartial, the trial judge erred in denying the motion for recusal.
Wallace v. Wallace, 352 So.2d 1376 (Ala.Civ.App.1977), held that if there is the appearance of partiality, the judge should recuse himself; failing that, the appellate court will issue a mandamus ordering the judge's removal.

59 20 S.W. at 704 (emphasis added).

60 In re Sheffield, 465 So.2d 350, 355 (Ala.1984),

61 Butler v. Ala. Judicial Inquiry Comm'n, 111 F. Supp. 2d 1241 (M.D.Ala.2000), *vacated*, 261 F.3d 1154 (11th Cir.2001) (granting state supreme court justice's motion to preliminarily enjoin state judicial disciplinary proceedings against him).

62 State ex rel. Comm'n on Judicial Qualifications v. Rome, 229 Kan. 195, 623 P.2d 1307 (1981) (per curiam) (original proceeding relating to judicial conduct).

63 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.9 (Thomson-West, 4th ed. 2007) (6 volumes).

64 Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707 (1988); AM. JUDICATURE SOCIETY, *Impeaching Federal Judges: Where Are We and Where Are We Going?*, 72 JUDICATURE (1989) (comments by Ronald D. Rotunda during panel discussion examining federal judicial impeachment process).
There are remedies, short of impeaching, to police federal judges, but they cannot be removed except by impeachment. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector for the Courts*, 41 LOYOLA U. CHICAGO L. REV. 301 (2010).

65 Federal authority is derived from 28 U.S.C.A. § 455(a) (1994). State courts rely on the corresponding provision of the state judicial Code of Judicial Conduct.

66 United States v. Cooley, 1 F.3d 985 (10th Cir.1993).

67 1 F.3d 985, 987–88.

68 1 F.3d at 988. *See also* In re IBM Corp., 45 F.3d 641 (2d Cir.1995), where the court directed Judge Edelstein "to recuse himself from further consideration of United States v. IBM, Civil Action No. 72-344 (S.D.N.Y.) and to have the case randomly reassigned." 45 F.3d at 645. The Court ruled that it had to order recusal in light of the trial judge's possible lack of impartiality. The Court stated, "Judge Edelstein's actions in the aftermath of the stipulation for dismissal extended beyond the courtroom. Notable in this regard were *newspaper interviews given by the Judge* concerning IBM's activities in general and Assistant Attorney General Baxter's role in particular." IBM Corp., 45 F.3d at 642 (emphasis added). The court relied on its supervisory powers.

69 In addition, the "district judge had appeared on national television with Barbara Walters to talk about the abortion protests in Wichita, and had stated in part that 'these people are breaking the law.'" *Cooley*, 1 F.3d at 990. And, the "district judge had been quoted in

national media saying if anyone plans to come to Wichita, 'they had better bring a toothbrush!'" *Id*. The reference to toothbrushes was the judge's way of announcing that the judge would make sure that abortion protestors would have to stay overnight in the jail.

70 *Cooley*, 1 F.3d at 995 (footnote omitted) (emphasis added).

71 *Cooley*, 1 F.3d at 995.

72 *Prosecutor Disqualified in Oklahoma Bomber's Case*, WASH. POST, Oct. 17, 2000, at A34.

73 *See* In re Barry, 946 F.2d 913, 914 (D.C.Cir.1991), where the court criticized the trial judge for extra-judicial comments but did not reverse the conviction.

*See also* United States v. Microsoft Corp., 253 F.3d 34 (D.C.Cir.2001), *cert. denied*, 534 U.S. 952, 122 S.Ct. 350, 151 L.Ed.2d 264 (2001), which involved the same judge, Thomas Penfield Jackson, this time in a civil antitrust case. The United States and individual states brought antitrust action against manufacturer of personal computer operating system and Internet web browser. The trial judge concluded that the manufacturer had monopolized, attempted to monopolize, and had engaged in tying violations of the Sherman Act. The trial court issued a remedial order requiring Microsoft to submit a proposed plan of divestiture. Microsoft appealed, and the states petitioned for certiorari. The Supreme Court declined to hear direct appeal, denied petition, and remanded, 530 U.S. 1301, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000).

Regarding the antitrust issues, the D.C. Court of Appeals held: (1) Microsoft committed the monopolization violation; (2) Microsoft did not commit the attempted monopolization violation; (3) the rule of reason, rather than a per se analysis, applied to the tying claim; (4) a remand was required to determine if manufacturer committed tying violation; and (5) the court must vacate the remedies decree. Regarding the ethics issue, the D.C. Circuit held that the *district judge's comments to the press while the case was pending required his disqualification*, but the court only required the judge's disqualification *on remand*. The D.C. Circuit imposed only a partial remedy even though it concluded that the judge's extra-judicial comments created the appearance that he was not acting impartially, within the meaning of the disqualification statute, and members of public could reasonably question whether the judge's desire for press coverage influenced his judgments.

In the *Microsoft* case, the court considered the motion to disqualify the district judge for the first time on appeal, even though the motion was based on press accounts of the judge's comments about case, rather than on record evidence, because the plaintiffs did not dispute comments attributed to the judge in the press, and did not request evidentiary hearing.

74 United States v. Microsoft, 253 F.3d 34 (D.C.Cir.2001) (per curiam). *See* Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions-A Case Study of the Microsoft Litigation*, 2001 U. ILLINOIS L. REV. 611 (2001).

75 United States v. Microsoft, 253 F.3d 34, 116 (D.C.Cir.2001), *cert. denied*, 534 U.S. 952, 122 S.Ct. 350, 151 L.Ed.2d 264(2001) (per curiam) (emphasis added). *See also* In re School Asbestos Litigation, 977 F.2d 764, 783 (3d Cir.1992).

76 253 F.3d 34, 116 (emphasis added).

77 Thomas Penfield Jackson, *Beyond Republican Party v. White*, 32 HOFSTRA L. REV. 1163 (2004).

78 *See* In re Barry, 946 F.2d 913, 914 (D.C.Cir.1991) (per curiam). In that case, the Court criticized the trial judge for extra-judicial comments but did not reverse the conviction. The D.C. Circuit does not name the trial judge, but the news reports at the time do. *E.g.*, AP, *Barry Loses Appeal to Delay Jail Term*, SAN FRANCISCO CHRONICLE, at A2 (10/24/91), 1991 WLNR 2347780. Marion Barry, the former Mayor of Washington, D.C., argued Barry "that Jackson showed bias during an October 1990 speech to Harvard law students, in which the judge said he believed Barry was guilty of perjury and other crimes but that some jurors would not have voted to convict him on most of the charges under any circumstances." The jury convicted Barry of a single count of cocaine possession in August 1990. The jury acquitted Barry of one count of cocaine possession and it deadlocked on 12 other charges, including three felony counts of lying to a grand jury.

79 946 F.2d 913, 914 (D.C.Cir.1991).

80 946 F.2d 913, 917–18 (Edwards, J., dissenting)(footnotes omitted).

81 253 F.3d 34, 116 (emphasis added).

82 Referring to Judge Jackson's refusal to allow Microsoft time to argue against the breakup, he compared Microsoft to the Empire of Japan after its defeat in World War II: "are you aware of very many cases in which the defendant can argue with the jury about what an appropriate sanction should be? Were the Japanese allowed to propose the terms of their surrender? The government won the case." John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue in an Interview; Jackson Says Microsoft Did the Damage to Its Credibility in Court*, WALL STREET JOURNAL, June 8, 2000, at A3. The article is based on what it acknowledged was "an extraordinary interview" for a sitting federal judge.

83 253 F.3d 34, 117.

84 253 F.3d 34, 116. *See also* In re Allied-Signal Inc., 891 F.2d 974, 975–76 (1st Cir.1989). That case held that "where no actual bias is at issue, where the question is solely one of appearances, judicial actions already taken are not necessarily rendered invalid because of a circumstance that violates [28 U.S.C.A.] § 455(a)."

85 Carrie Johnson, *In Judicial World, No Clear Verdict on Jackson Microsoft Remarks Spur Debate on Speaking Out*, WASHINGTON POST, Aug. 9, 2001, at p. E1.

86 *Lashing Out at Leaks*, WASHINGTON POST, Aug. 22, 2000, L Edition, at p. A18:

> "Hours before Vice President Gore delivered his acceptance speech at the Democratic National Convention, word leaked out in Washington that a new grand jury had been impaneled to examine President Clinton's conduct in the Monica Lewinsky affair. Democrats howled, the White House accused independent counsel Robert Ray of being the source of the story, [but on] Friday, an obviously embarrassed federal appeals court judge, Richard Cudahy, who also sits on the three-judge panel that oversees Mr. Ray's office, stepped forward to say he was the leaker, albeit an 'inadvertent' one. Judge Cudahy explained in a statement that during the course of a discussion with a reporter concerning the three-judge panel's decision to extend the independent counsel's term for another year, he inadvertently referred to the existence of a newly impaneled grand jury to consider evidence concerning the president's conduct."

*See also* Bill Miller, *Cisneros Prosecutor Extended Independent Counsel Continues to Probe for Obstruction*, WASHINGTON POST, July 4, 2001, at A17; Ronald D. Rotunda, *Independent Counsel and the Charges of Leaking: A Brief Case Study*, 68 FORDHAM L. REV. 869 (1999).

87 Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004), *on remand*, 378 F.3d 426 (4th Cir.2004).

88 Lynn Waltz, *Doumar's Destiny*, PORT FOLIO WEEKLY, Aug. 2, 2004, at pp. 24–27. His photograph graced the entire front page of that newspaper.

89 Hamdi v. Rumsfeld, 542 U.S. 507, 531, 124 S.Ct. 2633, 2648, 159 L.Ed.2d 578 (2004), *on remand*, 378 F.3d 426 (4th Cir.2004) (O'Connor, J., plurality opinion):

> "With due recognition of these competing concerns, we believe that neither the process proposed by the Government *nor the process apparently envisioned by the District Court* below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant." (emphasis added).

90 Lynn Waltz, *Doumar's Destiny*, PORT FOLIO WEEKLY, Aug. 2, 2004, at p. 27.

91 Ronald D. Rotunda, *Holding Enemy Combatants in the Wake of Hamdan*, 8 ENGAGE: The Journal of the Federalist Society's Practice Groups 52 (Issue 3, June 2007).

92 Carrie Johnson, *In Judicial World, No Clear Verdict on Jackson Microsoft Remarks Spur Debate on Speaking Out*, WASHINGTON POST, Aug. 9, 2001, at p. E1.

93 United States v. Microsoft, 253 F.3d 34 (D.C.Cir.2001) (per curiam).

94 Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981). See, Ronald D. Rotunda, *Dealing with the Media: Ethical, Constitutional, and Practical Parameters*, 84 ILLINOIS STATE B.J. 614 (Dec. 1996)

95 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.25 (Thomson-West Pub. Co. 4th ed. 2008) (6 volumes).

96 ABA's Standing Committee Report on 1990 Code, Legislative Draft 22 (1990). For a fuller discussion of the issue of cameras in the court, see, Ronald D. Rotunda, *Reporting Sensational Trials: Free Press, a Responsible Press, and Cameras in the Courts*, 3 COMMUNICATIONS LAW & POLICY 295 (Spring, 1998).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.11 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.11 Rule 2.11

## § 10.2-2.11(a) The Text of Rule 2.11

The text of Rule 2.11 provides:

**RULE 2.11. *Disqualification***

**(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:**

**[*Ed. Note:** "'Impartial,' 'impartiality,' and 'impartially' mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Terminology ¶8.**]**

**(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.**

**[***Ed. Note: ""Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Terminology ¶14.**]**

**(2) The judge knows* that the judge, 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:**

**[***Ed. Note: ""Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Terminology ¶14.

**[***Ed. Note: "'Domestic partner' means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married." Terminology, ¶5**]**

**[***Ed. Note: "'Third degree of relationship' includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece." Terminology, ¶24.

**(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;**

**(b) acting as a lawyer in the proceeding;**

**(c) a person who has more than a *de minimis** interest that could be substantially affected by the proceeding; or**

**[***Ed. Note: "'*De minimis*,' in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." Terminology, ¶4**]**

**(d) likely to be a material witness in the proceeding.**

**(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.**

**[***Ed. Note: "Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. Terminology, ¶7.

**[***Ed. Note: "'Member of a judge's family residing in the judge's household' means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household." Terminology, ¶18

**[***Ed. Note: "Economic interest" means ownership of more than a *de minimis* legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in 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 a director, an officer, an advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge." Terminology, ¶6**]**

**(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].**

**[***Ed. Note: "'Aggregate,' in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent." Terminology, ¶1.

**[***Ed. Note: "'Contribution' means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure." Terminology, ¶3.**]**

**(5) The judge, while a judge or a judicial candidate,* has 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.**

**[***Ed. Note: "'Judicial candidate' means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office." Terminology, ¶13.**]**

**(6) The judge:**

**(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;**

**(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;**

**(c) was a material witness concerning the matter; or**

**(d) previously presided as a judge over the matter in another court.**

**(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.**

**(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.**

**COMMENTARY**

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a *de minimis* legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in 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 a director, officer, advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge.

**§ 10.2-2.11(b) The Relationship between Rule 2.11 of the 2007 Model Code and the Corresponding Provisions of the 1990 Model Code**

Rule 2.11 is, in many ways, the heart of the Judicial Code. It provides when a judge must disqualify herself because of personal bias, family relationships, financial interests, campaign contributions, prior commitments, and prior relationships as a lawyer, government official, witness, or as a judge.

Rule 2.11 corresponds to various provisions that the 1990 Code placed mainly in Canon 3E. [1] The one exception is Rule 2.11(C), which comes from the 1990 Code, Canon 3F. [2]

Rule 2.11(C) and Canon 3F provide a procedure for the parties to waive any disqualification imposed by Rule 2.11(A) and Canon 3E respectively. In contrast, the federal statute only allows waiver if the judge is disqualified because his or her impartiality might reasonably be questioned. [3] We shall discuss the waiver issue later.

The framers of Rule 2.11 correctly viewed their changes as "stylistic and structural [*i.e.*, reorganizing] rather than substantive." [4] The framers made only five substantive changes and those changes really do not change much.

• First, Rule 2.11(A)(2), (A)(3), and (B) treats "domestic partner" the same as the judge's "spouse." [5]

• Second, Rule 2.11(A)(2)(a) treats "general partner" and "managing partner" of a partner the same as an officer or director of a party. The 1990 Rules did not use the terms, "general partner" and "managing partner," and the 2007 Code added these terms to guarantee completeness.

• Third, Rule 2.11(A)(2)(d), which corresponds to Canon 3E(1)(d)(iv), prohibits the judge from deciding a case if she is likely to be a material witness. The difference is that the new Rule deletes the phrase, "to the judge's knowledge," simply because the framers viewed that phrase as "unnecessary." This change is hardly substantive although the framers of the 2007 listed it as a substantive change. [6]

• Fourth, Rule 2.11(A)(6)(b) disqualifies a judge if she had served in government employment, "and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy." This provision is a new Rule, but it merely reflects what the 1990 Code provided in its Commentary to Canon 3E(1)(b). Moreover, this provision parallels a similar conflicts rule governing lawyers who "participated personally and substantially" as a Government official. [7]

• And, fifth, Rule 2.11 adds a new subsection, Rule 2.11(A)(6)(d), which provides that the judge should disqualify himself if he "previously presided as a judge over the matter in another court." However, the Reporters' Explanation of Changes to Rule 2.11 announces, without further explanation, that—

This Rule, however, leaves unaffected the propriety of a judge who decided a case on a panel of an appellate court participating in the rehearing of the case en banc with that same court. [8]

This exception makes sense. Traditionally, a judge who participates in a panel decision also participates in the *en banc* decision, if he or she is a member of the *en banc* court. Other judges (such as judges visiting from another Circuit) would not participate. Yet, the 2007 Code does not make that exception clear in the black letter Rule or in the Commentary.

### § 10.2-2.11(c) The Ethics Rules, Federal Statutes, and the Judicial Conference of the United States

Rule 2.11 of the 2007 Code [9] governs judicial disqualification. This topic is probably the most litigated area of the Code of Judicial Conduct. Parties use it to remove a judge they do not trust or to overturn an unfavorable decision.

Rule 2.11 shares many similarities with section 455 of title 28, the section in the United States Code that governs disqualification of federal judges. [10] There are, as well, a few important differences, discussed below.

In addition, the Judicial Conference of the United States—composed of Article III judges—had approved a Code of Conduct for United States Judges. This Code of Conduct applies in addition to the federal statute. The framers modeled the federal rules on the ABA Model Judicial Code. The Judicial Conference develops and proposes rules for federal courts, including the Code of Conduct for United States Judges. [11] The Judicial Conference modeled its rules on the 1972 ABA Code of Judicial Conduct. [12] When the ABA changed its Model Code in 1990, the Judicial Conference issued a new set of rules in 1998. [13] And, in response to the ABA changes in 2007, the Judicial Conference—in 2009—adopted a new "Code of Conduct for United States Judges." [14]

Surprisingly, some litigants do not know of the Judicial Conference requirements. Needless to say, it is useful to litigants who need to know when to move to disqualify a federal judge.

The Code of Conduct for United States Judges, governs the conduct of United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. In addition, certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. [15] This Code of Conduct does *not* govern the United States Supreme Court because the Judicial Conference does not have the authority to make rules governing the U.S. Supreme Court. [16]

To say that the Code of Conduct for United States Judges does not, by its express terms, include the Supreme Court, does not mean that the Justices do not turn to the Code for guidance. Chief Justice John Roberts, took the occasion of his 2011 Annual Report on the Judiciary, to reassure us that the Justices do follow the relevant statutes and ethics rules, even if they are not under a legal compulsion to do so:

> All Members of the Court do in fact consult the Code of Conduct [of the Federal Judicial Conference] in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since, as the commentary accompanying Canon 1 of the Code explains, the Code "is designed to provide guidance to judges." … The Justices [also] turn to judicial opinions, treatises, scholarly articles, and disciplinary decisions. They may also seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues. For that reason, the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance. But as a practical matter, the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues. [17]

Consequently, in an effort to analyze and illustrate Rule 2.11, we will refer not only to state cases, but also to relevant federal cases interpreting 28 U.S.C.A. § 455 or the Code of Conduct for United States Judges. One can assume that the applicable language in the Judicial Code and this federal statute are largely identical unless otherwise indicated. [18]

### § 10.2-2.11(d) When the Judge's Impartiality Might Reasonably Be Questioned

#### § 10.2-2.11(d)(1) General Principles

Rule 2.11(A)—and 28 U.S.C.A. § 455(a)—provide generally that a judge "shall disqualify himself or herself in any proceeding in which the judge's *impartiality might reasonably be questioned*. …" [19] Subsequent subsections add specific instances where the judge must disqualify himself, but those instances are *in addition* to any other case where the judge's impartiality might reasonably be questioned. [20]

The principle that the litigants are entitled to an impartial tribunal is deeply rooted both in the common law and in international law. [21] The difficulty is not the principle, which is basic. The problem is in interpreting a principle that is, frankly, vague. [22]

If it is reasonable to question the judge's impartiality, the judge must recuse himself, whether or not a litigant files a motion to disqualify. [23] However, the fact that the litigants did not move to disqualify is evidence that one should not question the judge's impartiality, but only *if* the litigants knew the facts that would enable them to evaluate a disqualification motion. That is why the judge should disclose on the record information that the parties or their lawyers "might consider relevant" to the disqualification issue, even if the judge believes that there is no real basis for disqualification. [24] This disclosure should be "broad" to assure that the parties are aware of the relevant facts. [25]

#### § 10.2-2.11(d)(2) Objective Test

##### § 10.2-2.11(d)(2)(i) A Duty to Sit

The Federal law now requires that a judge disqualify herself if there is a *reasonable* question as to the judge's impartiality. The test is objective: would a "reasonable person," knowing all the circumstances, conclude that the judge's "impartiality might reasonably be questioned." [26]

Thus, judges should not disqualify themselves merely to avoid difficult or controversial cases. [27] If the claim to disqualify does not meet the objective test, the judge should sit and hear the case.

In both federal and state courts, judges should not recuse themselves for no reason, because "the parties in a judicial proceeding do not choose their judges, as they do in arbitration." [28]

Similarly, the test of Rule 2.11(A) is also objective. It requires that the judge's partiality "might *reasonably* be questioned." [29] Rule 2.7 [30] reaffirms this principle. It requires judges to decide matters "except those in which disqualification is required." The drafters added this section, which first appeared in the 1990 Code, "to emphasize the judicial duty to sit and to minimize potential abuse of the disqualification process." [31]

Public policy forbids judges to disqualify themselves for frivolous reasons, because that would delay the proceedings, overburden other judges, and encourage improper judge-shopping. In fact, there is even case law that holds that mandamus can issue against a judge ordering him to sit. [32]

### § 10.2-2.11(d)(2)(ii) The Fully Informed and Knowledgeable Observer

Rule 2.11(A) requires the judge to recuse herself if her "impartiality might *reasonably* be questioned." [33] That standard is not subjective. Instead, *the test is whether an objective and knowledgeable member of the public would find it reasonable to doubt the judge's impartiality.* The Court looks at an objective standard of conduct. [34]

First, in determining whether there is an "appearance of impropriety" or whether someone might "reasonably" question the judge's partiality, the court looks at the perspective of a "fully informed and objective observer." [35] Someone who attacks the ethics of a judge should not be able to strengthen his attack by careful ignorance. The litigant who charges partiality must support the allegations by a factual basis. [36] For example, Chief Justice John Roberts can decide a case involving John Roberts (a CBS reporter), because the two people are not related, although an unknowledgeable observer might think that they are the same person.

Second, mere public clamoring for the judge's recusal is insufficient. "Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers." [37] The judge must tread the narrow path between timidity and obstinacy.

The judge should not disqualify herself at the mere whiff of controversy or simply because a litigant is persistent. The law of disqualification should not give a competitive advantage to litigants who seek to engage in judge-shopping by alleging the slightest of factual bases for bias. [38] When the judge maintains her automobile, the squeaky wheel gets the grease. But when a judge decides whether to grant a disqualification motion, she should look at the merits of the motion rather than the shrillness of the movant.

It does not matter that people who do not know all of the facts or do not know the precedent think the judge should recuse himself. [39] One should look at the facts and the precedent. The application of the standard "impartiality might *reasonably* be questioned" is subject to the particular factual circumstances of each case. Litigants do not have a right to a judge of their choosing. [40] The party seeking disqualification must show that an *objective*, disinterested observer who is fully informed of the underlying facts would "entertain *significant* doubt that justice would be done absent recusal." [41]

The standard is "objective" in the sense that the court applies the test outlined above to the facts and then treats similar situations similarly. The court does not reflexively react to public opinion polls because it is not relevant that many unknowledgeable people are upset. The test is whether "an objective, disinterested observer *fully informed of the underlying facts*, entertains significant doubt that justice would be done absent recusal?" [42] If the claimed disqualification involves "remote, contingent, indirect or speculative interests," the judge should not recuse herself. [43]

For example, if the judge is considering of leaving the bench and negotiating for employment with a law firm that was appearing before the judge in a matter, the judge must disqualify herself because her "impartiality might reasonably be questioned." [44] That conclusion applies to all judges in an objective way. Disqualification based on a lack of impartiality must have a "reasonable basis." [45] In other words, litigants have a right to an impartial judge, but they do not have a right to use the disqualification rules to engage in judge-shopping.

With this case, contrast *In re Aguinda*. [46] Plaintiffs, who were citizens of Ecuador and Peru, sued Texaco, Inc., claiming that it polluted rain forests and rivers in those two countries, causing environmental damage and personal injuries. Judge Rakoff, the trial judge, dismissed this case and the Court of Appeals reversed and remanded it. In the second trip to the Second Circuit, the plaintiffs alleged that Judge Rakoff must recuse himself because he attended an expense-paid seminar on environmental issues during the period between his dismissal of the case and our remand. Petitioners argued that "because Texaco contributed general funding to the organization that sponsored the seminar and a former Texaco chief executive officer was a speaker at the seminar, an appearance of partiality warranting disqualification was created." [47]

The seminar that Judge Rakoff attended was entitled, "Real and Alleged Environmental Crises—A Seminar for Federal Judges." Petitioners stated that the topics of the seminar were "directly related to the issues bound to arise in the course of [their] litigation." Judge Rakoff's attendance at the seminar (after he had dismissed the case but before the remand) created, in the view of the plaintiffs, "an appearance of partiality and that, therefore, he is disqualified from presiding on the remand proceedings." [48]

*Aguinda* rejected the motion, holding that the judge's attendance at an expense-paid environmental law seminar funded by an organization that received general funding from an oil company-litigant was *not* a ground to *reasonably* question the judge's impartiality and thus not ground for recusal, even assuming that seminar presented an "unbalanced" viewpoint on environmental issues. [49] Judges can take classes, and sometimes these classes are not "objective" because academics have a point of view. Nobel economists do not treat communist economics as another, equally valid theory of economics. If someone is accomplished enough to assume a judgeship, we expect that judge to be able to separate the wheat from the chaff. [50]

The cases in the various subsections of § 10.2-2.11 offer an assortment of examples where a judge disqualified herself, or a higher court held that the judge should recuse herself because her impartiality might reasonably be questioned or because the judge violated one of the specific subsections of Rule 2.11. In many other cases, also discussed here, the judge or higher court found no *reasonable* question of impartiality and therefore no disqualification.

### § 10.2-2.11(d)(2)(iii) The Rule of Necessity

#### § 10.2-2.11(d)(2)(iii)(1) Introduction

The 1990 Code added a new Comment 3 to Canon 3E(1). It recognized and codified a principle that was already in the case law, called the Rule of Necessity. The 2007 Code retained this rule. [51]

#### § 10.2-2.11(d)(2)(iii)(2) Rationale

The Rule of Necessity authorizes a judge to hear a case even though a specific provision of the Model Code may otherwise require disqualification. For example, if a party attacks a statute governing judicial salaries, a judge can participate in judicial review of that salary statute. The salary statute, in our hypothetical will affect the salary of every judge. Hence, by necessity,

some judge must decide the issue even though a resolution of the judicial salary issue will affect all of the judges. Or, consider the case of an emergency— for example, a hearing on probable cause or for a temporary restraining order. If the only judge available to hear an issue requiring immediate judicial action is disqualified, the Rule of Necessity will allow the judge to issue the ruling anyway. [52]

Courts long ago developed an exception to the general disqualification provisions: no judge is required to disqualify herself if the basis for disqualification would require every judge to disqualify herself. This "rule of necessity" was created to give every person effective redress in the courts. The alternative would create a category of cases that no judge would be allowed to heard.

### § 10.2-2.11(d)(2)(iii)(3) Disclosure on the Record

Sometimes the ethics rules will not disqualify all judges from presiding, but the only judge who can preside is disqualified. If the matter requires "immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable." [53]

This fact pattern is related to the Rule of Necessity: the judge who is disqualified may be the only person who is available at that moment to handle the matter

### § 10.2-2.11(d)(2)(iii)(4) Legislation Affecting Judges' Pay

*United States v. Will* [54] considered whether Congress could repeal or modify a statutorily defined formula for annual cost-of-living increases in the salary of federal judges. Every federal judge, from the district court level to the Supreme Court, had a financial interest in the outcome of the proceeding. The Court held that the "rule of necessity" precluded disqualification. "The declared purpose of § 455 is to guarantee litigants a fair forum in which they can pursue their claims. Far from promoting this purpose, failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum." [55]

In *Williams v. United States,* [56] the plaintiffs were United States District Court judges. They brought a class action seeking a declaration that a statute barring payment of automatic adjustments to judges did not prevent the payment of an Employment Cost Index (inflation) adjustment owed to federal judges under the Ethics Reform Act of 1989. On cross motions for summary judgment, Federal District John Garrett Penn held that he should not recuse himself, although his ruling would affect his salary. The Rule of Necessity prevented recusal of a federal district court judge who would determine whether the Ethics Reform Act entitled federal judges to an automatic Employment Cost Index adjustment to their income, because there were no Article III judges who did not have interest in outcome of case.

The judge in *Williams* then went on to hold that the Ethics Reform Act entitled judges to their Employment Cost Index adjustments because they had vested, for purposes of the Article compensation clause, when Congress enacted the Ethics Reform Act. Moreover, the appropriations measure (which prohibited using funds to increase the salary of federal judges except as specifically authorized by Congress) was not permanent legislation and had no effect on Employment Cost Index adjustments made under Ethics Reform Act.

### § 10.2-2.11(d)(2)(iv) Recusal Issues When A Judge Is Being Considered For Another Position

### § 10.2-2.11(d)(2)(iv)(1) Introduction

Sometimes, state and federal judges receive offers of other positions or they are contemplating leaving the bench and wish to initiate offers of other employment. These offers can raise ethical questions. No specific rule in the 2007 Judicial Code or the 1990 version of the Model Code of Judicial Conduct addresses this issue, so we must analyze it under the catch-all provision of Rule 2.11(A) of the 2007 Code or Canon 3E(1) of the 1990 Code. Both require a judge to disqualify himself or herself in a proceeding "in which the judge's impartiality might reasonably be questioned."

Like ancient Gaul, the issue of judicial recusal based upon other job offers is divided into three parts.

> FIRST, a private law firm may offer a sitting judge a position with that law firm.
>
> SECOND, the federal (or state) government may offer a judge a different judgeship position within the federal (or state) judiciary.
>
> THIRD, the federal government may offer a federal judge a non-judicial position in the federal government. This position may be in the Department of Justice (such as when Justice Thurgood Marshall left the Second Circuit to become Solicitor General, or Justice Goldberg, for example, left the Supreme Court to become U.N. Ambassador). Similar alternatives will face state judges.

The employment offer could also come from a state government. The state, for example, may offer a position in the state judiciary or state government to a state or federal judge. For example, a state governor (where the governor has the power to appoint) may offer a federal or state lower court judge a position on the state supreme court. Or, the governor may offer a state or federal judge a position in the state government, such as state attorney general (in those states where that position is appointed). Or, the governor may offer a state or federal judge a position on the ticket, such as running for lieutenant governor. All these offers may occur when the state or the governor has brought a case before the judge in question.

In all these situations, litigants with cases before the judge may move to disqualify the judge claiming an "appearance of impropriety" because the opposing litigant (or lawyer representing that litigant) is offering a new employment opportunity to the judge.

Let us consider the major categories and factual scenarios.

### § 10.2-2.11(d)(2)(iv)(2) Judges Negotiating with Private Law Firms

When judges leave the bench, by retirement or resignation, they do not always stop working. Instead, they may engage in the private practice of law. The United States Judicial Conference's Committee on Codes of Conduct reflected the current law when it advised that a judge who is considering leaving the bench may explore future employment possibilities with private law firms, "on a private, dignified, basis." [57]

If the judge does explore these private law firm opportunities, the federal rule is that he or she must "recuse from all cases handled by any such law firm during any such negotiations, and for a reasonable period after the negotiations terminate (the exact length of time depending upon the nature of the discussions, the reasons for termination, etc.)." [58]

Thus, Judge Winters, in the case of *In re CBI Holding Co., Inc.*, [59] decided not to recuse himself simply because he had had discussions "of a very general matter" with a member of one of the law firms representing a party in this matter five years earlier. If the discussions had been more concrete and contemporaneous, the judge should have disclosed the facts and recused himself, unless the parties waived the conflict. [60]

The leading case involving a judge who is leaving the bench to join a private law firm is *PepsiCo, Inc. v. McMillen*. [61] A federal trial judge in Chicago had become eligible to take senior status. He contacted a head hunter or recruiter who agreed to contact Chicago firms to see if any would want to hire the judge. Inadvertently, and contrary to the judge's instructions, the head hunter contacted firms representing both the plaintiff and defendant in a pending antitrust case. One firm expressed no interest in hiring the judge, although the other firm left the matter a bit more open because it did not return the phone call. The judge did not go to work for either firm.

After the matter was discussed in judge's chambers, defendants sought a writ of mandamus to disqualify the judge. The Court of Appeals was careful to stress that there was no intentional impropriety committed in the case, but it ordered the judge recused

to avoid any appearance of partiality or impropriety in the matter before him. The court defined "appearance of impropriety" from the perspective of a "fully informed and objective observer," and said the case was "unusual":

> We deal with *an unusual case* in which, only days before trial is to begin, the trial judge discovers that he has been in communication (albeit through an agent rather than in person) with the law firms representing the parties, concerning the possibility that one of the law firms might make him an offer of employment upon his resignation from the bench. A *fully informed and objective observer* might wonder whether the judge could decide the case with the requisite aloofness and disinterest when *he had just solicited* (if unintentionally) employment by the law firms in the case. This conclusion requires recusal. [62]

The *PepsiCo* case is intriguing. The judge in *PepsiCo* did not know that the head hunter had contacted the two law firms. However, the law firms believed that the head hunter was acting on the judge's behalf. From their perspective, the judge before whom they trying a case was asking each of them for a job and asking each of the two firms to bid to see who gave the judge the best job offer—how big should the partnership draw be; how extensive should the fringe benefits be?

But that was not all. The Seventh Circuit was concerned that the judge had *initiated* (through the head hunter) the contacts: "The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case *in the role of a suppliant for employment*." [63]

On the other hand, when the law firm sought recusal, it eventually became clear that the judge was innocent of acting as a supplicant because he had instructed the head hunter not to contact either firm. The law firms eventually learned of this information, and a "*fully informed and objective observer*" would be less concerned the judge has "unintentionally" and unknowingly solicited employment. The fact that the judge did not know what the head hunter had done did not affect the result, the court said because, even if the judge acted without fault, he must disqualify himself.

The court repeatedly emphasized that the judge "is accused of, and has committed, no impropriety. The exploration of employment possibilities with firms appearing in a case about to be tried before him was accidental." [64] At another point, it said, "There would be no actual impropriety if Judge McMillen were allowed to continue to preside over the trial in this case (which began on June 3)." [65] Nonetheless, it ordered disqualification.

The court, while creating what looks like a strict liability disqualification rule, simultaneously tried to cabin its holding: "Our holding is narrow," the court warned, because "[w]e deal with an unusual case," and so it was unwilling to make any pronouncements that applied to other factual scenarios. [66] It did not purport to cover all cases of employment with private law firms: "We do not explore the outer bounds of propriety in a resigning judge's negotiating with law firms for future employment." [67]

*PepsiCo*, the court explained, is about a resigning judge soliciting private law firms for future employment.

Let us turn to the situation where the judge leaves one judicial position and takes a different judicial position. That factual situation is different from the facts involving a judge who leaves one judicial position for another judicial position, a situation that the *PepsiCo* court did not address. One can, of course, argue that we should read *PepsiCo* more broadly. However, that case instructs us to the contrary, stressing that its holding is "narrow," and it was not even considering all situations of a judge resigning the judgeship and negotiating with law firms for future private employment. [68]

### § 10.2-2.11(d)(2)(iv)(3) Judges Elevated To Another Judicial Position

*PepsiCo* [69] considered the case of a judge negotiating for a salary and partnership draw with the two private parties appearing before him. The case law treats that scenario differently than the situation where a judge accepts, or is offered, or agrees to be considered for, another judgeship. There is no negotiation for that job; the salary is fixed. There is no discussion about who gets the corner office, what the nuances of the pension plan are, or whether the new partner's draw will decrease if he is an insufficient rain-maker.

The ABA Comment to its Judicial Canon 3E of the 1990 Code, in elaborating when a judge's impartiality "might reasonably be questioned" says that the judge should disqualify herself if she is "negotiating for employment with a law firm." [70] The negative implication suggests that moving to a different position in the judicial branch is different because one does not "negotiate" for a different position in the judicial branch. The 2007 Code does not have this Comment; indeed, it does not explicitly refer to the situation where the judge is negotiating for employment.

There are few cases in this area, although, as a factual matter, this state of affairs happens with some frequency. The President may nominate a Supreme Court Justice to be Chief Justice, such as Justice Rehnquist who became Chief Justice Rehnquist. Or, the President may elevate a federal judge to a higher office in the federal judiciary, or may offer any judge a different position within the judicial branch. That last situation is what happened in *Mistretta v. United States*, [71] where the litigant complained that the President could tempt judges by offering to appoint them to the Federal Sentencing Commission, an entity within the judicial branch. A federal trial judge appointed to the Sentencing Commission would also receive a higher salary. [72]

The Supreme Court, in *Mistretta*, [73] was dismissive of the argument that there is any problem:

> We have never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions. The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. [74]

Few cases discuss this issue directly. One is *Baker v. City of Detroit*. [75] The judge refused to recuse himself from a reverse discrimination case against defendants, including Mayor Young of Detroit. The plaintiffs, who sought disqualification under 28 U.S.C.A. § 455(a), complained of bias because Mayor Young was chairing the judicial selection committee that forwarded the judge's name to President Carter for elevation to the Court of Appeals. The trial judge explained that plaintiff moved to disqualify because "*Mayor Young served as a member of the selection committee which submitted my name*" to the President as one of four candidates for appointment to the Sixth Circuit. [76]

This case initially came before the judge when he was a trial judge; while that case was before him, Mayor Young was urging President Carter to appoint him to a higher court. Note that the mayor was a real defendant, not a nominal party. The reverse discrimination case was hotly contested and very important to the Mayor. Yet the judge refused to recuse himself, even though the Mayor was chairing the judicial selection committee that forwarded the judge's name to President Carter for elevation to the Court of Appeals. The judge denied this disqualification motion and kept this case in his docket even *after* he was elevated to the Sixth Circuit. [77]

*Laxalt v. McClatchy* [78] is an analogous case. The court held that a United States Magistrate need not recuse herself in a case where Senator Paul Laxalt was the plaintiff. In this case, the Magistrate had asked the Senator in the past to recommend her for a federal judgeship (over which appointment he had considerable influence), and she said she might do so again. Not only was the Senator the plaintiff, but the other litigant would depose members of the Senator's staff and perhaps call them as witnesses in the trial of this case. The *Laxalt* court broadly concluded:

> This holding is not dependent on whether Magistrate Atkins plans again to apply for a judgeship in the future, does not plan ever to apply again, or doesn't know in her own mind whether she might seek a future judicial opening. The facts could not create any reasonable doubt in a reasonable person as to her impartiality. [79]

Although very few cases address this topic, there is a lot of historical precedent reflecting the rulings of these cases. In practice, federal judges do not recuse themselves because the President is considering them for a position on a higher court or has nominated them for another position in the judiciary.

Consider, for example, when Justice Byron White announced his resignation in March 1993. President Clinton considered Judge Stephen Breyer, but then nominated Judge Ruth Bader Ginsburg to the U.S. Supreme Court. President Clinton announced his

nomination of Judge Ginsburg almost three months later, on June 14, 1993. During this short time period, when there was an actual vacancy on the Court, she participated in nearly 50 civil cases involving the U.S. Government or one of its agencies—including the Department of Defense or Department of the Army—and more than 25 additional criminal cases where the United States was a party. As far as we can tell from the records, in none of them did she recuse herself because the media reported that she was being considered for elevation to the U.S. Supreme Court.

President Clinton, at that time, also interviewed Judge Breyer of the First Circuit. However, the President did not choose Judge Breyer until the following year. During that entire period, Judge Breyer did not recuse himself from any case involving the U.S. Government even though he had had conversations with the Administration about his possible elevation to the U.S. Supreme Court.[80] In no case during a period of over a year did he recuse himself after he was interviewed for a seat on the Supreme Court. In none of the cases did he recuse himself because the President told him that he was considering Breyer for the Supreme Court. In none did he recuse himself because the President had nominated him to the Supreme Court. In none did any litigant move to disqualify him because he was being considered for the Supreme Court.

When the Senate confirmed Judge Roberts of the D.C. Circuit to become Chief Justice Roberts, some commentators[81] argued that he violated the federal recusal statute[82] because of his failure to recuse himself from the three-judge panel that decided *Hamdan v. Rumsfeld*.[83] The significant fact, in their view, was that Attorney General Alberto Gonzales spoke to Judge Roberts about a nomination to the U.S. Supreme Court on April 1, six days *before* oral arguments in the *Hamdan* case.

*Hamdan* was one of a series of cases dealing with the War on Terror.[84] Roberts was on the panel but did not write a separate opinion. Judge Randolph, speaking for the court, held that the President's designation of a military commission to try an enemy combatant alleged to have fought for al-Qaeda does not violate the separation of powers doctrine. He went on to hold that the Geneva Convention of 1949 did not give an enemy combatant any right to enforce its provisions in a federal court. Finally, even if the Geneva Convention were enforceable in court, a military commission violates no rights of any enemy combatant when it tries the combatant.

The Senate Judiciary Committee questioned Judge Roberts about the fact that he had met with the Attorney General shortly before oral argument in the *Hamdan* decision, and the senate subsequently voted to confirm him as Chief Justice. The lawyers for *Hamdan*, by the way, never moved to recuse Judge Roberts, but other litigants unsuccessfully sought to intervene and raise the ethics issue.

Proponents of recusal emphasized that the case was "hotly contested." However, all appellate litigation is especially "hotly contested," by definition, because the parties cared enough to file the appeal. Parties do not involve themselves in time-consuming and expensive litigation, appeal the case, and then contest the case "mildly," "warmly," or "half-heartedly." No case is "coldly contested."[85]

Moreover, we should be wary of any proposed rule that applies to only one case because the case is "unique" or because it is "hotly contested." Creating, after the fact, a rule that applies to only one case is simply a way of engaging in *ad hoc*, *ex post facto*, *ad hominem* attacks. This form of attack is so old and tired that we identify it using Latin names, a language long dead. The advantage (and unfairness) of creating unique rules is that we no longer have to worry about precedent because we apply the rule to only one case.

The President and the Attorney General are not the only people who interview potential judicial nominees. U.S. Senators interview candidates for possible judgeships. In some states, there are "Judicial Selection Panels" who interview candidates for federal judgeships, particularly federal district judgeships. Some states have created Judicial Selection Panels to recommend qualified candidates for openings on the state courts.

Members of these panels include laypeople and lawyers, and both of these groups, especially lawyers, have cases in state or federal court. If the persons whom these panels interview must recuse themselves from any case involving a panel member (as party or litigant), then the number of judges who must recuse themselves increases tremendously. Many of the lawyers on these

judicial selection panels have cases before state and federal judges all the time, and these lawyers will be interviewing state and federal judges who are interested in being nominated to the federal bench.

One might argue that recusal in these circumstances is so important and the appearance of impropriety is so significant that it does not matter that many judges will have to recuse themselves, because recusal is the right thing to do. However, if a judge must recuse himself in those circumstances, that would give power to officials in the Administration and the members of the Judicial Selection Panels to engage in judge-shopping and manipulating who might hear a case.

For example, Judge Roberts did not meet the President until late in the process, on July 15, just four days before he was offered the position. He met with the Attorney General on April 1, before there even was a vacancy on the Supreme Court. If the judge should recuse himself in such circumstances, there is the risk that the President, or the Attorney General, or any of their agents, could require a judge to recuse himself from a decision. All the Government needs do is simply discuss with the prospective nominee a possible position on a higher court, or a position at the United Nations, or at the FBI, Homeland Security, etc. Then, the Government has created a conflict. This power is magnified because the recusal rule would apply to all those whom the Attorney General or other relevant officials interview. It applies at least to the short list, but the short list is always longer than it first appears because some people on the long list will not know that they are missing from the short list.

Such a recusal rule, if it became the law, would give Administration officials power to force the recusal of one or more of the judges simply by considering them for a position that is not yet open but will open eventually. Our hypothetical recusal rule, which one might superficially see as protecting the litigants opposing the government, may really be a rule that undercuts litigants' rights by giving Government officials a power to force recusal at very low cost to itself.

The power that this new recusal rule would bestow may not be limited to government officials. Any person on the Judicial Selection Panels might have a similar power. A panel member can invite a state judge or federal trial judge to be interviewed for a position on the federal district court or federal court of appeals. When the interviewee learns that a member of the panel has a case before him or is appearing before him, he will have to recuse himself.

Members of the panel can become creative and launder their invitations, so that Panel Member #1, with no case before the prospective nominee, will invite the prospective nominee, who will learn, at the interview, that he has a case before Panel Member #2. We know that lawyers already manipulate the rules to force recusal of the judges who hear their cases, and the system does not always catch them.[86] Whenever we create rules, we can expect that there will be those who use them to game the system.

### § 10.2-2.11(d)(2)(iv)(4) The Judge Who Moves from a Federal Judgeship to a Position in the Executive Branch

There is very little case law concerning judges who move from judgeships to positions in the Executive Branch. However, there are many historical examples. Justice Goldberg became U.N. Ambassador; Judge Thurgood Marshall became Solicitor General Marshall; Judge Kenneth Starr became Solicitor General Starr. Justice Jackson became the War Crimes Prosecutor at Nuremburg. Judge Griffin Bell left the bench to become Attorney General (Griffin Bell). Judge Michael Chertoff became Secretary of the Department of Homeland Security. Judge Shirley Hufstedler left the bench to become Secretary of the Department of Education.[87]

When litigants attacked the constitutionality of the Sentencing Guidelines because the President could tempt federal judges by offering an appointment to the Sentencing Commission, the Supreme Court quickly rejected the argument that the President can influence federal judges by blandishing or offering other federal positions in the judicial or executive branch. This "temptation," the Court said in *Mistretta v. United States*,[88] does not compromise the "impartiality of the Judicial Branch":

> We have never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions. The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. Were the impartiality of

> the Judicial Branch so easily subverted, our constitutional system of tripartite Government would have failed long ago. [89]

There are only a few other cases on this issue. In *United States v. Ellsberg and Russo,* [90] an unreported trial court decision, the trial judge refused to recuse himself because he had discussed with the President and his aide the possibility of him becoming F.B.I. director while presiding over a criminal trial of interest to the President. The judge later dismissed the criminal prosecution for prosecution improprieties, and so the parties never tested the issue on appeal.

*Scott v. United States* [91] is an appellate decision that arose in the Washington D.C. court system, not the Article III courts. *Scott* held, unlike *Russo*, that a judge must recuse himself "'when he [was seeking] employment [in the prosecutor's executive office in the department prosecuting] the case.'" [92] The *Scott* judge, unlike the judges in *Laxalt* or *Baker*, was not taking a different position in the judiciary; he was joining one of the parties.

*Scott* involved a judge who was presiding over a criminal trial while deciding whether to accept the position of Assistant Director for the Debt Collection Staff with the title of "senior litigation counsel" in the Department of Justice. The trial judge presiding over a criminal was discussing this position with the Department of Justice while the local U.S. attorney's office was prosecuting the criminal case before him. He eventually advised the Chief Judge of the Superior Court and the District of Columbia Commission on Judicial Disabilities and Tenure that he would leave the bench to accept that position.

The trial judge in *Scott* joined the prosecutors and became a lawyer in the "Executive Office for United States Attorneys." He, in fact, supervised some of the Government lawyers who appeared before him. *Scott* treated the situation of a judge joining the prosecutors as akin to the judge negotiating for private employment with a law firm. The court repeatedly cited *PepsiCo*, and treated it the same as the case where the judge was planning to leave the bench.

*Scott* came down four months after *Mistretta*, which, oddly enough, it does not cite. *Scott* did cite cases like *Laxalt* but apparently thought them inapplicable because they involved judges moving to other judgeships. As Judge Schwelb noted:

> The precedents strongly suggest, however, that recusal would not be required in the case of a judge under consideration for a new appointment. See, e.g., *Laxalt v. McClatchy*, 602 F.Supp. 214, 217–18 (D. Nev.1985), and authorities there cited. [93]

*Scott* concludes that a judge who is *negotiating* for a position with the *prosecutors*, at least in a criminal case, must disclose the new position and recuse himself. [94] Moreover, the defendant, *Scott* says, cannot waive this disqualification. *Scott* was interpreting the ABA Model Code of Judicial Conduct, not the federal statute. That distinction was important, the court said, because—unlike a case decided under the federal statute—*Scott* believed that the defendant could not even waive the right to force the judge to recuse himself, because the "*appearances of partiality*" is something that "*can never be waived by the litigants* regardless of the immateriality of the Canon violation." [95]

One wonders why that would be so. Why would the law, as a matter of policy, forbid litigants from waiving an immaterial violation of a rule that is designed to protect the litigants? Recall that judges evaluate the appearance of partiality from the standard of "a reasonable person, knowing and understanding all of the relevant facts." [96] The court does not explain why a knowledgeable outsider would be upset if a litigant waived his right to disqualify a judge. The ABA Model Code specifically allows a party to waive the "appearance of impropriety," or the "might reasonably be questioned" provision of Rule 2.11(A). [97]

One can read *Scott* broadly for the proposition that a judge must disqualify himself if he is negotiating with the Department of Justice for a position there. Yet, the opinion focuses on so many special aspects of the facts that to read the holding that broadly may be unfair to the court, which offered multiple reasons for its conclusion. First, *Scott* repeatedly emphasized that the Department of Justice had "conceded" at the second oral argument that the judge "violated the Canon in presiding at Scott's trial and in imposing sentence during his employment negotiations." [98] The Government also conceded that the trial judge should have recused himself at trial. The court acted as if these concessions bound it.

The opinion concurring in the result also relied heavily on that point: "I find this to be a very close and troubling case in which only the prosecutor's critical concessions have put Scott over the top." [99] Later, the judge again punctuated this crucial concession:

> We are thus faced with a criminal appeal in which the government has admitted trial court error, and in which all members of the court agree that reversal is required if such error in fact occurred. Although, for the reasons described in this opinion, I have serious reservations as to whether an impartial observer fully informed of the facts would perceive any appearance of impropriety, it is difficult to vote to sustain a conviction where the prosecutor now says that the appearance of justice was flawed. Under the adversary system, judges may ignore or reject concessions of this kind, but they should pause and reflect carefully before they do so. [100]

One does not know why the Government, in effect, agreed with the defendant. Perhaps it was because it concluded it would be no trouble to retry Scott. The court found it "significant that the United States has not suggested there would be special hardship in retrying Scott." [101]

Second, the *Scott* majority was impressed that the trial judge, in a criminal case, was making "factual determinations involving credibility," [102] and was not merely deciding the law. The court thus suggests that its decision may not apply to a judge who decides the law and not the facts.

The *Scott* court also relied on an unusual time line. At some points, the court appears to be concerned about the judge's mere fact of negotiation with the prosecutors while presiding over the criminal trial. While discussing *PepsiCo*, the court said: "we hold that Judge Murphy violated Canon 3(C)(1) when he presided at Scott's trial *while he was actively seeking* employment with the Executive Office for United States Attorneys." [103] Later, quoting *PepsiCo*, the court said, "a fully informed person might reasonably question whether the judge 'could decide the case with the requisite aloofness and disinterest *when he* [*was seeking*] *employment* [*in the prosecutor's executive office* in the department prosecuting] the case.'" [104]

Yet, there are parts of the case where the court finds the dividing line is when the judge decides he will take the offer. Although the judge was "formally offered the job on or about February 6, 1985," [105] the opening existed and the judge had already decided, in December, that he would accept the position if offered. That later date seems important for the court:

> By December 23, 1984, *when he had decided to accept the position* in the Executive Office for United States Attorneys, the judge had a duty to recuse himself from Scott's case. These facts present 'precisely the kind of appearance of impropriety' that Canon 3(C)(1) is designed to prevent. [106]

In December, the trial was still in progress. That may have been the judge's fatal flaw. Once he decided to accept the offer, he had to tell the parties, which would have allowed either one to ask for his recusal.

The D.C. court does not itself read *Scott* broadly. In a later case, it emphasized that "negotiations" were important, when it held that recusal is unnecessary based on the claim that the judge was a potential candidate for federal prosecutor's position, when there was no showing that judge had sought the position or negotiated for it. [107]

### § 10.2-2.11(d)(2)(v) When the Judge Knows a Party, Witness, or Attorney

Rule 2.11(A)(2) [108] governs situations where the judge or certain relatives are a party or a lawyer in a proceeding or have a more than a *de minimis* interest in the proceeding. We discuss that provision in § 10.2-2.11(f). There are other situations where the judge merely knows a party or a witness or lawyer. There is no rule that requires the judge to disqualify herself merely because she knows a party or witness or a lawyer in proceeding. However, sometimes litigants seek to disqualify the judge because of such a relationship. Those motions usually fail.

As a general rule, the judge's obligation to disqualify herself where her "impartiality might reasonably be questioned" does not mean that a judge must automatically recuse herself simply because someone she might know is involved in litigation before her, either as a party, a witness, or as an attorney. In a small town, in particular, a judge may have a casual acquaintance with many people who become involved in some way with a trial. Even in a large city, the number of lawyers who regularly litigate may be small in number, and the judge may be on friendly terms with all of them.

### § 10.2-2.11(d)(2)(v)(1) When the Judge's Own Lawyer Represents a Party in the Proceeding before the Judge

The general rule is that a judge should recuse herself when the judge's own lawyer represents a party, whether that attorney is representing the judge in a personal matter or in a matter pertaining to the judge's official position or conduct. Whether or not the lawyer charged a fee is irrelevant.

The case law typically imputes this particular judicial disqualification to the lawyers in the law firm where one of the lawyers represents the judge. In other words, the judge must disqualify herself even if the lawyer's law partner or associate is the one appearing before the judge. [109]

However, ABA Formal Opinion 07-449 [110] assumes that the judge may not need to disqualify herself. It considers the situation where a client asks the lawyer to represent him before a judge, but that lawyer (or someone in the same law firm) is simultaneously representing that presiding judge in an unrelated matter. The ABA advises that the lawyer may undertake the representation, under ABA Model Rule 1.7(b), only if he reasonably believes that he will be able to provide competent and diligent representation to both the litigant and the judge and they give their informed consent, confirmed in writing.

The judge, in turn, under Model Code of Judicial Conduct Rule 2.11(A)(1), must disqualify herself from the proceeding over which she is presiding *if* she maintains a bias or prejudice either in favor of or against her lawyer. This disqualification obligation also applies when another lawyer in her lawyer's firm is representing a litigant before her. If the judge determines that she is biased, that type of bias is not subject to waiver by the parties. [111]

However, if the judge concludes that there is no bias or prejudice for or against her lawyer, under Judicial Code Rule 2.11(C), then there still is the generic question whether the judge's partiality "might reasonably be questioned" under Rule 2.11(A). In that case, ABA Formal Opinion 07-449 advises that the judge may continue to participate in the proceeding. However, she then must disclose on the record that she is being represented in the other matter by one of the lawyers, and the parties and their lawyers all consider such disclosure, out of the presence of the judge and court personnel, and waive the judge's disqualification. [112]

If a judge does not make such disclosures in violation of Judicial Rule 2.11(C), then the ABA advises that, in general, the lawyer may *not* disclose to his other client his representation of the judge without the judge's consent, because of the lawyer's obligations under Rule 1.6. Because the lawyer cannot disclose this to his client, the lawyer cannot obtain his client's valid consent to the dual representation, as required by Model Rule 1.7(b). Nor can the other party consent under the procedures outlined in Judicial Rule 2.11(C). Then, ABA Formal Opinion 07-449 concludes, the lawyer's continued representation of the judge in such a circumstance is an affirmative act effectively assisting the judge in her violation of the Judicial Code, and the lawyer, in so doing, violates Model Rule 8.4(f). The lawyer (or another lawyer in the lawyer's firm), in that circumstance, must withdraw from the representation of the judge. [113]

**Duration.** If the judge must disqualify herself, what is the duration of the disqualification? For how long must the judge disqualify herself after the lawyer no longer represents her? The general (and vague) test of Rule 2.11(A) applies—as long as the judge's impartiality might reasonably be questioned."

In making this decision, one should look at factors such as the following: whether the matter was significant or consequential to the judge personally (e.g., defending the judge in a judicial disciplinary proceeding or responding to allegations regarding the judge's integrity) or relatively less significant or relatively inconsequential (e.g., a routine real estate transaction); the size of the

fee that the judge paid to the lawyer; whether the lawyer's representation of the judge was isolated or repetitive; and whether the representation was in a matter that was highly confidential or highly publicized. [114]

Some jurisdictions impose a bright-line rule. A New York ethics opinion, for example, advises that the judge's obligation to recuse ends two years after the judge last consults with the lawyer. [115]

### § 10.2-2.11(d)(2)(v)(2) When the Judge Is Not a Friend of the Lawyer or Party or Witness

*Rinden v. Marx* [116] involved an attorney who was a defendant before the judge on drunken driving charges. Previously, the attorney *qua* attorney had served a complaint on the judge because the judge was a clerk of a corporate defendant and was the person authorized to receive service of process. The corporate defendant had sufficient liability insurance, so there was no chance that the judge would be personally liable for any adverse judgment. In the absence of actual bias or prejudice, the judge did not have to disqualify himself. The disposition of the drunken driving charges against the attorney would have no effect on the civil suit.

In *Amidon v. State*, [117] the defense counsel had publicly criticized the judge in the past and the judge had earlier referred this lawyer to disciplinary authorities. The court held that the judge need not recuse himself, notwithstanding claims that the judge had personal animus against the lawyer. Any other result would allow any unscrupulous litigant the right to disqualify a judge simply by making many critical allegations against the judge. Such a rule would reward the wrong kind of conduct.

Contrast *Smith v. State*. [118] The Supreme Court of Georgia reversed the defendant's conviction of theft and selling marijuana because the trial judge refused to disqualify himself. During the trial, a deputy struck the defense counsel, who then moved for a postponement stating that, because of the beating, he was unable to represent his client on that day. The trial judge denied the motion, and even sympathized with the deputy because the defense counsel had earlier subjected the deputy to defense counsel's derogatory questioning concerning sexual activities with an informer in the case. The state Supreme Court held that a judge has a duty to protect counsel from either party. When the judge fails to perform this duty after knowledge of the attack and shows that his sympathies are with the attackers, his impartiality might reasonably be questioned.

### § 10.2-2.11(d)(2)(v)(3) When the Judge Is a Friend of the Lawyer or Party or Witness

Often, the judge is a friend of one of the lawyers appearing before him. Indeed, that is common, because many trial judges come from the trial bar, where they were friends with the other lawyers. In smaller towns, the judge may know a witness. Police officers routinely testify, and after a number of cases, the judge will know that officer by name. In other cases, the judge may know a witness.

For example, in *Commonwealth v. Perry*, [119] a murder trial, the judge was acquainted with the victim, a police officer, who had often appeared in court as a witness. The judge had also attended the victim's funeral. The defendant sought reversal of his conviction because the judge did not recuse himself. The divided court held that, in the absence of actual prejudice, the judge did not have to disqualify himself merely because of this personal acquaintance with the victim. Judges do not live in a vacuum, and a contrary rule could result in judges disqualifying themselves in many cases. The Court reasoned that the ethics rules permit a judge to form social relationships, and society should not reasonably expect judges to be prejudiced merely because of the existence of that relationship. Any other result would deter many qualified persons from seeking a judicial office.

*Matthews v. Rodgers* [120] held that there was no need to disqualify the lower court judge merely because he had asked one of the attorneys appearing before him to be a pallbearer at his father's funeral. “Friendships within the bench and bar do not, of themselves, cause prejudice.” [121] Such actions did not demonstrate that there was lack of impartiality. As the court explained:

> trial judges often know most, if not all, of the attorneys who practice before them. They may have attended the same schools, churches, or belong to the same civic clubs. Most are members of the same bar association. Given these circumstances it probably is not unusual for an attorney to be asked to serve as a pallbearer for the funeral of a member of a judge's family and similarly judges are often honored to serve as pallbearers for the funeral of

> a member of an attorney's family. These friendships within the bench and the bar do not, of themselves, cause prejudice. [122]

In *T.R.M. v. State*, [123] the defendant in a sexual assault trial alleged that "the judge was biased and prejudiced against the juvenile because the State's complaining witness was a close personal friend of the judge's daughter and his family. Further, the judge's daughter was present during the hearing, serving as court reporter, and the complaining witness was scheduled to be maid of honor in her forthcoming wedding." [124] The defendant moved to disqualify the judge, who refused. This case was a juvenile proceeding, so the trial judge was also the trier of fact, yet the appellate court did not reverse the trial judge's decision to stay in the case. The trial judge also rejected the recommendation contained in the written report of the Department of Institutions, Social and Rehabilitative Services, which was to place the juvenile on probation in his own home under the supervision of the Department. Instead, the court ordered a harsher penalty: the juvenile was committed to the care, custody and control of the State Department of Institutions, Social and Rehabilitative Services for placement in state training school for boys. The Oklahoma Court of Criminal Appeals held that the judge did not abuse his discretion and acted properly in refusing to recusal himself.

One might think that the judge's family friendship with the sexual assault victim might have no bearing on the judge's actions because he would have no interest in convicting an innocent person. However, the judge may have an interest in seeing the conviction of a guilty person. This is problematic because the judge is not supposed to tilt or put his finger on the scales of justice to make sure that the trial comes out "right." The judge is supposed to be the impartial umpire.

*T.R.M.* was a bench trial, but even if there were a jury trial, the result may be the same. There are many ways a judge may affect the jury's view of events without any effective appellate review. There are matters that are within the discretion of the trial judge that the court of appeals will not disturb except for abuse of discretion. In addition, juries tend to look up to the judge, and if they sense that the judge is angry with one side, the jury is more likely to side with the other side. Consequently, the judge can affect what the jury may think by body gestures or tone of voice. If the judge criticizes one of the attorneys in a loud tone of voice, the transcript does not record the volume or the scowl on the judge's face. *T.R.M.* did not discuss any of these questions and instead held that this was not a case where the judge's "impartiality might reasonably be questioned."

In *Amidon v. State*, [125] defense counsel had publicly criticized the judge in the past, and the judge had earlier referred the lawyer to disciplinary authorities. The court held that the judge need not recuse himself, notwithstanding claims that judge had personal animus against the lawyer. This decision makes good sense. If the general rule were otherwise, a lawyer could disqualify any judge merely by criticizing that judge unfairly and in a harsh manner. Such a result would perversely reward the wrong conduct and give a competitive advantage to lawyers who exercise very little self-restraint and do not mind hurling charges at judges.

*United States v. Tucker* [126] held that the trial judge should recuse himself when he told reporters that he could not judge the case fairly. This case was one of the criminal prosecutions that was part of the Independent Counsel's investigation of alleged scandals surrounding the Clinton Administration. The defendants in this case included Jim Guy Tucker, the Governor of Arkansas who succeeded to that position when Bill Clinton became President. This trial judge, *before* he was assigned to the trial, told reporters that if "anything came up regarding President Clinton, I would recuse," because of his close friendship with Mrs. Clinton. The Court of Appeals agreed that "this case will, as a matter of law, involve matters related to the investigation of the President and Hillary Rodham Clinton." [127]

Yet, when the time came, the trial judge refused to recuse himself; instead, he dismissed an indictment against the Arkansas governor and several others. Both the independent counsel and the Clinton Justice Department joined together in urging the Court of Appeals to reverse. It did so and, on remand, reassigned the case to a different judge.

History offers many examples of judges who were personal friends with one of the litigants or with a party to the matter and yet did not disqualify themselves because they believed that they could decide the matter fairly. Indeed, in some cases, the judges were friends with both parties. [128]

Consider, for example, several examples from the U.S. Supreme Court. In the early days of the Court, the Justices as well as many of the lawyers who practiced before them lived in the same boarding house and took their meals together. [129] Washington, DC, was a small town then, but with respect to the legal community, it is still a small town, and many of the lawyers who regularly practice before the Court know the Justices and each other.

President John Quincy Adams hosted various dinner parties featuring such notables as Chief Justice Marshall, Justice Johnson, Justice Story, Justice Todd, Attorney General Wirt, and Daniel Webster. [130] Justice Harlan and his wife often visited the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. [131]

Justice Stone tossed around a medicine ball with members of the Hoover administration on mornings outside the White House. [132] Stone was no wimp. One time, he "knocked Hoover down [and], hit him in the face." [133]

Justice Holmes was a good friend of President Theodore Roosevelt and his wife, and dined with her almost once a week. [134] Holmes did not recuse himself in *Northern Securities Co. v. United States*, [135] the case that upheld President Theodore Roosevelt's trust-busting program. Holmes had dissented in that case, and that dissent very much troubled Roosevelt. After Holmes' dissent, Teddy Roosevelt said of Holmes that he "could carve out of a banana a judge with more backbone than that." [136]

Justice Douglas was a regular at President Franklin Roosevelt's poker parties, and Chief Justice Vinson was a poker buddy of President Truman. [137] Many of the justices who decided *Youngstown Sheet & Tube Co. v. Sawyer*, [138] the case that challenged President Truman's seizure of the steel mills, were friends of President Truman; indeed, he had appointed four of them, but none disqualified themselves. Truman was not technically a party in that case, but he was vitally concerned with how the Court decided it, and the Court ruled against Truman. In this case, the nominal defendant was the Secretary of Commerce, sued in his official capacity, but Truman was interested with how the Supreme Court decided the case.

Justice Marshall often recused himself in cases involving two organizations with which he had had long associations, the NAACP and the NAACP Legal Defense Fund. His ties to the NAACP were strong. In 1936, he joined the NAACP's legal staff, and, in 1940, he wrote the NAACP Legal Defense and Educational Funds corporate charter and became its first director and chief counsel. He remained with the NAACP until President Kennedy appointed him to the Second Circuit. President Johnson later appointed him Solicitor General and then a Supreme Court Justice. However, Marshall did not always recuse himself from cases involving the NAACP. Eventually, on October 4, 1985, he formally decided that he would no longer recuse himself, and he sent a letter to his colleagues announcing that result. [139] However, long before then, he would, on occasion, decide important cases involving the NAACP and its Legal Defense Fund. [140] He had friends and shared concerns with the NAACP, but that friendship did not require him to disqualify himself.

President Kennedy appointed Justice Byron White, who was a good friend of both the President and his brother, Attorney General Robert Kennedy. White went on a vacation with the Attorney General even though Robert Kennedy was a defendant, in his official capacity, in several cases before the Court. [141] In at least one of these cases, the Attorney General's reputation was at issue. [142] Besides these cases in which Kennedy was technically a party, in another case pending at the time of the skiing vacation, Attorney General Robert Kennedy personally argued the Government's position. This was the *only* case that Attorney General Kennedy argued to the Court in his government career, so, to an extent, it put his reputation as a lawyer on the line.

A long series of cases reflect the principle that the mere fact that the judge is a good friend and close friend of a lawyer does not, by that fact alone, require disqualification. [143] Consider Cheney v. United States District Court. [144] In this decision, Justice Scalia rejected a motion of one of the respondents to disqualify him. The other respondent refused to join in the motion.

The case arose when respondents sued the National Energy Policy Development Group (NEPDG) and its individual members, including Richard Cheney, Vice President of the United States, cabinet members, and other federal officials in their official

capacity. Respondents claimed that there were violations of the Federal Advisory Committee Act (FACA), the Freedom of Information Act (FOIA), and the Administrative Procedures Act (APA). Petitioners filed an interlocutory appeal from orders of the federal district court denying a motion to dismiss and permitting discovery, and along with other defendants, petitioned for writ of mandamus vacating discovery orders and directing that lower court rule on administrative record and dismiss Vice President Cheney. The D.C. Circuit dismissed the petition and the interlocutory appeal. The Supreme Court granted certiorari, and one of the respondents moved to recuse Justice Scalia.

Justice Scalia refused. He noted that he was friends with the Vice President and went with him on a hunting trip along with about 30 other people. The Justice, accompanied by his son and son-in-law, was never alone with the Vice President and never discussed the case with him. Justice Scalia was also a friend of the lawyer who filed the motion, and while this case was pending that lawyer wrote him a letter asking him, as a personal favor, to attend one of his classes. The Vice President did allow the Justice and his family members to accompany him on a government plane, but the Justice and these family members returned on a commercial flight after purchasing round trip tickets and thus no one saved any money from hitch-hiking.

Various newspaper editorials around the country summarized the facts (often incorrectly) and called upon Justice Scalia to disqualify himself. The movant relied on these articles to argue that the Justice must disqualify himself based upon the public's purported perception of an appearance of impartiality. But that is not the test. The issue is not what lay people, uninformed about the facts and the legal precedent, think. The issue is whether the statutory standard—"impartiality might reasonably be questioned"—is met. Based on the case law and historical practice, mere friendship with a litigant, particularly one who is only a litigant *ex officio*, does not require disqualification:

> My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 28 U.S.C.A. § 455(a). Why would that result follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same [duck] blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

> A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive …. [145]

Ironically, the lawyer for the movant in this case—the lawyer who claimed that Justice Scalia had to recuse himself because of his friendship with Vice President Cheney—that same lawyer, at the very time he was filing his recusal motion sent a letter to Justice Scalia. He addressed his letter to "Dear Nino" (the nickname for Justice Antonin Scalia) asking him, as a friend, to make an appearance at a class he was teaching, to "visit there for a few days and talk with my students." [146] If Scalia accepted the logic of Morrison's recusal request, he would have had to recuse himself from the Cheney case because of the "appearance" of a prejudicial friendship with Morrison. Of course, that might empower a lawyer to force a judge's recusal by sending him friendly letters.

Justice Breyer and Justice Ginsburg both participated in *Clinton v. Jones*, [147] although the decision affected the President's personal reputation. Both Justices owed their jobs to President Clinton and remained friends with him. No litigant called for his or her recusal because mere friendship does not require recusal. That decision ultimately led the House of Representatives to impeach President Clinton, with the Senate refusing to remove him from office. Ginsburg and Breyer ruled *against* President Clinton, but that is the point: a judge can have a friend, even owe his job to that friend, and yet be impartial in deciding the case.

The *Cheney* case is one of the relatively few decisions where a Justice writes an opinion explaining the reason for recusal or failure to recuse. Typically, the Justices disqualify themselves without giving reasons. From 1971 (when Nixon appointed

Rehnquist to the Court) to 2004, Rehnquist disqualified himself about 200 times. From 1986 until 2004, Scalia disqualified himself about the same number of times. From 1993, when Clinton appointed Stephen Breyer to the Court, until 2004, Breyer disqualified himself nearly 400 times. Breyer's frequent disqualifications may be a function of his business interests: typically, the reason for disqualification involves personal financial holdings rather than political friendships. [148]

However, there are certain circumstances where a judge's personal acquaintance requires disqualification—when it is clear that the relationship affects the judge's fact-finding ability or judgment. *In re Conduct of Jordan*, [149] involved a defendant who served on a library board with the judge. The judge stated that—because of his personal knowledge of this defendant—the judge could not believe that the defendant had committed the alleged acts. Therefore, the judge's impartiality might reasonably be questioned, for if there is a conflict in the evidence, a reasonable person would expect the judge to be inclined to believe the testimony offered on behalf of the defendant based on what he knew outside the courtroom, i.e., his belief in the defendant's veracity. In this case, the personal acquaintanceship and the judge's remarks regarding his friend showed that the judge had prejudged (or appeared to have prejudged) the case.

Even if the lawyers try their case to a jury, a judge's personal bias in favor of, or against, a litigant should require disqualification. Neither the ABA Model Code of Judicial Conduct nor the federal statute draws any distinction based on the possibility of a jury or bench trial. Perhaps they recognize that the judge's bias regarding a party can infect the entire proceeding. The judge may tacitly or implicitly communicate to the jury his views. Those views might affect the judge's actions in a host of discretionary rulings (*e.g.*, whether to grant a continuance or judgment N.O.V., whether to rule that a damage verdict in a civil case is "excessive," or whether to impose a more severe sentence in a criminal case).

*United States v. Murphy*, [150] did not reverse Murphy's criminal conviction even though the trial judge went on vacation with the prosecutor of Murphy's case immediately after sentencing Murphy. Yet it was more than just a vacation ("secret plans") that the judge, prosecutor, and their families took in 1984: "The relation between Judge Kocoras and U.S. Attorney Webb was unusual. … A social relation of this sort implies extensive personal contacts between judge and prosecutor, perhaps a special willingness of the judge to accept and rely on the prosecutor's representations." [151] On the other hand, in this case, the principal defense lawyer for Murphy and that lawyer's family *had also* vacationed with the judge and his family in 1982. The court refused to reverse the conviction. [152] If the defendant had raised the matter earlier, "U.S. Attorney Webb might have stepped aside and allowed the case to be tried by a member of his office." [153]

### § 10.2-2.11(d)(2)(v)(4) When the Judge's Former Law Clerk Represents a Party

The law does not require a judge to disqualify herself automatically from presiding over a case simply because her former law clerk represents a party in the litigation. Because many clerks continue to practice law in the jurisdiction where they served as clerks, an absolute disqualification rule would make law firms reluctant to hire these clerks and thereby deter highly qualified people from serving as law clerks.

No specific provision of the Model Judicial Code creates a *per se* rule prohibiting a judge from hearing a case where the judge's former law clerk is participating as a lawyer. Rule 2.11(A)(6)(a) of the 2007 Code, and Canon 3E(1)(b) of the 1990 Code, do not apply because the law clerk was not a lawyer with whom the judge had previously practiced law. Rule 2.11(A)2) and Canon 3E(1)(d)(ii) are also inapplicable unless the former law clerk is the judge's spouse or a person within the third degree of relationship to either the judge or her spouse.

However, there are ethical restrictions on the former law clerk because of that former clerk's prior association with the judge. These restrictions are found in the Model Rules of Professional Conduct, which govern lawyers. [154] They do not allow a lawyer to represent anyone in connection with a "matter" in which the lawyer "participated personally and substantially" as a law clerk to a judge, unless all parties to the proceeding "consent after consultation." If this section disqualifies a lawyer, no other lawyer in the firm may handle the matter unless the law firm imposes an effective screen on the former law clerk. [155] In other words, unless the law firm walls-off the former law clerk from his or her colleagues in the law firm, the rule imputes the

disqualification to all the members of the entire law firm. In practice, this disqualification is narrow because the definition of "matter" is relatively narrow, [156] and because screening serves to prevent imputation.

Although no general rule requires judicial disqualification because of the participation in a case involving the judge's former law clerk, there are specific situations that require judicial disqualification. A judge, in short, may have to disqualify himself under the catch-all provision of Canon 3E(1) [157] if his impartiality might reasonably be questioned because of his former law clerk's participation in the case. Consider the following cases to get a sense of the law in this area.

In *Simonson v. General Motors Corp.*, [158] a law student worked one day per week as a judicial intern while also being employed by a local law firm. In one case before the judge, the same law firm that employed the intern also represented the defendant. The plaintiff moved to reassign the case to another judge alleging that the intern's dual responsibilities created the "appearance of impropriety." The judge denied the motion and instituted the following procedures to insure that the judge's impartiality could not be reasonably questioned. He (1) instructed the student not to participate in the litigation as a judicial intern, (2) he instructed the law clerks not to give that student any assignments related to the litigation, or discuss the case with him, and (3) he instructed that student to make arrangements with his law firm not to perform legal services on this particular case. This case, in effect, presaged Model Rule 1.12(b) & (c) of the ABA Model Rules of Professional Conduct.

*Fredonia Broadcasting Corp. v. RCA Corp.*, [159] a 1978 case, reversed the trial judge because he did not disqualify himself when his former law clerk was an associate in the law firm representing one of the parties. The law clerk was on the judge's staff *during* the first trial and was employed by the law firm when the case was again before the judge on remand. The court of appeals required disqualification because the former law clerk "had been exposed to the trial judge's innermost thoughts about the case," and that gave the party represented by the clerk's law firm an unfair advantage in the case. The court emphasized, however, that it was not holding that a former law clerk could never practice before the judge, but in this particular case the law clerk was "actively involved as counsel for a party in a case in which the law clerk participated during his clerkship." [160] If this fact situation were to occur now, the judge could avoid disqualification if the law firm screened his former law clerk in accordance with Model Rule 1.12(c) of the ABA Model Rules of Professional Conduct.

### § 10.2-2.11(e) Disqualification for Personal Bias or Prejudice or Personal Knowledge of Facts

#### § 10.2-2.11(e)(1) Introduction

Rule 2.11A(1) [161] and 28 U.S.C.A. § 455(b)(1) provide that a judge must disqualify herself where she has "a personal bias or prejudice concerning a party, or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Section 455 of Title 28 of the U.S. Code, unlike Rule 2.11A(1), does not categorize the specific instances requiring disqualification as examples where a judge's impartiality might reasonably be questioned. Section 455(b) begins, "He shall also disqualify himself in the following circumstances." The framers of this statute did not intend that this language change would alter application of the federal statute from situations where Rule 2.11A(1) would require disqualification.

#### § 10.2-2.11(e)(2) Extrajudicial Bias

Both Rule 2.11(A)(1) [162] and federal law [163] require disqualification only if there is bias concerning a *party*, as distinguished from bias concerning an *issue* in the case. This distinction reflects the Judicial Code's intent that a judge need not disqualify himself if bias arises from his beliefs as to the *law* that applies to a case. A judge may have fixed beliefs about principles of law that would not mandate disqualification. Otherwise, a judge could not write books or articles or speak on legal subjects—all activities expressly permitted under Canon 4B. Indeed, after deciding cases and creating precedent for years, if would be incredible if the judge did not form some fixed ideas about the law. [164]

Consider *Papa v. New Haven Federation of Teachers*. [165] In this case, the trial judge was presiding over an attempt to enjoin teachers from striking. The defendants sought to disqualify the judge and asserted that the judge was biased because of a speech he had earlier given criticizing teachers' strikes in general. The judge gave this speech before the case arose and did not specifically address the case. Although the judge's statements were extrajudicial in nature, the state supreme court analogized the judge's statements to judicial expressions of opinion about specific laws, the obligation to obey those laws, and the consequences of disobedience. Under this analysis, we know that disqualification is not required for judicial expressions of opinion about the law. Therefore, the court concluded that extrajudicial opinions on points of law should also not require disqualification as long as the comments do not raise a reasonable question that the judge will prejudge a pending or impending case.

However, the court disqualified the judge in *Papa* for giving another interview to a reporter concerning the pending proceeding. That interview violated what was then called Canon 3B(9). [166]

Similarly, *In the Matter of Sheffield*, [167] was a case in which the court suspended a judge for two months without pay because (among other things) he held a telephone interview with a reporter during which he commented on the merits of a pending case. The state Supreme Court held that clear and convincing evidence did not establish that Judge Sheffield had acted in bad faith in issuing a show cause order or erroneously finding in contempt of court an individual who merely wrote a letter to the editor of a newspaper criticizing a decision of trial court. However, Judge Sheffield's failure to abstain from public comment about a pending proceeding and his failure to disqualify himself where his impartiality might be questioned warrants the suspension.

The evening before Judge Sheffield held the contempt hearing in his court on the published letter, a reporter called the judge. During the conversation with that reporter, the judge said: “The contempt speaks for itself …. I think it's pretty obvious who she [the author of the letter to the editor] is talking about. Everybody in Abbeville knows what she is talking about. Just because she doesn't name any names [in her published letter to the editor] doesn't lessen what's been done.” Judge Sheffield also suggested to the reporter that “the article [had] false information in it,” and that the reporter “might want to look at the libel laws; call an attorney.” [168] Judge Sheffield argued that his comments to the reporter “were merely abstract legal explications of the pending contempt hearing—a part of his judicial duty.” The state supreme court disagreed, and concluded that the “evidence is clear and convincing that certain of his comments to the reporter were on the merits, and thus were prohibited” [169] by a provision of the Alabama Code that corresponds to Canon 3B(9) of the ABA Model Judicial Code.

### § 10.2-2.11(e)(3) The Extra-Judicial Source Rule

If the judge rules against a party, that ruling does not normally constitute improper grounds for disqualification if the judge bases her judgment on *facts* learned about a party during the very proceeding at which the judge sits. [170] The judge, after all, is supposed to make judgments and decisions based on what she learned at the hearing.

> [A] judge is not merely a passive observer. He must … shrewdly observe the strategies of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions. [171]

Similarly, courts generally hold that a judge's participation over separate jury trials of codefendants does not constitute reasonable grounds for questioning the judge's impartiality in a subsequent jury trial involving a remaining codefendant. [172]

However, the situation is different if the source of this bias as to facts was an “extrajudicial source.” [173] The alleged bias and prejudice is disqualifying if it stems from an extrajudicial source and results “in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” [174]

Although a judge generally does not have to disqualify himself if he acquires knowledge through his judicial duties, the fact that a judge's remarks or behavior take place in the judicial context does not exclude them from scrutiny and from requiring recusal if they reflect such pervasive prejudice as would constitute bias against one of the parties. Thus, in *State v. Harry*, [175] the Court ordered the judge to recuse himself for prejudicial statements made in a judicial context. According to the affidavit of the defendant's attorney, the judge accused the defendant's attorney of delaying tactics and informed the attorney that if the attorney allowed an innocent man to go on trial because of the defendant's silence, the judge would make it difficult for the defendant at his own trial. The prosecution claimed the judge should not recuse himself because the statements did not arise from an extrajudicial source. The state Supreme Court did not rely on what is now Rule 2.11(A)(1), but rather required disqualification because of a violation of the requirement that the judge be patient, dignified, and courteous to litigants, lawyers, and others. [176]

### § 10.2-2.11(e)(4) Intemperate Remarks

It may not always be easy for a judge to project a calm attitude and to remain detached when those around him have lost their composure, but the judge must practice self-restraint nonetheless. The general principle is simply stated: "[T]ribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial. … When the judge joins sides, the public as well as the litigants become overawed, frightened and confused." [177]

Consider, for example, *Nicodemus v. Chrysler Corp.*, [178] where the plaintiff sought reinstatement in an unfair employment practices suit. The judge, who granted the plaintiff's preliminary injunction, had stated:

> This thing is the most transparent and the most blatant attempt to intimidate witnesses and parties that I have seen in a long time. I don't believe anything that anybody from Chrysler tells me because there is nothing in the record that is before me and in my experience in dealing with this case that gives me reason to believe that they are worthy of credence by anybody. They are a bunch of villains and they are interested only in feathering their own nests at the expense of everybody they can, including their own employees, and I don't intend to put up with it. [179]

For good measure, the trial judge added that he was awarding $1000 in attorney fees "not necessarily because the employment laws allow it but because I believe" that the company is trying to "defy the court."

Because these and similar remarks were testy, unrestrained, and "unsupported by the record," the appellate court reversed the preliminary injunction and disqualified the trial judge from further considering the case. The Court of Appeals observed that, "this is not our first encounter with intemperate language by this particular district judge." [180]

With *Nicodemus*, it is useful to contrast another decision, *In re International Business Machines Corp.* [181] In this case, IBM claimed that the trial judge was biased because he decided 86 percent of 10,000 oral motions and 74 out of 79 written motions against IBM and in favor of the government. The appellate court held that adverse rulings alone do not create the appearance of impartiality. "A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias." [182]

One party may lose most of the motions it makes simply because it made many weak motions that the judge should reject. Statistics alone are not sufficient to demonstrate this type of bias. Judging, unlike baseball, is a not a game of statistics.

### § 10.2-2.11(e)(5) The Judge's Religion

*Idaho v. Freeman* [183] involved a judge hearing a case concerning the constitutionality of Congress' extension of the ratification period for the Equal Rights Amendment. The Mormon Church generally opposed the ERA, and the judge was a Mormon and a regional representative of that Church. However, he was never required nor requested to promote the church's position. The judge's duties as a regional representative did not relate to the ERA. The judge concluded that his religious affiliation did not

require him to disqualify himself. The trial judge later held that the extension was unconstitutional, a ruling that the United States Supreme Court dismissed as moot.

Any other conclusion would have grave consequences. Would the ethics rules require a judge who believes in God to disqualify himself in a case brought by an atheist claiming that a city display of a Christmas tree violates the establishment of religion clause? If the rules disqualify a judge who believes in God, would not the rules also disqualify an atheistic judge?

The ABA Model Code is just a model. It does not become law unless the court adopts it as a court rule, or the legislature enacts the ABA rules as a statute. In all cases, the rules comes state action. That means that the rules must comply with the Constitution, and our Constitution forbids any religious test for government office. [184]

To deal with this issue, the ethics rule is that religious beliefs (or the lack of them) do not, by themselves, mandate disqualification.

### § 10.2-2.11(e)(6) Personal Bias—Other Examples

Instances of actual bias or prejudice, like the appearance of impartiality, are often fact-bound and must be examined on a case-by-case basis. The following cases explore several situations where courts have found actual bias or prejudice, or the lack thereof.

In *Commonwealth v. Leventhal*, [185] the defendant moved for a new trial, asserting that the trial judge was biased for numerous reasons. The defendant alleged the judge had an "intimate relationship" with the chief prosecution witness. However, this "intimate relationship" only amounted to the judge's having taught the witness in a bar review course 35 years previously and having written a letter of recommendation for admission to the bar. The court dismissed this ground as frivolous.

The defendant also claimed that the judge made prejudicial remarks during the trial, which supposedly indicated to the jury that the judge believed the defendant was guilty. The court rejected this claim as well, holding that these remarks did not demonstrate bias, for the judge normally has a great deal of discretion in commenting on the trial to the jury.

Finally, the defendant argued the judge was biased because the judge was a defendant in a civil suit that the defendant had brought against the judge. The court noted that a lawsuit between a judge and a party may require disqualification in certain circumstances, but a party cannot disqualify a judge simply by bringing a separate action against him after the principal suit has commenced. It would then be too easy for a litigant to create a "conflict" and go judge shopping.

In*Department of Revenue v. Golder*, [186] the issue in the underlying case was the constitutionality of an estate tax statute. At the time of the statute's enactment, the justice writing the opinion in the case had been special tax counsel to the Florida House of Representatives and had prepared a preliminary memorandum of law supporting the constitutionality of the proposed statute. The judge's prior involvement with the statute did not constitute bias because the views expressed in the memorandum were developed independently of any particular controversy or party. The special tax counsel was involved with a legal issue, not with a particular legal case. Also, the views as to the constitutionality of the statute were not extrajudicial.

In *State v. Linsky*, [187] New Hampshire sought to enjoin the defendants from demonstrating at a nuclear power plant. The defendants alleged the judge had prejudged the issues because of certain statements he made at the arraignment. However, the court held the judge was not biased because the judge subsequently had stated that he was not prejudging the defendants' guilt and would reach a verdict only on the evidence. The defendants also claimed the judge had personal knowledge of disputed evidentiary facts through newspapers, radio, and a meeting between the judge and defense counsel, thereby creating the possibility that the judge could be called as a witness.

The *Linsky* court held that such knowledge did not require disqualification because the facts of which the judge had knowledge would probably not be material at trial and could be obtained from other sources. One might also add that if knowledge gathered from news media mandated disqualification, then only judges who never read newspapers, listened to the radio, or television watched could hear cases.

Finally, *Linsky* held that it would be inappropriate for defense counsel to object to his own meeting with the judge; if defense counsel had not wanted the meeting, he should not have had it. To hold otherwise would allow counsel to harvest the seeds of disqualification that the lawyers had planted themselves.

Just as lawyers may not force a judge to be disqualified because of action that the lawyers seeking disqualification has taken, so also a litigant should not be able to impose disqualification on a judge because of the litigant's improper actions. In *State v. Ahearn*, [188] the defendant was charged with assault and robbery with a deadly weapon. The defendant appeared *pro se* and physically attacked the judge during the trial. The appellate court noted that "much of the defendant's conduct was intended to harass the court and generally disrupt the judicial process." The defendant sought reversal of his conviction because of an unfair trial. One of the grounds the defendant asserted was that the judge should have disqualified himself because he had physically attacked the judge!

*Ahearn* held that the defendant's attack did not require disqualification because it was a "scheme" to drive the judge out of the case. The defendant also argued that his harsh sentence demonstrated the judge's bias. The court noted that the judge probably should have recused himself because his impartiality might reasonably be questioned. But the sentence itself did not demonstrate actual bias in light of the defendant's crimes and his twelve previous felony convictions. The failure to disqualify, therefore, was within the trial judge's discretion and was not reversible error.

Commonwealth v. Boyle, [189] held that bias did not exist just because a trial judge's rulings in a former trial were similar to rulings in a pretrial proceeding. "If the rulings at the second trial constituted a fair exercise of discretion, the fact that a trial judge had previously ruled in a similar manner under similar circumstances is to be expected." [190] Similarly, a judge does not demonstrate partiality merely because his rulings in a proceeding tend to favor one party over the other. [191]

*United States v. Poludniak* [192] involved a judge presiding over a case where a U.S. Senator was an extortion victim. Earlier, in a newspaper article, the judge had stated that he hoped to talk with senators to obtain additional funds to hire more marshals for courthouse security. Because the Senator involved in the case was a victim, not a party, the judge did not have to disqualify himself.

With *Poludniak*, one should contrast, *United States v. Brown*. [193] In this case, the trial judge had stated to a third party, at a swimming pool, that he was going to preside over the defendant's trial and that he was "going to get that nigger." The court reversed defendant's conviction on appeal because the judge's offensive and biased statement did not "comport with the appearance of justice" and demonstrated the judge's personal bias. Furthermore "it could not be said from the record alone that appellant received a fair trial." [194]

Another case where the judge's remarks required his disqualification was *United States v. Holland*. [195] In the first trial of this case, the judge, with no objection from any counsel, had an unrecorded conversation with the jury in the jury room. The defendant, on appeal, argued that the judge's conduct was error and won a new trial. At the second trial, the same trial judge stated on the record that, because of the defendant's appeal, he was going to increase the defendant's sentence. On appeal from this second trial, the appellate court held that the judge's remarks after the second trial demonstrated actual bias as well as the appearance of partiality. The Court remanded the case for a third trial and disqualified the trial judge from presiding over further proceedings in the case.

### § 10.2-2.11(f) Disqualification When The Judge Or Related Person Is A Party Or Lawyer, Has An Interest In, Or Is A Witness In The Proceeding

#### § 10.2-2.11(f)(1) Introduction: the Degrees of Relationship

#### § 10.2-2.11(f)(1)(i) Domestic Partners

Section 2.11(A)(2) of the 2007 Code corresponds to Canon 3E(1)(d) of the 1990 Code. Both sections are similar except that the 2007 Code broadens disqualification to cover "domestic partners." A "domestic partner" is "a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married." [196]

The framers of the 2007 Code added that term because such "commonplace 'non-traditional' relationships" exist outside marriage and "are deserving of treatment equal to that afforded marital relationships in evaluating their potential conflict-of-interest implications under the Rules." [197] Hence, the Judicial Code treats domestic partners as equivalent to spouses for purposes of evaluating economic conflicts under Rule 2.11(A)(2).

Rule 2.11(A)(2) thus covers the judge, the judge's spouse, a domestic partner, a person "within the third degree of relationship" to either of them, or the spouse or domestic partner of any of the foregoing persons. If any one of these persons is a party, officer, partner, director or trustee of a party; is a lawyer in the proceeding, "who has more than a *de minimis* interest that could be substantially affected by the proceeding"; or is likely to be a material witness, then Rule 2.11(A)(2) applies. And, it says that in all such cases, the judge must disqualify himself.

This disqualification provision is so expansive because the Code's drafters felt "that to maintain the appearance of impartiality the disqualification standard should encompass all persons within the third degree of relationship to a judge or his spouse even though the relationship arises only through marriage." [198]

### § 10.2-2.11(f)(1)(ii) Third Degree of Relationship

The degree of relationship, referred to in Canon 3E(1)(d), is measured according to the civil law system. The civil law system counts as one degree each person in the chain from the judge to the common ancestor, and from the common ancestor to the person whose relationship raises the issue.

Happily, we do not have to remember all that, because the Judicial Code defines the third degree of relationship to include the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. [199]

Of course, even if the judge's or his spouse's relative does not fall within the third degree of relationship, the judge still may be disqualified under the general, catch-all impartiality standard of Rule 2.11(A) Canon 3E(1), [200] that is the "judge's impartiality might reasonably be questioned."

Under these principles, a judge must recuse if faced with the same situation where the judge's brother appeared as prosecutor before him. [201] However, if the local judicial ethics rules do not mandate this disqualification, some courts do not mandate disqualification in criminal cases simply because of the trial judge's family relationship to the prosecuting attorney [202] was insufficient to raise a conclusive presumption of actual bias, for due process purposes.

As a matter of *constitutional* law, a judge's failure to disqualify himself simply because his nephew appears in the case as a prosecutor does not serve to overturn the conviction. For example, in *Railey v. Webb*, [203] the defendant sought to withdraw his guilty plea because the trial judge was the nephew of the state prosecutor, who personally participated in some of the proceedings. This situation, the defendant alleged, created an "impermissible appearance of judicial bias" that should have required the judge to recuse himself sua sponte. [204] Defendant sought habeas relief in federal court from his state court conviction. The court found no due process error meriting habeas relief.

### § 10.2-2.11(f)(2) Party, Officer, Director, Partner, or Trustee of a Party to the Proceeding

Rule 2.11(A)(2)(a) [205] —and 28 U.S.C.A. § 455(b)(5)(i)—requires disqualification if the judge, or the judge's spouse, domestic partner, or close relative ("third degree of relationship") is a party to the proceeding or an officer, director, general partner, managing member, or trustee of a party.

The Model Code, in 2007, added the categories of partner and managing member. The Code does not define "managing member." "Partner" is self-explanatory, because it is a legal term with a legal definition.

The Reporters' Notes do not explain what a "*managing member*" is. The Notes simply say that the drafters added "partner" and "managing member" in order to "ensure completeness of the list." [206] Presumably, the drafters intend to include any organization that is a party to the suit where the judge was involved in any managerial capacity of that organization. Later, a Comment to Rule 2.11 explains—in defining "economic interest"—that this Rule, for purposes of disqualification, is concerned with the judge participating in the management of any legal or equitable interest. [207] Hence, no matter what the law calls the entity, and no matter what is the judge's title within that organization, if the judge participates in the management of the entity and if that organization is a party, then the judge must disqualify himself.

We can more easily understand the application of this rule if we look at a few examples.

For example, in *Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded*, [208] the court ruled that a judge must recuse himself because his brother was a member of the plaintiff/board.

An often-cited decision is *Liljeberg v. Health Services Acquisition Corp.* [209] In 1977, pursuant to a plan to construct and operate a hospital, Liljeberg formed a corporation to apply for the necessary state "certificate of need." During the next two years, Liljeberg negotiated with Loyola University over a proposal to purchase (as the hospital site) a portion of Loyola's land for several million dollars. This negotiation also involved a plan to rezone Loyola's adjoining land, thereby greatly increasing its value. The federal trial judge (who presided over the bench trial) was a member of, and regularly attended the meetings, of Loyola's Board of Trustees. The minutes indicated the board members regularly discussed the negotiations' progress. The minutes also reflected that Loyola's interest in the project was dependent on the issuance of the certificate.

Liljeberg's prevailing in the litigation was central to Liljeberg's ability to buy Loyola's land. The judge ruled for Liljeberg and thus benefitted Loyola. Health Services moved to vacate the judgment, alleging that the trial judge should have disqualified himself under the relevant federal statute, § 455. [210] At a hearing to determine what the trial judge knew, he testified that he knew about the land dealings before plaintiffs filed the case, but that he had forgotten about them during the pendency of the matter. He learned again of Loyola's interest after his decision, but before the expiration of the 10 days in which the loser could move for a new trial. Even then, the judge did not recuse himself or tell the parties what he knew.

The Court of Appeals reversed the judgment in favor of Liljeberg in the underlying case and the Supreme Court affirmed (5–4). "Scienter is not an element of a violation of § 455(a)." [211] Judges need not "perform the impossible by disqualifying themselves based on facts they do not know," because, in appropriate cases, the judge can apply the disqualification retroactively to rectify an oversight once the judge concludes that 'his impartiality might reasonably be questioned.'" [212]

While harmless error could justify failing to reverse a judgment in some cases, in this instance the appearance of impropriety required reversal of the judgment because there was "ample basis in the record for concluding that an objective observer would have questioned" the trial judge's impartiality. Even though the judge's failure to disqualify himself "was the product of a temporary lapse of memory, it was nevertheless a plain violation of the terms of the statute." [213] Moreover, the trial judge's failure to stay informed of his fiduciary interest in Loyola University "may well constitute a separate violation of § 455." [214]

### § 10.2-2.11(f)(3) Acting as Lawyer in the Proceeding

#### § 10.2-2.11(f)(3)(i) General Principles

Rule 2.11(A)(2(b) [215] —and 28 U.S.C.A. § 455(b)(5)(ii)—requires disqualification if a person falling within that section is acting as a lawyer in the proceeding. People falling within this prohibition include the judge's spouse or domestic partner, or

any relative of the third degree of relationship to the judge or the judge's spouse or the judge's domestic partner (or the spouse of such a relative) of either the judge or the judge's spouse. [216]

### § 10.2-2.11(f)(3)(ii) Judge Related to Lawyer in a Law Firm Representing a Party

#### § 10.2-2.11(f)(3)(ii)(1) No Imputation for Lawyer-Relative to Other Lawyers in the Law Firm

The Commentary to Rule 2.11(A)(2)(b) [217] adds an important caveat to this disqualification provision. Rule 2.11(A)(2)(b) does not automatically disqualify a judge simply because a lawyer in the proceeding is a member of the law firm with which a relative of the judge is affiliated. In other words, this Rule *does not impute* the disqualification caused by the relative's *personal* appearance in the action to the members of that relative's firm.

Other provisions, in the context of particular facts, might serve to disqualify the judge, but Rule 2.11(A)(2)(b) does *not* disqualify the judge simply because the relative of the judge is a member of the law firm that appears before the judge. For example, a judge may disqualify herself under the catch-all provision of Rule 2.11(A) or Canon 3E(1) if her impartiality might reasonably be questioned. A judge may also be disqualified under Rule 2.11(A)(c) or Canon 3E(1)(d)(iii) if the judge knows that the lawyer-relative has an interest in the law firm that could be substantially affected by the outcome of the proceeding.

Let us now turn to a few cases illustrating these principles.

#### § 10.2-2.11(f)(3)(ii)(2) General Principles

Consider, for example, *Potashnick v. Port City Construction Co.*, [218] where the Court took an unusually broad view of judicial disqualification. The judge's father was the senior partner in the law firm representing the plaintiffs. [219] The judge's father, however, was not participating in the case. The court held that the judge was not disqualified under 28 U.S.C.A. § 455(b)(5)(ii)—which corresponds to Rule 2.11(A)(2)(b) and Canon 3E(1)(d)(ii). But then, the Court held that the judge should be disqualified under § 455(b)(5)(iii)—which corresponds to Rule 2.11(A)(2)(c) Canon 3E(1)(d)(iii). The judge's father received a one percent share of the firm's income, and the Court determined that the one percent share was more than a *de minimis* interest that the proceeding could substantially affect.

The Court's conclusion is easier to state than to justify. The outcome of *Potashnick* could not affect the fee because the law firm based its fee on an hourly rate. The Court argued that disqualification is nonetheless required because the outcome of the case has the *potential* to affect the lawyer-relative. The Court said that this potential existed because the law firm could have handled the case on a contingent fee basis, or a favorable result may have justified a higher fee. Furthermore, the Court claimed, the decision in the case could affect the firm's reputation, its relationship with its clients, and its ability to attract new clients. Hence, the Court concluded, the judge's father had interests that could substantially be affected by the outcome of the case. The Fifth Circuit in *Potashnick* broadly held that "when a partner in a law firm is related to a judge within the third degree, that partner will always be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's law firm." [220] This interpretation of the ethics rules creates, in effect, an automatic imputation despit the drafters intent that there be no automatic imputation.

Consequently, the Second Circuit, in *Pashaian v. Eccelston Properties, Ltd.* [221] rejected that *per se* rule and concluded that one must look at the totality of the circumstances. The Second Circuit denied the motion to disqualify the trial judge; the record below showed that the law firm in question "had sixty partners as of March 1995, [and] had a gross revenue in 1994 of approximately $117,500,000." The trial judge considered, under seal, the extent of the relative's participation in the net income of the Cahill law firm, and the amount at stake in the present litigation. The trial judge, Judge Martin, concluded that the relative's "interest would not be 'substantially affected' by the outcome of this case." Judge Martin recognized that cases can add to the reputation of major law firms in the City of New York. Nonetheless, he concluded that "insofar as the reputation of [the law firm] is concerned, this matter is not of that significance to either add or detract from its reputation in the City of New York and, indeed, even in the nation or perhaps the world—given its offices in Europe." [222]

Similarly, in *United States ex rel. Weinberger v. Equifax, Inc.*, [223] the judge's son was an associate in the law firm representing the defendant, but the son did not personally participate in the case. The judge was therefore not disqualified under 28 U.S.C.A. § 455(b)(5)(ii). The Court also held the judge was not disqualified under § 455(b)(5)(iii) because, as an associate, the son did not have an interest that could be substantially affected by the outcome of the case. Regarding the impartiality standard under 28 U.S.C.A. § 455(a), the Court held that the judge did not abuse his discretion in concluding that his impartiality could not reasonably be questioned. [224]

In *SCA Services, Inc. v. Morgan*, [225] on the other hand, the Seventh Circuit interpreted the disqualification provisions broadly to presume disqualification and grant mandamus. The judge's brother was a partner in the law firm representing one of the parties, but he did not directly participate in the case, thereby precluding disqualification under 28 U.S.C.A. § 455(b)(5)(ii).

Nonetheless, the Court required disqualification under both § 455(b)(5)(iii) and § 455(a). The Court argued that the brother of the judge, who was not working on the case, could still benefit. It "is arguable that Morgan's firm will earn substantial legal fees in this matter, a percentage of which will accrue to Donald A. Morgan." [226] The Seventh Circuit thus converted a rule that does not automatically impute the disqualification of the brother to all other members of the law firm into a rule that does automatically impute, requiring the judge's disqualification.

The law firm responded that if Bret S. Babcock, the attorney who was actually working on the case, was not working on this case, he would be working productively on another case. Any "income differences based on the outcome of this case would clearly not be substantial." [227] Whatever income that the client offered this firm (at an hourly rate) would be income that the firm would receive from another client. Each client imposes an opportunity cost. If you take one client, you cannot take another client because there are only so many hours in a day (a fact that young associates eventually discover). The fact that the law firm makes an hourly fee in a case does not mean that the brother of the judge has any special financial advantage. If the judge disqualified himself, the law firm would make the same fee. If the law firm refused to take the case or disqualified itself, it would take another case and make the same fee. In any situation, the brother would share in the fees generated by the case.

The Seventh Circuit ultimately relied on the argument that is the last resort of any ethics argument—the judge's impartiality could be reasonably questioned because it is reasonable to assume that brothers enjoy a close personal and family relationship and would probably support each other's interests. This broad ruling appears in effect to, create mandatory disqualification for federal judges who have relatives who are members of law firms when other members of those law firms appear before the federal judge. Yet, the drafters of the Model Code and the drafters of the federal statute rejected this *per se* disqualification because they rejected imputation of the disqualification of one lawyer in a law firm to every lawyer in the law firm. One might just as well ask if it violated the appearance of impartiality for the Seventh Circuit to create a mandatory rule when the drafters of the federal law and the ABA Model Code rejected a mandatory rule.

Contrast *S.J. Groves & Sons Co. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 627*, [228] another federal case where the judge's brother was a partner in the law firm representing one of the parties. In this case, however, the law firm withdrew from the case before the judge had made any discretionary rulings. The court held that the judge did not abuse his discretion in refusing to disqualify himself where the firm had no continuing interest in the case and there was no evidence that the judge forced the firm's withdrawal through delay or other means. The court noted, however, without explanation, that it probably would be better for a judge to recuse himself in such circumstances to avoid hardship on the parties.

### § 10.2-2.11(f)(3)(ii)(3) Remedies

*McCuin v. Texas Power & Light Co.*, [229] another federal decision, added an important qualification to the situation where the judge's close relative is a lawyer in the firm representing one of the parties. In that case, six years after the plaintiffs filed a discrimination suit, defendant added as co-counsel the trial judge's brother-in-law. In a companion case, another defendant added the brother-in-law shortly after it filed its answer.

*McCuin* was concerned that a litigant could disrupt preparation for trial and disqualify a judge whose rulings a litigant expects to be unfavorable by "the simple expedient of finding one of the judge's relatives who is willing to act as counsel …." Congress, however, has not given federal litigants the right of peremptory challenge to a judge.

Thus *McCuin* interpreted § 455 to mean that "counsel may not be chosen solely or primarily for the purpose of disqualifying the judge." The district court threatened with such maneuvers "need not confine itself to grievance proceedings against errant counsel."

The Fifth Circuit found that in several cases, the defendants employed the brother-in-law of the judge before whom the case was pending. This relative of the judge actually and personally participated in each of the cases. He was involved in discovery. He also enrolled as counsel of record.

This first judge therefore assigned the case to a different judge (the second judge). This second judge found that, in each case, the defendants had engaged the judge's brother-in-law as a stratagem in order to disqualify the judge. The employment of the brother-in-law was really a "sham."

The problem was that the first judge (who was the Chief Judge) decided which new judge should hear the case. "To permit a disqualified chief judge to select the judge who will handle a case in which the chief judge is disabled would violate the congressional command that the disqualified judge be removed from all participation in the case." [230] The disqualified judge should not pick his successor. People might think that the first judge picked a particular new judge for his views. "Congress intended the statutory antisepsis to be absolute in order to avoid any bacterium of impugnment." [231]

In such cases, the Court held, "the judge to whom each case was initially assigned was required to disqualify himself as soon as he became aware that his brother-in-law had been enrolled as counsel. He, therefore, should not have taken any further action in either case, and the reassignment order was improper." [232] Accordingly, the Court remanded the cases for reassignment in an objective manner not involving the disqualified judge. If a local, nondiscretionary rule already exits for reassignment, the court should follow that. If not, the case should be referred to the senior active judge of the district as Acting Chief Judge for reallotment. [233]

The next issue the *McCuin* Court turned to was the question of whether it was ethical for an attorney to accept retention solely as a device to disqualify the judge because the attorney is a relative of the judge. Commentators have expressed concerns with this practice. [234]

*McCuin* agreed that lawyers should not accept cases when they do so for the sole reason of disqualifying the judge. Because no ethics rule specifically applies to this situation, the Court, in order too reach its conclusion, relied on the appearance of impropriety:

> A lawyer's acceptance of employment solely or primarily for the purpose of disqualifying a judge creates the impression that, for a fee, the lawyer is available for sheer manipulation of the judicial system. It thus creates the appearance of professional impropriety. Moreover, sanctioning such conduct brings the judicial system itself into disrepute. [235]

The Court remanded for the lower court to look into the motives of the litigant in hiring the judge's relative, although it acknowledged that, "by permitting inquiry into these motives, we open the door to a host of problems." [236] The Court concluded that federal litigants do not have any right of peremptory challenge to a judge. Thus, the court interpreted § 455 to mean that "counsel may not be chosen solely or primarily for the purpose of disqualifying the judge." [237] The Court may *disqualify counsel* for breaching his ethical duties.

We do not know how often lawyers engage in this stratagem. We do know that other cases have reported that it occurs. [238]

### § 10.2-2.11(f)(3)(ii)(4) Disqualification in the U.S. Supreme Court

In *Microsoft Corp. v. United States*, [239] the Court denied a petition for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit. In the course of this denial, Chief Justice Rehnquist explained why he was *not* disqualifying himself. Microsoft Corporation retained a Boston law firm as its local counsel in *private* antitrust litigation, and his son, James, is both a partner in that firm, and one of the attorneys working on those cases. The Chief Justice, after he "reviewed the relevant legal authorities and consulted with [his] colleagues" decided not to disqualify himself from these cases. [240]

First, he concluded that under § 455(b)(5)(iii) of title 28, there is no reasonable basis to conclude that the interests of his son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. "It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm's usual rates. Even assuming that my son's nonpecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those interests when neither he nor his firm would have done any work on the matters here." [241]

Second, Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." What matters under § 455(a) is not the reality of bias or prejudice but its appearance. The test for the "appearance of impropriety" is an objective one, based on the perspective of a *reasonable observer who is informed of all the surrounding facts and circumstances*. [242]

Using that test, Chief Justice Rehnquist concluded that he would not disqualify himself. Because his "son's personal and financial concerns will not be affected by our disposition of the Supreme Court's Microsoft matters," he did not "believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court." [243]

The Chief Justice candidly acknowledged that a decision by the Supreme Court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust suits in other courts. His son's representation and the matters before this Court related to Microsoft's potential antitrust liability. However, the U.S. Supreme Court is somewhat unique. By "virtue of this Court's position atop the Federal Judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides." [244]

To this consideration, one must add another. Unlike the situation that exists in a District Court or a Court of Appeals, which sits in panels, there is no way to replace a recused Justice. "Not only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court." [245]

This principle counsels and advises against reading the disqualification rules too broadly, particularly when they apply to the highest courts of each state or to the U.S. Supreme Court. We sometimes think, loosely, that ethics is good and that therefore more is better than less. But "more" may not be better if the "more" exacts higher costs. A requirement that imposes unnecessary disqualifications levies costs on the judicial system and the litigants, and that is something that judges must consider when applying the "appearance of impropriety" standard.

On the other hand, there is no "duty to sit" that requires Supreme Court Justices to sit. If the federal statutes or ethics rules disqualify a Justice, that Justice should not sit. He or she does no favors to the Court by remaining part of the nine justices when the court rules or relevant statutes command otherwise. One should not read the disqualification rules too broadly, just as one should not read them too narrowly, particularly when we are talking about the various disqualification rules that do not have the

vagueness about them that is inherent in the fuzzy phrase, "appearance of impropriety." There are real costs to the legitimacy of the system when Justices do not disqualify themselves when they should recuse.

The Supreme Court is "supreme," and no other court can discipline one of its members, but that truism does not mean that the Justices can excuse themselves from following the law. Thus, Chief Justice John Roberts, took the occasion of his 2011 Annual Report on the Judiciary, to reassure us that the Justices do follow the relevant statutes and ethics rules, even if they are not under a legal compulsion to do so:

> All Members of the Court do in fact consult the Code of Conduct [of the Federal Judicial Conference] in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since, as the commentary accompanying Canon 1 of the Code explains, the Code "is designed to provide guidance to judges." … The Justices, like other federal judges, may consult a wide variety of other authorities to resolve specific ethical issues. They may turn to judicial opinions, treatises, scholarly articles, and disciplinary decisions. They may also seek advice from the Court's Legal Office, from the Judicial Conference's Committee on Codes of Conduct, and from their colleagues. For that reason, the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance. But as a practical matter, the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues. [246]

### § 10.2-2.11(f)(3)(iii) More than a *de minimis* Interest that the Proceeding Could Substantially Affect

Rule 2.11(A)(2)(c) [247] provides that the judge must disqualify himself if the judge, the judge's spouse or domestic partner or a person within the third degree of relationship to any of them, has an interest that the proceeding could "substantially affect" if that interest is "more than *de minimis*."

#### § 10.2-2.11(f)(3)(iii)(1) Knowledge

First, the judge must "know" about this interest. The judge may not know all the interests of his domestic partner or other persons in the litany of Rule 2.11(A)(2)(c). "Know" does not mean, "should have known," or "likely to know." It means, "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." [248]

"Actual knowledge" does not mean willful blindness or studied ignorance. Rule 2.11(B) provides:

> A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household. [249]

Rule 2.11(A)(3) governs economic interests. Rule 2.11(A)(2)(c) governs any interest, economic or otherwise. This Rule mandates disqualification when a judge knows that a person covered under this section has: (1) more than a *de minimis interest* and (2) this interest "could be substantially affected by the proceeding."

#### § 10.2-2.11(f)(3)(iii)(2) *De minimis*

The ABA Code defines "*de minimis*" as "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." [250] Rule 2.11(A)(2)(c) says this interest must be "more than" a *de minimis* interest. The Code is telling us that the interest must be more than insignificant. This double negative is grammatically equivalent to "significant." But, given the convoluted way that the drafters constructed this language, the Code seems to be telling us that the interest need not be significant, as long as it is more than insignificant. In other words, Rule 2.11(A)(2)(c) would not require the judge's disqualification in cases where the interest is so insignificant that it could not raise a reasonable question as to a judge's impartiality. [251]

If the interest is more than *de minimis*, then the judge must disqualify himself if the proceeding could substantially affect the interest at issue. The corresponding federal law does not have the "*de minimis*" standard. It simply provides that the judge must

disqualify herself if she or her spouse "or a person within the third degree of relationship to either of them, or the spouse of such a person" has any "interest that could be substantially affected by the outcome of the proceeding." [252]

In short, Rule 2.11(A)(2)(c) is really a catch-all provision that, in effect, advises the judge to disqualify herself if there is any other reason that merits disqualification.

### § 10.2-2.11(f)(3)(iv) Likely to be a Material Witness in the Proceeding

The last circumstance enumerated in Rule 2.11(A)(2)(d) [253] requires the judge's disqualification whenever a person covered in this section "is likely to be a material witness in the proceeding."

Note that it is not enough that the relative will likely be a witness, but the testimony also must be "material" before the judge is required to disqualify himself. Parties cannot mandate judicial disqualification by calling a judicial relative as a witness for a collateral matter.

The Judicial Rule does not explain what it means by "material," but the standard is probably analogous to that of Model Rule 3.7, of the Model Rules of Professional Conduct (the advocate-witness rule).

### § 10.2-2.11(f)(4) Disqualifications Based on Economic Interests

### § 10.2-2.11(f)(4)(i) Introduction

Rule 2.11(A)(3) provides that the judge must disqualify herself if the—

> judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding. [254]

### § 10.2-2.11(f)(4)(ii) Definitions

### § 10.2-2.11(f)(4)(ii)(1) Fiduciary

Rule 2.11(A)(3) uses various terms of art. The first one is "fiduciary." The definition is straightforward. A fiduciary includes relationships such as executor, administrator, trustee, or guardian. [255]

### § 10.2-2.11(f)(4)(ii)(2) Member of the Judge's Family Residing in the Judge's Household

The terminology section of the 2007 Model Code defines the long phrase, "member of a judge's family residing in the judge's household" as follows: "any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household." [256]

### § 10.2-2.11(f)(4)(ii)(3) Economic Interest

The two words, "economic interest" encapsulate a very extensive definition. First, the economic interest must be a legal or equitable interest.

This "economic interest" must also be, by definition, more than "*de minimis*," a term discussed more fully further below. In brief, a "*de minimis*" interest is "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." [257]

The Terminology section defines "economic interest" as follows:

> ownership of more than a *de minimis* legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does *not* include:
>
> (1) an interest in the individual holdings within a mutual or common investment fund;
>
> (2) an interest in 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 a director, an officer, an advisor, or other participant;
>
> (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
>
> (4) an interest in the issuer of government securities held by the judge. [258]

The Commentary to Rule 2.11 elaborates on the definition of "economic interest:"

> "Economic interest," as set forth in the Terminology section, means ownership of more than a *de minimis* legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:
>
> (1) an interest in the individual holdings within a mutual or common investment fund;
>
> (2) an interest in 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 a director, officer, advisor, or other participant;
>
> (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
>
> (4) an interest in the issuer of government securities held by the judge. [259]

For example, *In re Virginia Electric & Power Co.*, [260] involved VEPCO, a public utility, attempting to recover damages caused by defective pump supports for its nuclear power plant. Because of a fuel adjustment clause, the regulations permitted VEPCO to charge its customers directly for the amount that VEPCO claimed as damages. If VEPCO won its suit, it might be required to return to its customers that part of the award representing the surcharge. Customers could receive a $70 to $100 refund. The presiding judge was a VEPCO customer. The court upheld the judge's refusal to disqualify himself under this section because the judge merely had a contingent interest in the litigation, not a legal or equitable financial interest. VEPCO customers would only receive a refund if the Virginia State Corporation Commission authorized a return of the surcharge. The court also held that the judge did not have any other interest that would be substantially affected by the outcome of the case. [261]

Similarly, a judge's interest as a ratepayer or taxpayer should not be a "legal or equitable" economic interest. Such interests, however, could require disqualification if it is "any other" interest that is "more than *de minimis*" and could be "substantially affected" by the outcome of the proceeding. Canon 3E(1)(c).

Although the judge's economic interest must be legal or equitable before the judge will be disqualified, this interest need not have the traditional indicia of ownership, such as a title or other physical representation of ownership. In *Taylor v. Public Convalescent Service*, [262] a pauper was appealing a default judgment that had been entered in the justice of the peace court. Before the pauper could perfect his appeal, the justice of the peace had to determine the validity of the pauper's affidavit, claiming that he could not pay court costs. Under local rules, approval of the pauper's affidavit could deny (or, at least delay) the justice of the peace from receiving a portion of his income, because the justice of the peace received court costs as fees. The state supreme court required disqualification in this case because the justice of the peace had a direct economic interest

in whether or not the pauper would succeed on his affidavit. This structural set-up was defective because it gave the judge a financial interest in the controversy.

### § 10.2-2.11(f)(4)(iii) The Subject Matter in the Controversy

In order for Canon 3E(1)(c) to be applicable, the judge's economic interest must be "in the subject matter in controversy." In *Commonwealth v. Keigney*,[263] the defendant pled guilty to armed robbery while masked, larceny of a motor vehicle, and unlawfully carrying a revolver in a motor vehicle. The presiding judge, a former stockholder and board member of the bank named in the indictment, was an accommodation maker for a friend's $1,500 note held by the bank. In the defendant's motion for a new sentencing trial, he argued that the judge should have disqualified himself because of his past pecuniary relationship with the bank. The court held that in the absence of actual bias or prejudice, the judge was not required to disqualify himself. The disposition of the indictment could not have resulted in the judge having to pay the note.

### § 10.2-2.11(f)(4)(iv) A "*De minimis*" Interest

### § 10.2-2.11(f)(4)(iv)(1) The 1972 Judicial Code

The 1972 Judicial Code required the judge to disqualify himself or herself if he or she (or a spouse or minor child in his household) had a "financial interest" in the subject matter in controversy.[264] The 1972 Code, in general, defined "financial interest" to mean legal or equitable interest, "*however small.*"[265] The apparent harshness of this bright-line rule was mitigated by the fact that the parties and their lawyers could always waive this disqualification. Thus, under the 1972 Code, a judge would be disqualified from a case where International Business Machines is a party, if she owns even one share of IBM stock. However, the parties and lawyers could always implement a proper waiver.[266]

The drafters of the 1972 Judicial Code thought that it would be too difficult to interpret an ambiguous concept such as "substantial" financial interest. If the substantiality test were applied to financial interests, it would not be clear whether the judge's financial interest should be compared to the total of all financial interests of others in the party, or the total of all the judge's financial interests.[267] In either case, judges would have to expose the value of their entire stock portfolio to the parties in order to determine whether the judge's economic interest was "substantial." Many judges did not want to reveal that much information about their financial affairs. The 1972 Code, in short, picked a bright line that respected judges' privacy and protected litigants from having their case heard by judges with financial interests in one of the parties.

The "however small" qualification to the financial interest conflict can lead to some anomalous results. Consider, *In re Cement Antitrust Litigation* (MDL No. 296),[268] where the judge's wife owned some stock in several of the plaintiff class members. The judge recused himself at the defendants' request, but the plaintiffs sought to have the judge reappointed because of the complicated nature of the case. After concluding that unnamed class members were parties within the meaning of the federal disqualification statute,[269] the appellate court upheld the judge's decision to recuse himself.

The Ninth Circuit's disdainfully commented: "[A]fter five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke's $29.70."[270] On the other hand, one might point out in response that, whenever one draws a bright line, there will always be cases close to the line that some argue should go the other way. The alternative to a bright line is a vague one, and vagueness leads to more litigation, not less.

In *Union Carbide Corp. v. United States Cutting Service, Inc.*,[271] a divided panel of the Seventh Circuit tried to ameliorate the occasional harsh results of the disqualification rules by holding that, at least in some cases—in this case, in the midst of a large antitrust class action—a judge could "cure" the disqualification resulting from her husband's ownership of stock by selling the stock. Congress, in 1988, subsequently codified this result.[272]

### § 10.2-2.11(f)(4)(iv)(2) The 1990 Judicial Code and the 2007 Code

The drafters of the 1990 Code decided that when "economic interest" refers to ownership, it means "ownership of more than a *de minimis* legal or equitable interest. …" [273] And they, in turn, define "*de minimis*" to mean "an insignificant interest that could not raise reasonable questions as to a judge's impartiality." [274] And "impartial" means that the judge has an open mind in considering issues that come before the court and that the judge has no bias or prejudice for or against any party. [275] The 2007 Code keeps these definitions [276] and, in so doing, embraces the vagueness of a term—"*de minimis*"—that refers to quantities —e.g., how much stock may the judge own before the interest is disqualifying?—when litigants would prefer precision.

Thus, Rule 2.11(A)(3) and Canon 3E(1)(c) do not require judges to disqualify themselves unless they have more than a *de minimis* legal or equitable ownership in the subject matter in controversy or in a party to the proceeding. In addition, they must disqualify themselves if there is any other interest that is "more than *de minimis*" and "that could be substantially affected by the proceeding." [277]

The drafters of the 1990 Judicial Code are exceedingly pithy in explaining this significant requirement (new to the 1990 Code) that the interest be more than *de minimis*. They simply announce that they added this requirement "to obviate the need for disqualification where a judge's financial interest is *de minimis* and would not affect impartiality." [278] The 2007 Judicial Code keeps the same definition of "*de minimis*" except that it makes it a bit clearer by explaining that the *de minimis* interest is in the context of "interests pertaining to the disqualification of a judge." [279]

Unfortunately, the drafters of the 1990 Code and the 2007 Code offer no litmus or bright-line test to determine when an interest is "*de minimis*." The drafters do not even offer a vague-line test. Obviously, a judge will not be disqualified under the 1990 Judicial Code if she owns one share of I.B.M. stock and I.B.M. is a party. But what if she owns 200 shares, with a tax basis of over $15,000 and a fair market value of $35,000? Is that *de minimis*? What if she owns 200 shares, but her entire net worth is only $175,000? Do we compare her I.B.M. shares to her total stock portfolio? Or, do we compare it to her net worth? Or, do we use some absolute standard? What if she has a stock portfolio with a tax basis of over $3 million, but the I.B.M. stock represents only .5 percent of her total portfolio. Is that amount *de minimis* as to her? Does the answer change if the market value (as opposed to the tax basis) of I.B.M. stock is $25,000, and the market value of her portfolio is $4 million, so that I.B.M. comprises .625 per cent of her portfolio? What if her net worth is $6 million, so the IBM stock represents less than .42 percent of her portfolio?

Many judges (like other people) like to keep their financial information private. In general, a "judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties." [280] While proclaiming an interest in the privacy of a judge's financial affairs, the drafters of the 1990 Judicial Code have ironically composed a rule that should give litigants the right to learn a lot more about a judge's financial affairs. The "*de minimis*" rule makes such information material, because, in order to learn whether a financial interest is "*de minimis*," the litigants may need to have a good picture of the judge's net worth.

The federal statute requires the judge to disqualify herself if she owns even one share of a corporation that is a party to the lawsuit [281] and does not allow the parties to waive the disqualification. [282] The ABA Judicial Code of 1972 also adopted this clear bright line. However, under the ABA 1972 Judicial Code, there should be little hardship on the judge or the parties because the 1972 Code allowed the parties to waive the disqualification. [283]

Under the 1972 Code, a judge did not have to decide if 100 shares of Wal–Mart were "*de minimis*" or not. This created a clear bright line, with the possibility of waiver. So, nowadays, under such a bright-line provision, the judge could program a computer with her stock holding, and the computer could automatically remove from the judge from the appropriate cases. Or, the computer could advise the parties of the stock holdings and, if the clients wanted to waive the disqualification, they could do so outside of the presence of the judge.

Under the 1990 ABA Judicial Code, the judge has to make a determination as to whether the amount of her holdings is *de minimis*, that is, are the amounts of the stock holdings large enough that they could be "substantially affected by the proceedings." Hence, there are inevitable questions of how much stock is too much.

In *Huffman v. Arkansas Judicial Discipline and Disability Commission*,[284] the judge and his wife owned 12,000 shares of Wal-Mart stock then worth about $700,000. The judge argued that the amount was "*de minimis*." Perhaps it was, given his other holdings (we do not know what they were). Or, perhaps it was if his decision, no matter what it was, would not affect the value of the stock. It takes a dramatic legal proceeding to move the price of a stock in a large publicly-traded company like Wal-Mart even one percent.

The appellate court avoided those troublesome issues by holding that the judge's ownership of the retailer's stock created an appearance of impropriety in ruling on Wal-Mart's motion for a temporary restraining order. Maybe it was *de minimis* to this particular judge, for we do not know what his net worth is, and nothing he decided in that case could have moved the stock in any direction, a point that the dissent emphasized.

### § 10.2-2.11(f)(4)(v) The Judge's Family

Canon 3E(1)(b) extends the net of disqualification to cases where the judge's family owns disqualifying interests. If either the spouse, parent, or child (no matter where they are residing), or any other "member of the judge's family residing in the judge's household"[285] has an economic interest or other interest that would disqualify the judge if the judge had that interest, then that interest is, in effect, imputed to the judge, who then must disqualify himself. However, this disqualification provision only applies *if* the judge knows of the interest. Thus, let us turn to the question of "knowledge."

### § 10.2-2.11(f)(4)(vi) Knowledge of Economic Interests

Rule 2.11(A)(3), Canon 3E(1)(c)—as well as 28 U.S.C.A. § 455(b)(4)—requires disqualification only if the judge "knows" of the disqualifying economic interest. This Canon and the federal statute require that a judge inform himself about his own financial interests.[286] If the judge does not keep himself so informed, he would be subject to sanctions for violating the Judicial Code. Otherwise, the Judicial Code would place a premium on ignorance.

But ignorance is not always bliss. The Reporter's Notes to the 1972 Judicial Code conclude that this requirement of knowledge *precludes* the use of a "blind trust" to avoid disqualification.[287] Although the 1990 Judicial Code replaced the 1972 Judicial Code, the language of the 1972 Judicial Code and the present Judicial Code are nearly identical on this issue.[288] The 2007 Judicial Code[289] adopts the language of the 1990 Code on this issue. Consequently, it would appear that the present ABA Judicial Code precludes the use of a blind trust, even though a strong argument can be made that this type of investment vehicle should be allowed because it solves the problem of alleged judicial bias while allowing a judge to continue to invest.

Although a judge *shall* keep informed of his or her own *personal and fiduciary* economic interests, the judge need only make a "reasonable effort" to learn of the personal economic interests of his or her spouse and minor children residing in the judge's household. The Rules realistically recognize that there may be limits to what a judge can do to require others to keep him or her informed of all financial dealings. Relevant factors to determine whether a reasonable effort has been made should include the following: "Did the interest of the spouse or child come from the judge or from another source? Does the spouse or child know the nature of the interest, or is he or she the beneficiary of a blind trust? Has the spouse's or child's financial interest been supervised by the judge in the past, or has the judge not been involved in the handling of the interest?"[290]

As to other members of the judge's family who do not fall under Rule 2.11(B),[291] Rule 2.11(A)(3)[292] requires the judge to disqualify herself only if she has actual knowledge of the financial interest of such persons. The simple reality is that such persons often act independently of the judge, and so this section pragmatically does not require her to exert an effort to gain knowledge of such persons' economic interests.

### § 10.2-2.11(f)(4)(vii) Exceptions to Economic Interest Disqualification: Mutual Funds

#### § 10.2-2.11(f)(4)(vii)(1) Introduction

The definition of "Economic Interest" excludes several types of economic interest. [293]

Under the ABA Model Judicial Code, if a judge invests in a particular mutual fund and has an economic interest (*i.e.*, more than a *de minimis* interest) in that fund, she must disqualify herself if that mutual fund itself is a party to the proceeding, subject to several very important exceptions. [294] First, there is no disqualification simply because she owns shares in a mutual fund that owns shares in a company that is a party to the proceeding. Second, there is also no disqualification simply because the judge owns shares in a particular mutual fund and the company that manages that fund (rather than the fund itself) is a party to the proceeding, because the judge's interest in the particular fund is not an interest in the company that manages or promotes the fund. There are various permutations of these principles. Let us consider them.

### § 10.2-2.11(f)(4)(vii)(2) The Mutual Fund Owns Stock in a Party to the Lawsuit

First, assume that the judge owns 100 shares of the Fidelity Magellan Fund or the Vanguard 500 Index Fund or the T. Rowe Price New Horizons Fund. Let us also assume that all three funds own shares of Wal–Mart Corporation, and Wal–Mart is a party to a case before the judge. The judge does not need to disqualify himself simply because she owns interest in a fund and that fund, in turn, owns interest in Wal–Mart and Wal–Mart is a party before the judge. [295]

The federal statute also provides that the judge is not disqualified simply because Wal–Mart is a party and the judge owns shares in a mutual fund that owns shares in Wal–Mart. Recall that under the federal statute, a federal judge would have to disqualify himself if he owned even one share in Wal–Mart, if Wal–Mart were a party, because the federal statute defines "financial interest" as ownership, however small. [296] Under both the federal statute, the 2007 Judicial Code, the 1990 Judicial Code, and the 1972 Judicial Code, there is no rule requiring the judge to disqualify herself simply because Wal–Mart is a *party*, she owns shares in a mutual fund, and that mutual fund owns shares in Wal–Mart.

This result is clear because the definition of "economic interest" explicitly excludes "ownership in a mutual fund" subject to two exceptions. The mutual fund does not create a disqualifying interest unless: [1] the judge participates in the management of the fund or common investment fund or [2] the proceeding before that judge "could substantially affect the value of the investment." [297] Let us turn to these two exceptions.

### § 10.2-2.11(f)(4)(vii)(3) The Judge Who Manages the Fund

If the judge is part of an investment club that makes decisions on stock, then she is participating in the management of the fund and must disqualify herself if the fund owns shares in Wal–Mart and Wal–Mart is a party before her. [298] (Technically, under the 1990 Model Judicial Code, she must disqualify herself if the amount is more than *de minimis*. In contrast, under the federal statute, she must disqualify herself if she owns any legal or equity interest in Wal–Mart, no matter how small. [299] For convenience, this section will assume that any stock ownership is more than *de minimis*, and thus triggers the mandatory disqualification rule under the ABA Model Judicial Code.)

### § 10.2-2.11(f)(4)(vii)(4) The Individual Fund Is a Party

Assume that the judge owns shares in the Fidelity Magellan Fund, and a litigant is suing the Magellan Fund itself, alleging, for example, that the Fund imposed illegal trade costs that caused financial loss to those who owned shares in that Fund. The litigant wants the fund managers to reimburse the Fund for allegedly illegal trading costs. Now the judge is a member of the class of those who own shares in the Fund. She does have an "economic interest" and must disqualify herself from hearing the case. In addition, if the litigation "could substantially affect the value of the investment," [300] the judge should also disqualify herself.

### § 10.2-2.11(f)(4)(vii)(5) The Company that Manages the Mutual Fund Is a Party

Assume that the judge owns shares in the Fidelity Magellan Fund or the Vanguard 500 Index Fund or the T. Rowe Price New Horizons Fund. Fidelity Investments (a privately-owned corporation) manages the Fidelity Magellan Fund; the Vanguard

Company (a mutual company) manages the Vanguard 500 Index Fund; and T. Rowe Price Group, Inc. (a publicly traded corporation) manages T. Rowe Price New Horizons Fund.

In each case, the judge has an economic interest in the particular *fund*, but not in the entity or individual who manages the fund. In other words, the judge does not have a legal or equity interest in the T. Rowe Price Group, Inc. (the Company); she only owns shares in the T. Rowe Price New Horizons Fund, one of the many funds that the Company manages. Hence, the judge does not have to disqualify herself simply because the Company is a party. The judge does not have any ownership interest in that Company; she does have ownership in a fund that T. Rowe Price manages.

The judge owns a legal or equitable interest in the individual fund ("New Horizons") but has no equitable or legal interest in the fund company ("T. Rowe Price Group, Inc."), just as a judge who has funds in a BankAmerica checking account has a legal interest in that account but not in Bank America. The way that the judge could acquire an interest in BankAmerica is to buy some of its stock.

The Judicial Canons treat all three mutual fund companies the same because it focuses on substance, not labels. For ethics purposes, it does not matter whether the company managing the fund is publicly-traded, privately-owned, or organized as a mutual company.[301] In all three cases, the judge only owns a legal or equitable interest in the particular mutual fund.

The policy reasons behind this rule are easy to understand. The drafters of the Model Judicial Code wanted to encourage judges to invest in mutual funds rather than individual stocks.[302] A judge who moves her investments from stocks in individual companies to stocks in mutual funds reduces the chances of creating a conflict requiring her recusal. Hence, the Judicial Code provides that a deposit in a mutual savings association is not an economic interest in the mutual savings association itself, and the judge's economic interest in a mutual fund is not an economic interest in the individual holdings within a mutual fund.[303] The Judicial Code wants to encourage judges to invest in funds, but it has no interest in encouraging investments in funds managed by particular mutual fund companies. Investments in funds managed by Fidelity instead of T. Rowe Price or Vanguard, are, for ethics purposes, the same. The Judicial Code does have an interest in authorizing non-disqualifying investments. When people become judges they should not give up their right to invest for the future, nor should the Judicial Code preclude them from presiding over cases because of their investments that cannot realistically affect their judgment.

The ethics opinions hold that a "shareholder" (or policy holder) in a mutual insurance company (State Farm) or a "shareholder" (or mutual fund investor) in Vanguard is not like a shareholder in IBM.[304] If I own $100 of the Vanguard Index Fund, I do not "own" the Vanguard Company in the same way that I "own" IBM. Instead, I am just like someone who owns $100 of Fidelity Magellan Fund. I cannot get a stock certificate for the Vanguard Company and sell my interest in the Vanguard Company to another person; I can only sell my shares in the Vanguard Index Fund. That fund will pay me dividends, but I receive no dividends from the Vanguard Company; I cannot realize any capital gains from the Vanguard Company if that company is worth more tomorrow than it is worth today. The only way I can secure a theoretical "share" in the Vanguard Company is by buying a mutual fund that the Vanguard Company sells, and when I sell that mutual fund, I lose my "share" in Vanguard. I am like a depositor in a Savings & Loan.

The XYZ Savings & Loan may call me an "owner," and it may say in its various prospectuses that I own XYZ Savings & Loan "indirectly," but I am not like any owner of even one share of Citibank and BankAmerica. The XYZ Savings & Loan may also say that each customer is like a member of its family, but one should not expect to dine with the bank president on Thanksgiving.

Some companies (such as Vanguard and State Farm Insurance) have set themselves up in a particular corporate structure to reduce fees. But neither that corporate structure, nor any statement in a prospectus that speaks of "indirect owners," changes the law of ethics, because ethics is concerned about substance, not labels. An investor in Vanguard mutual funds is not an equity owner of Vanguard Company, while a shareholder of BankAmerica is an owner of BankAmerica. A depositor in BankAmerica is also not an owner of BankAmerica.

An owner of a particular Vanguard mutual fund is like a depositor in a mutual savings bank. To see what the rules are for Vanguard holders, we should look at the ethics rules for depositors in a mutual savings bank. After all, an ethics rule is supposed to focus on substance, not on form—on what is really going on, not on what label someone chooses to give.

### § 10.2-2.11(f)(4)(vii)(6) Summary

For the sake of completeness, let us consider the different permutations involving all three different types of mutual fund companies. The results all come out the same way.

If the judge owns stock in T. Rowe Price Group, Inc. (the Company), then the judge should disqualify herself in any case in which T. Rowe Price Group, Inc. is a party. If the judge owns shares in T. Rowe Price New Horizons Fund (the Fund), there is no reason to disqualify herself in any case involving T. Rowe Price Group, Inc. (the Company) because she does not own any stock in the Company. The Company simply manages the Fund, and the Fund holds its stock in trust for those who own shares in the Fund. Similarly, if the judge has a checking account in the XYZ Bank, she does not disqualify herself in any case involving the XYZ Bank because she has no economic interest in the Bank, which is merely holds her funds in trust for her.

If the judge owns shares in T. Rowe Price Group, Inc. (the Company) and puts those shares in a safe deposit box in a BankAmerica branch, or has her broker (A.G Edwards, a publicly traded corporation) hold her T. Rowe Price Company stock for her, she does not disqualify herself in any case involving BankAmerica or A.G. Edwards. Those companies merely hold her stock in trust; that arrangement does not give her an equity interest in the bank or the publicly traded brokerage house.

If the judge really owned shares in Fidelity Investments (the company), that would be unusual because it is not publicly traded. But, if she were a shareholder in that company itself, she should disqualify herself in any case involving that company because she would be a shareholder in a party to the lawsuit. If she simply was one of the investors in one of the many funds that Fidelity manages (e.g., the Magellan Fund), she would not disqualify herself in any case involving Fidelity because she is not an owner of Fidelity. She only owns shares in Magellan Fund, one of many funds that Fidelity manages. Those shares belong to her, not to the Fund. Her interests in that fund are shares in various other companies, and Fidelity must hold that those shares in trust for the Fund members. It is hard to imagine a case involving Fidelity (the company) that could possible affect her interests in Magellan Fund. However, if there were such a case, then she should disqualify herself if her interests in the Magellan Fund "could be substantially affected by the proceedings." [305]

The judge's ownership of shares in a mutual fund (e.g., the Vanguard Index Fund) is also not an ownership interest in the Vanguard Company itself anymore than my ownership of a saving account makes me an equity owner of the Saving Bank. [306] The corporate form of Vanguard Company is a little different from the corporate form of T. Rowe Price or Fidelity. The Vanguard Company is neither a publicly traded stock nor a closed corporation. It is a mutual company, like a mutual insurance company or a mutual savings bank. [307] However, the ethics rules treat all mutual fund companies alike and do not discriminate against Vanguard and in favor of, e.g., T. Rowe Price, because the ethics rules focus on substance, not labels. [308]

### § 10.2-2.11(f)(5) Exceptions to Economic Interest Disqualification: Civic Organizations

If the judge or her spouse, parent, or child hold an office in an educational, religious, charitable, fraternal, or civic organization, that position does not create any "economic interest" in securities held by the organization. [309] Thus, if the judge is an officer in her local church, and the church owns 100 shares of IBM stock, the judge need not disqualify herself whenever IBM is a party before her. However, if the church is a party before her, and she is an officer of her church, she must disqualify herself because "economic interest" includes the relationship of officer, director, advisor, or other active participant in the affairs of a party.

### § 10.2-2.11(f)(6) Exceptions to Economic Interest Disqualification: Civic Organizations: Financial Institutions and Mutual Insurance Companies

The interest of a policy holder in a mutual insurance company, or the deposit in a mutual savings association, or credit union, or similar proprietary interest, is an "economic interest" only if the pending or impending proceeding could substantially affect the value of that interest. [310]

For example, the judge does not have to disqualify himself from hearing a case involving a credit union simply because he has a savings account at that credit union.

### § 10.2-2.11(f)(7) Exceptions to Economic Interest Disqualification: Civic Organizations: Government Bonds

Ownership of government securities is not an "economic interest" in the issuer of those bonds (*e.g.*, the State of Illinois) unless the proceeding could substantially affect the value of the bonds. [311] In other words, simply because a judge owns a certain number of municipal bonds of the City of Chicago does not mean that he must disqualify himself in every case where the City of Chicago is a party. Similarly, merely because a judge owns $5,000 (or $500,000) of U.S. Bonds does not require her to disqualify herself in every case where the U.S. Government is a party.

However, the situation is different if an issue concerning the bonds themselves were the subject of the litigation before the judge (*e.g.*, was it legal for the state to extend the time when the bonds were due), and the judge owned these bonds. Then, under the ABA Code, the judge has a disqualifying economic interest if the proceeding before the judge could substantially affect the value of the securities. [312]

### § 10.2-2.11(g) Judicial Campaign Contributions by a Party before the Court

Rule 2.11(A)(4) provides:

> The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]. [313]

This Rule relates to Rule 4.4(B)(1), which provides that if a judge candidate is subject to a public election, he or she must direct the judge's campaign committee—

> to solicit and accept only such campaign contributions as are reasonable, in any event not to exceed, in the aggregate, $[insert amount] from any individual or $[insert amount] from any entity or organization. [314]

These provisions are applicable where judges are subject to public election. The Model Code leaves it up to each jurisdiction whether or not to adopt specific dollar limits. Jurisdictions that adopt specific dollar limits on contributions in 4.4(B)(1)—or Canon 5(C)(3) of the 1990 Code—should adopt the same limits in Rule 2.11(A)(4)—or Canon 3(E)(1)(e) of the 1990 Code. If the jurisdiction does not adopt specific dollar amounts, it should use the alternative "reasonable and appropriate" language. [315]

The ABA added what is now Rule 2.11(A)(4) to the Judicial Code in 1999. [316] The ABA responded to concerns that lawyers were making political contributions to judges before whom they appeared. The rule leaves the time period blank and the contribution blank. Each jurisdiction should make its own decision as to the specific time and amount. [317]

Each jurisdiction should pick what is a reasonable amount for that jurisdiction. Because of the differences in each state and judicial district, the size of the electorate, and the availability of public funding in some jurisdictions, the ABA realized that an amount that would be handsome in one area may be parsimonious in another.

The Rule does provide that the judge should "aggregate" all contributions from any one source. "Aggregate" is a term of art. It means "contributions in cash or in kind made directly to a candidate's campaign committee," and "also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent." [318]

Elections include "retention elections," [319] which are elections where the judge runs to retain his or her office but the judge does not have an opponent. The judge runs against her record, and the people vote to either retain the judge or remove her.

The ABA Committee that drafted this provision recognized that application of specific contribution limits could result in some lawyers or parties contributing to a judge's campaign "solely" in order to disqualify the judge, but the Committee had no solution to this problem. [320] Indeed, the language increases the problem because this provision allows the very person who had contributed to move for recusal.

A simple solution would be to change the phrase, "a timely motion," to read, "a timely motion by an *opposing* party." [321]

### § 10.2-2.11(h) Judicial Statements that Appear to Commit the Judge

Rule 2.11(A)(5) provides that the judge must disqualify himself if he made statements, while a judge or candidate for judicial office, "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." [322]

The terminology of the Judicial Code defines "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." [323] If the judge or candidate for judgeship makes a campaign statement or promise that actually "commits" or reasonably appears to commit the judge to decide a particular case or a particular issue a certain way, there is the appearance that the judge is no longer impartial. The judge, however, may make statements in cases that are holdings, and those holdings bind the judge to the extent that precedent binds any judge.

The judge may also put dictum in cases. He needs the agreement of a majority to add dictum to a majority opinion in any multimember court, but no such restraint binds a trial judge, who sits alone. Similarly, any appellate judge need not secure the consent of his colleagues to write his views on any issue in a concurring opinion or dissent. Rule 2.11(A)(5) does not cover such situations because—by its own terms—it only prohibits statements "*other than* in a court proceeding, judicial decision, or *opinion*," so the judge has a safe harbor for anything he says in an opinion.

The provision in Rule 2.11(A)(5) [324] that says that a judge may not make a statement that "appears to commit" the judge with respect to reaching a result or ruling in a particular way regarding an issue in the proceeding may appear, at first, to be a fair rule. In practice, the term is quite ambiguous. This ambiguity, in turn, raises First Amendment problems because the ABA intends state and federal courts to adopt this Canon as a law regulating judges. There are always First Amendment issues when the government prohibits speech, particularly when the prohibiting rule is vague. [325]

Consider, for example, the situation where the U.S. Supreme Court, on occasion, cites foreign law as a reason to declare that a state or federal statute is unconstitutional. [326] This practice has proved controversial. [327] In response to these complaints, Justice Breyer explicitly "promised" that the Court (or, at least, he personally) will never treat foreign law as binding, even though he may cite it. One may treat Justice Breyer's statement as a promise that he will not treat foreign law as binding even if he cites it in a decision as the reason for the holding. He has promised that he will not use foreign law "to reach a particular result or rule in a particular way in the proceeding or controversy." [328]

At the 2005 annual meeting of the American Bar Association, here is what Justice Breyer said, unequivocally, with respect to foreign law:

> "[I]n some of these countries, they're just trying to create these independent judicial systems to protect human rights and contracts and all these other things. And if we cite them sometimes, *not as binding, I promise*, not as binding, well, that gives them a little boost sometimes with their legislators, I might say. As I say, the Supreme

> Court of the United States, which you've heard of as citing us and we cite them sometimes, doesn't bind, but nonetheless it sort of gives them a little leg-up for rule of law and freedom, I say." [329]

Given these problems, the U.S. Supreme Court, in *Republican Party of Minnesota v. White*, [330] invalidated a canon of judicial conduct that the Minnesota Supreme Court had promulgated. It prohibited a "candidate for a judicial office" from "announc[ing] his or her views on disputed legal or political issues." A candidate running for associate justice of that court sued seeking a declaration that this announce clause violated the First Amendment and an injunction against its enforcement. The U.S. Supreme Court agreed. [331]

Minnesota argued that its "announce" clause was like the ABA "commit" clause. [332] The Court assumed, for the sake of argument, that the Minnesota position was correct, [333] and then proceeded to invalidate the Minnesota rule. The Court concluded (over a strong dissent), that the state interest simply did not justify restrictions on campaign speech. The announce clause was not narrowly tailored to promote "impartiality," in the sense of no bias for or against any party, because it did not restrict speech for or against particular parties, but rather speech for or against particular *issues*.

If the state meant to promote "impartiality" in the sense of no preconception for or against a particular legal view, that is not a compelling state interest, the Court argued, because it is both "virtually impossible," and also not desirable, to find a judge who does not have preconceptions about the law. Indeed, the Minnesota Constitution specifically requires judges to be "learned in the law." People who are learned in the law develop preconceptions on legal issues.

The Minnesota "announce clause" also did not promote impartiality in the sense of "open-mindedness" because it is underinclusive. For example, the rule allowed a judge to rule on a legal issue on which he had already expressed an extra-judicial opinion while on the bench. The Minnesota Code of Judicial Conduct, in fact, encouraged judges to speak out on disputed legal issues outside the context of adjudication, such as in classes that they teach, or in books or speeches that they write.

The Minnesota rule prohibited a judicial candidate from saying, "I think it is constitutional for the legislature to prohibit same-sex marriage." Yet she could say the very same thing up until the very day before she declares herself a candidate. The candidate who was already a judge could write whatever she wanted in a dissent, or in a concurrence, or in dictum in the majority opinion.

In response to the *White* decision, in August 2003, the ABA added Canon 3E(1)(f) and Canon 5A(3)(d) to the 1990 Code. These sections correspond to Rule 2.11(A)(5), and Rule 4.1(A)(13). Canon 5A(3)(d), after the 2003 amendments in response to *White*, no longer uses the term, "*appear* to commit." Instead, it provides that the candidate for judicial office, "with respect to cases, controversies, or issues that are likely to come before the court," may not "make pledges, promises *or commitments* that are inconsistent with the impartial performance of the adjudicative duties of the office." [334] The 2007 Code uses similar language in Rule 4.1(A)(13).

However, the 2007 Code and the 1990 Code continue to use the "appears to commit" language in Rule 2.11(A)(5) and Canon 3E(f)—the sections regarding disqualification. So, judges and judicial candidates may not "commit" themselves when running for office, because that would violate Rule 4.1(A)(13) and Canon 5A(3)(d)(i). However, if a judge "*appears* to commit" herself with respect to an issue in the proceeding; or a controversy in the proceeding, in violation of Rule 2.11(A)(5) and Canon 3E(1)(f), then the judge should recuse herself, pursuant to Rule 2.11 and Canon 3E.

In the debate in the House of Delegates of the ABA, one state judge spoke against the proposal, arguing that it might "make things worse" by *encouraging* judicial candidates to comment on controversies and then blaming the ABA for their recusals. But others argued that the drafters sought to conform to the *White* decision and respond as best as they could. [335]

Further litigation will determine if such distinctions about what judicial candidates may and may not say are constitutionally valid. We do know that a national public opinion poll conducted for the ABA in August 2002 showed that by a two-to-one margin (61% to 32%), voters concluded that a judge who has voiced "opinions about legal and political issues" can later "still be fair and impartial" on those same issues. In addition, 75% of respondents thought that *elected* judges were more likely to be

fair and impartial than *appointed* judges would be. Only 18% preferred appointed judges, who do not need to run in judicial elections.[336]

The people polled understood that the mere fact that judicial candidates talk about legal issues does not mean that they lack impartiality about those issues. Sitting judges write decisions about legal issues, decide those issues in future cases, and sometimes even overrule themselves.

### § 10.2-2.11(j) Disqualification if the Judge Is a Former Lawyer in the Matter

#### § 10.2-2.11(j)(1) General Principles

Rule 2.11(A)(6)(a) and 2.11(A)(6)(b)[337] provides that the judge must disqualify herself if she have served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association. In addition, she must disqualify herself if she, while serving in governmental employment, participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

Rule 2.11(A)(6)(b) makes explicit in the black letter what former Canon 3E(1)(b) had only stated in Commentary. Judges must not sit on cases concerning matters with which they were involved as government lawyers, for the same reason that they must not sit on cases concerning matters in which they were involved as lawyers.[338]

Note that the ABA Model Code of Judicial Conduct refers to a "lawyer in the matter," while the federal statute refers to judges who had served as lawyers while in "*private* practice."[339] However, the drafters of the federal statute added a subsection[340] to cover the case where the lawyer acted as a governmental lawyer. That subsection provides that a judge is disqualified "[w]here he has served in *governmental* employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."[341] A judge should disqualify himself, for example, if he acted as an Assistant U.S. Attorney in the case before he became a judge.[342] This very broad disqualification provision also provides that judges who previously served in a governmental capacity (whether or not they acted as practicing lawyers) are disqualified if, in that capacity, they advised on a particular case, were a material witness concerning a particular case, or expressed any opinion about the merits of a particular case.[343]

In *Department of Revenue v. Golder*,[344] the issue in the underlying case was the constitutionality of an estate tax statute. At the time of the statute's enactment, the justice writing the opinion in the case had been special tax counsel to the Florida House of Representatives and had prepared a preliminary memorandum of law supporting the constitutionality of the proposed statute. The judge's prior involvement with the statute did not constitute bias because the views expressed in the memorandum were developed independently of any particular controversy or party. The special tax counsel was involved with a legal issue, not with a particular legal case. Also, the views as to the constitutionality of the statute were not extrajudicial.

Similarly, Justice Rehnquist refused to disqualify himself in *Laird v. Tatum*.[345] His previous participation was limited to testifying on similar legal issues before a Senate Subcommittee. Although the *Laird* case itself was then in the lower courts, and Rehnquist did briefly refer to the case in Senate testimony, he never was counsel of record, did not consult on that case, and was not otherwise involved with it.

Justice Rehnquist's refusal to recuse himself was controversial at the time,[346] and it led to Congress enacting 28 U.S.C.A. § 455(b)(3).[347] This section now requires a judge to disqualify himself "[w]here he has served in government employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."

For example, Justice Scalia disqualified himself in *Public Citizen v. Department of Justice* under this section.[348] As is the custom on the Supreme Court, Justice Scalia did not give a reason for his disqualification, but he did explain his rationale in a subsequent decision.[349] He disqualified himself because he had been Assistant Attorney General for the Office of Legal Counsel. In that capacity, he had expressed an opinion that addressed the *precise question* presented in *Public Citizen*: whether the American Bar Association's Standing Committee on Federal Judiciary, which provided advice to the President concerning judicial nominees, was an "advisory committee" and therefore regulated under Federal Advisory Committee Act.

On the other hand, § 455(b)(3) should not be read too broadly. Thus, a judge need not recuse himself simply because he had previously worked in the executive branch for President George W. Bush. In one case, the movant asked for the judge's recusal if he had "personally participated on issues relating to the Softwood Lumber dispute between the United States and Canada." The judge denied the motion because: "During my service in the Executive Branch, I did not participate in any stage of this Baker Hostetler litigation, nor did I express an opinion concerning the merits. Therefore, § 455(b)(3) does not support my recusal in this case."[350]

Shortly after President Obama nominated Solicitor General Elena Kagan to the Supreme Court, she said that she would disqualify herself only in cases in which she was listed as one of the authors of the solicitor general's brief filed before the court.[351] However, the relevant federal statute that specifically governs this situation, 28 U.S.C.A. § 455(b)(3), imposes a far stricter obligation on federal government employees. It requires disqualification in *every case* where a government employee has *participated* as a lawyer or as an *adviser* or *expressed an opinion* concerning the merits of the particular case in controversy.[352]

In response to that statute, Justice Kagan, during her first months on the bench, disqualified herself in about 50% of the cases.[353] She was, after all, Solicitor General and therefore involved in many cases that would make up the diet of the high court. In addition, the United States Courts webpage advises that:

> Judges may not hear cases in which they have either personal knowledge of the disputed facts, a personal bias concerning a party to the case, *earlier involvement in the case as a lawyer*, or a financial interest in any party or subject matter of the case.[354]

Eventually, the number of disqualifications will drop because her past work in the Executive Branch will recede into the past.

*United States v. Arnpriester*[355] held that § 455(b)(3) applies and requires a judge to disqualify himself in a criminal case because he was the U.S. Attorney at the time of an "investigation *preceding* the indictment"[356] that eventually led to indictment. The court emphasized: "there can be no prosecution unless it is preceded by investigation."[357] The court relied on both §§ 455(a) [impartiality might reasonably have been questioned] & 455(b)(3) [he had served in government employment as counsel in connection with indictment] in reaching its result. The trial judge was not personally involved in the investigation. It simply occurred under his watch.

Similarly, 28 U.S.C.A. § 455(b)(3) requires a magistrate judge to automatically disqualify himself from hearing a motion for reduction of the sentence because the magistrate judge was the Assistant United States attorney who had represented the government in earlier proceedings on the defendant's motion for reduction of sentence.[358]

### § 10.2-2.11(j)(2) Imputation

The 1990 Model Judicial Code discusses imputing the disqualification provision to prior governmental employment. It provides that a "lawyer in a governmental agency does not ordinarily have an association with other lawyers employed by that agency" within the meaning of this subsection.[359] The drafters used the word "ordinarily" to indicate that disqualification does not usually result from these relationships.[360]

The 2007 Code does not incorporate that language, but the language of Rule 2.11(A)(6)(b) focuses on what the judge, when he was a lawyer in government employment, did "personally and substantially." This Rule does not contemplate imputation, although Rule 2.11(A)(6)(a) does contemplate imputation.

In other words, Rule 2.11(A)(6)(a) disqualifies a judge if she served as a lawyer in the controversy or "was associated" with a lawyer—*e.g.*, her law partner. Rule 2.11(A)(6)(b) disqualifies the judge if she "personally and substantially" participated as a lawyer or public official concerning the proceeding or, in her official capacity, publicly expressed an opinion concerning the merits of the particular matter.

Thus, a judge whom the Securities and Exchange Commission had formerly employed would not have to disqualify himself under Rule 2.11(A)(6)(b) simply because another former or present member of the SEC brings a case before the judge. However, the judge would still have to disqualify himself under the catch-all provision of Rule 2.11(A), *if* the fact-situation is such that his impartiality might reasonably be questioned. In addition, a judge would have to disqualify himself under Rule 2.11(A)(6)(b) if the SEC matter before him were one in which he had "personally and substantially" served as a lawyer with the SEC.

In *Matter of O'Brien*, [361] a part-time judge (who was also authorized to practice law) represented the husband in a dissolution of marriage proceeding. The judge prepared the petition and served the summons on the wife. At the hearing on the matter, the regular judge was absent, and the judge who represented the husband was selected as judge *pro tempore*. The judge then entered the dissolution decree and approved the property settlement. Even though the parties consented to the judge/lawyer acting as judge *pro tempore*, the judge's conduct still violated Rule 2.11(A)(6(a) and Canon 3E(1)(b). [362] The Court reprimanded and admonished the judge.

Rule 2.11(A)(6)(a) requires disqualification only if the judge acted as a lawyer in the *matter in controversy.* In other words, Rule 2.11(A)(6)(a) requires disqualification only if the judge's bias is based upon his prior contacts when he was a lawyer in the *proceeding*, and not simply because of his familiarity with a legal issue.

For example, *Department of Revenue v. Golder*, [363] held that a judge need not disqualify himself when he was passing on the constitutionality of an estate tax statute simply because, three years earlier—when he was special tax counsel to the state legislature—he had written a preliminary memorandum concluding that the statute was constitutional.

If *Golder* had involved a federal judge, a special federal statute would have applied. This federal statute it requires disqualification of the judge who, when she was a government employee, had "expressed an opinion concerning the merits of the *particular case* in controversy." [364] Because the judge had not expressed an opinion about the merits of the particular case, the federal statute also should not require disqualification in this instance.

The second clause of Rule 2.11(A)(6)(a) [365] requires judicial disqualification when a judge's former law partner or associate has served as a lawyer in the matter, but only if the lawyer served as counsel *while* the judge was also practicing law with the lawyer. In other words, a judge should not participate in a case that his former law firm handled, even though the firm is no longer involved, *if* the judge was a member of the firm when it was acting as counsel.

Thus, in *Hall v. Hall*, [366] a judge did not have to disqualify himself in a divorce proceeding where the wife's counsel was the judge's former law partner in the absence of proof that the wife's representation began before the judge left his legal practice. Of course, one must always bear in mind that, depending on the fact situation, the judge may still have to recuse himself under the catch-all provision of Rule 2.11(A) where there is a reasonable question as to the judge's impartiality. The longer the judge is on the bench, the less likely the need for disqualification under the general provisions of Rule 2.11(A).

### § 10.2-2.11(k) Material Witness in the Proceeding

Rule 2.11(A)(6)(c) [367] —and 28 U.S.C.A. § 455(b)(5)—requires the judge's disqualification whenever a person covered in this section "was a material witness in the proceeding." Note that it is not enough that the judge will likely be a witness, but the testimony also must be "material" before the judge is required to disqualify himself.

Parties cannot mandate judicial disqualification by calling a judge as a witness for an immaterial matter. The Judicial Canons do not explain what is meant by "material," but the standard is probably analogous to that of Model Rule 3.7, of the Model Rules of Professional Conduct (the advocate-witness rule).

### § 10.2-2.11(*l*) Judge Previously Presided as a Judge in the Matter in Controversy

Rule 2.11(A)(6)(d) it a new Rule, but the principle it embraces is not new. Rule 2.11(A)(6)(d) provides that if the judge "previously presided as a judge over the matter in another court," then she must disqualify herself. It has long been the rule that a judge who heard a case on the trial level will not be part of the panel hearing an appeal from her own decision.

Trial judges sometimes sit by designation on courts of appeal, and vice versa. Sometimes a trial judge is elevated to the Court of Appeals, or any lower court judge is elevated to the Supreme Court. For example, Judge Roberts was on the panel that decided *Hamdan v. Rumsfeld*, [368] and then was elevated to the Supreme Court before it reviewed the case. After the Supreme Court accepted certiorari, and Judge Roberts was now Chief Justice Roberts, he recused himself because he had been a member of the D.C. Circuit panel. Hamdan's lawyers unsuccessfully urged Roberts *not* to recuse himself and participate in the Supreme Court decision. He naturally disqualified himself. [369]

Rule 2.11(A)(6)(d) makes clear that judges should not hear cases over which they presided in a different court. The Reporters' Explanation adds that this Rule "leaves unaffected the propriety of a judge who decided a case on a panel of an appellate court participating in the rehearing of the case en banc with that same court." [370] The distinction that the Reporters' Explanation makes is a good one, but one wonders why the drafters did not place it in the Comments, which are available to anyone, instead of the Reporter's Explanation. The ABA warns, in bold type, that Reporters' Explanations "have not been approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct." And then it states, ominously—in all capital, bold letters: "they are not to be adopted as part of the Model Code." [371]

Parties often seek to disqualify a judge based on the judge's prior participation in a case involving the same party or the same facts. Absent some showing of hostility or actual bias, however, a judge is not required to disqualify himself merely because of earlier judicial contacts with the party. This principle is really no different from the situation where the judge knows of damaging evidence that he later excludes at trial. The law presumes that judge, even in a bench trial, will be able to screen out the excluded evidence.

For example, a judge is not required to disqualify himself in a criminal action because of a decision adverse to the party in a prior criminal case involving different and unrelated criminal charges. [372] Similarly, the law does not automatically disqualify a sentencing judge from hearing a habeas corpus motion that claims that the trial was unfair. [373] There also is no general rule requiring a judge to disqualify himself from hearing a case after the appellate court reversed the judge's ruling and remanded the case back to the trial court. [374] The appellate court can require that a different judge hear the case on remand, and sometimes it does so, but such an order is unusual.

In *State v. Beshaw*, [375] the defendant, convicted of burglary, asserted on appeal that the judge should have disqualified himself because, in a prior proceeding, the judge had cited the defendant for contempt for kicking a metal stand at the judge. Because the contempt proceeding was not material to the present case and had occurred 19 months earlier, the Vermont Supreme Court held that the judge did not abuse his discretion in refusing to disqualify himself.

Though the court affirmed the judge, it did suggest that perhaps the judge should have disqualified himself under what is now Rule 2.11(A) because his impartiality might reasonably have been questioned. One questions the wisdom of this suggestion.

It is bad public policy to give a defendant who kicks a metal stand the power to disqualify a judge. If parents reward children who have tantrums with candy bars, they quickly figure out that an easy way to get a candy bar is to throw a tantrum. Similarly, defendants who want to force a judge to disqualify himself will soon figure out that they need only kick a metal stand.

The facts that a judge learns in one case can affect other cases filed years later. Consider *Meeropol v. Nizer*.[376] The plaintiffs, the Meeropols, were children of Julius and Ethel Rosenberg. The Government had executed the Rosenbergs (sometimes called the "atomic spies") in 1953 following their convictions for conspiracy to commit espionage. The Meeropols sued attorney Louis Nizer for libel, invasion of privacy, and infringement of copyright. They also filed a motion before U.S. Supreme Court Justice Marshall, as Circuit Justice, to designate judges from other circuits to sit as appellate judges because the Second Circuit judges were associates, friends, or consultants of judges who had presided over the previous trial of the Meeropols' parents. Fourteen years earlier, Justice Marshall had been a member of the Second Circuit panel that had denied post-conviction relief to Morton Sobell, the Rosenbergs' co-defendant.

Justice Marshall raised the disqualification issue *sua sponte* and concluded that it was not necessary because he did not believe his impartiality to decide the extent of a circuit justice's powers under 28 U.S.C.A. § 291(a) "'might reasonably be questioned' in light of this participation in a case not related to the present action."[377] Justice Marshall then ruled that he had no authority to disqualify all of the judges on the appeals panel or to transfer the appeals to another circuit.

However, in *Rice v. McKenzie*[378] a judge was required to disqualify himself under 28 U.S.C.A. § 455 where, as a federal judge reviewing a habeas corpus petition, he was required to consider a case that he had helped to decide as chief justice of the state supreme court. In this case, the judge's impartiality could reasonably be questioned because, as a district judge, the judge was reviewing the constitutionality of what he previously approved as chief justice of the state supreme court.

Note that federal statute prohibits a judge from sitting on an appellate panel to review a case that he had decided as a trial judge.[379] That prohibition did not apply to this case, however, because the judge had not been the trial judge on the case.

### § 10.2-2.11(m) Keeping Informed About Economic and Fiduciary Interests

Rule 2.11(B)[380]—as well as 28 U.S.C.A. § 455(b)(4)—requires disqualification only if the judge "knows" of the disqualifying economic interest. This Rule and the federal statute require that a judge inform himself about his own financial interests.[381] If the judge does not keep himself so informed, he would be subject to sanctions for violating the Judicial Code. Otherwise, the Judicial Code would place a premium on ignorance.

But ignorance is not always bliss. Oddly enough, the Reporter's Notes to the 1972 Judicial Code conclude that this requirement of knowledge *precludes* the use of a "blind trust" to avoid disqualification.[382] Although 2007 Code and the 1990 Code have superseded the 1972 Judicial Code, the language used now is nearly identical on this issue to the language of the 1972 Judicial Code.[383] However, there is no indication in any of the legislative history that the 2007 Code or the 1990 Code precludes the use of a blind trust. The law should allow this type of investment vehicle because it solves the problem of alleged judicial bias while allowing a judge to continue to invest.

Although a judge *shall* keep informed of his or her own *personal and fiduciary* economic interests, the judge need only make a "reasonable effort" to learn of the personal economic interests of his or her spouse or domestic partner and minor children residing in the judge's household. The Rule realistically recognizes that there may be limits to what a judge can do to require others to keep him or her informed of all financial dealings.

Relevant factors to determine whether the judge has made a reasonable effort should include the following: "Did the interest of the spouse or child come from the judge or from another source? Does the spouse or child know the nature of the interest, or is he or she the beneficiary of a blind trust? Has the spouse's or child's financial interest been supervised by the judge in the past, or has the judge not been involved in the handling of the interest?"[384]

As to other members of the judge's family who do not fall under Rule 2.11(B), Rule (A)(3)—and Canon 3E(1)(c) of the 1990 Code—requires the judge to disqualify herself only if she has actual knowledge of the financial interest of such persons. The simple reality is that such persons often act independently of the judge, and so this section pragmatically does not require her to exert an effort to gain knowledge of such persons' economic interests.

The judge cannot know when she must disqualify herself for personal and fiduciary financial interests if she does not "know" about these interests. "Know," "knowledge," "known," and "knows" "mean actual knowledge of the fact in question." We can infer knowledge "from circumstances." [385]

The judge, first, must keep informed about her own personal and fiduciary interests. As to relatives, she has no affirmative duty to become aware of their interests *unless* the relative is a spouse or minor child residing in her household. [386] Federal law similarly provides that a "judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." [387]

In spite of these rather clear provisions, judges have not always kept informed. A 1997 study showed that eight federal appeals court judges participated in at least 18 cases where they (or their spouses or the trusts that they helped manage) held stock in one of the parties. The stock ownership ranged from as little as a few thousand dollars to as much as a quarter of a million dollars. Judges have admitted in interviews, "that they should not have participated in the cases but stressed that their stock interests did not affect their rulings." [388]

### § 10.2-2.11(n) Waiver or Remittal the Disqualification

### § 10.2-2.11(n)(1) The ABA Procedures

The waiver of disqualification provisions in the ABA Code of Judicial Conduct and the federal disqualification statute differ significantly. Consequently, we will discuss separately the two disqualification provisions in the following section.

A remittal procedure provides the parties an opportunity to waive the disqualification. If Rule 2.11 disqualifies the judge, Rule 2.11(C) permits the parties to waive disqualification unless the basis for disqualification is the judge's personal bias or prejudice concerning a party. Rule 2.11(C) and Canon 3F provide a procedure for the parties to waive any disqualification imposed by Rule 2.11 or Canon 3E. In contrast, the federal statute only allows waiver if the judge is disqualified because his or her impartiality might reasonably be questioned. [389]

In order to prevent the judge from pressuring the parties to waive disqualification, Rule 2.11(C) carefully describes the special procedure that the parties must use to accomplish the waiver. The judge should not pressure the parties or their lawyers to waive disqualification. The judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consulting with their clients. A party may act through counsel if his lawyer represents on the record that he has consulted the party who consents.

After the judge discloses on the record the basis for the disqualification, it is crucial that the judge ask the parties and lawyers to consider whether to waive disqualification, *outside of the presence of the judge*. If the parties and lawyers, *without participation by the judge*, all agree to waive the judicial disqualification, then the judge may participate. [390] The agreement regarding this waiver "shall be incorporated in the record of the proceeding." As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement. [391]

The 1972 Judicial Code required that the waiver be reduced to a writing, signed by all the parties and their lawyers, and be incorporated in the record of the proceeding. [392] The 1990 Judicial Code inexplicably omits this important safeguard for the parties, and then advises: "As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement." [393]

Surprisingly, even under the 1972 Judicial Code, some courts were lax in requiring a written waiver. [394] The wisdom of such cases is open to question. Of course, we do not want the parties to plant error by not waiving in writing and later raising the writing requirement if the trial decision on the merits is not to their liking. But judges can easily foreclose this possibility by simply requiring a writing.

The purpose of imposing the writing requirement on both the lawyers *and* the parties "independently of the judge's participation" is to prevent the judge from cajoling the parties and their lawyers to waive important rights. It is also to make sure that lawyers consult their clients outside of the judge's presence. Some lawyers may be sycophants, falling over themselves in an effort to please the judge, and thus too willing to waive their clients' rights. Judges should not be able to pressure a waiver of disqualification by figuratively cloaking the judge's iron fist in a velvet glove. The writing procedure minimizes the chance that a party or lawyer will feel coerced into an agreement.

### § 10.2-2.11(n)(2) The Federal Standard

The federal disqualification statute permits waiver of disqualification only where the judge would be disqualified when "his impartiality might reasonably be questioned." [395] The drafters of the federal law did not follow the ABA because they believed that "confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver." [396] Thus, there can be no waiver of any ground of disqualification set out in § 455(b).

The procedural requirement set out in the statute for waiver of disqualification when the judge's "impartiality might reasonably be questioned" is that the judge fully discloses this basis for disqualification on the record.

The federal statute, § 455(e), is silent regarding the requirement of a waiver in writing by the parties and the attorneys, but the Judicial Conference of the United States, by rule, has adopted such a requirement. [397] Surprisingly, federal judges (and litigants) do not know of the Judicial Conference Requirement, resulting in various unreported decisions in which the judges simply ignore the writing requirement.

Federal law allows a judge to "*cure*" a disqualification based on stock ownership. In order for the law to allow the judge to cure the disqualification, first, the judge, justice, magistrate judge, or bankruptcy judge must have already devoted "substantial judicial time" to a matter. Second, there must be the "appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome)." [398] If those two circumstances exist, then there is no disqualification "if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification." [399]

Congress added § 355(f), which largely codifies the ruling in *Union Carbide Corporation v. United States Cutting Service, Inc.*, [400] a complicated antitrust class action. In that case, the trial judge, Judge Susan Getzendanner, got married. Her husband had a self-managed retirement account that contained stock in IBM and Kodak. At the time the plaintiffs filed the case, there was no list of class members. When the judge disclosed her husband's holdings in her annual financial disclosure statements, the defendant moved to disqualify her because it knew that IBM and Kodak had bought products from the defendant. Instead, the judge immediately ceased ruling on motions in the case while her husband sold his interest in the two companies. The Court of Appeals upheld that procedure. After the sale, the husband no longer had an interest in the stock, the court reasoned. Hence, there was no basis for saying the judge's impartiality could reasonably be questioned. [401]

When § 455(f) refers to "substantial judicial time," one measures the amount of work that a case requires. The judge does not simply count days to see if "substantial" time has passed. [402]

While 28 U.S.C.A. § 455(f) allows a judge to divest a newly-discovered disqualifying interest and to continue to preside over a case, divestiture cannot cure circumstances where the law required recusal years before and the judge has rendered important

decisions in the interim. Thus, a judge does not cure his disqualification if a reasonable person would have known that judge had an interest in a party prior to judge's discovery and divestiture, which occurred long after he had presided over the bench trial and rendered a decision on the merits. [403]

### § 10.2.11(o) Overriding Constitutional Due Process Concerns Requiring Disqualification

#### § 10.2.11(o)(1) The Judge with a Direct Personal Financial Interest in the Case

It has long been the rule that due process does not allow a judge to preside in a criminal case if he is "paid for his service only when he convicts the defendant." [404] Lawyers may charge contingent fees in tort cases because charging the fee does not conflict with the interests of the client; indeed, the contingency nature motivates the lawyer because she is only paid if she is successful. The inevitable motivation of the lawyer is congruent with the interests of the client. This inevitable motivation is why contingency fees are not appropriate for judges.

The leading case is *Tumey v. Ohio*. [405] An Ohio state law provided that the mayor sat as a municipal judge when trying defendants accused of violating the Ohio Prohibition Act. [406] This statute also stated that the mayor's court has "final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part to the penalty." [407] The problem was that the mayor had a financial incentive to convict defendants. [408] The law made that clear:

> Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, *one-half to the treasury of the township, municipality or county where the prosecution is held*, according as to whether the officer hearing the case is a township, municipal, or county officer. [409]

Another law made the financial incentive to convict even clearer. It provided that the mayor should "retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases." [410] But there is "no way" that the mayor can collect his costs unless the mayor convicts the defendant. [411]

The end result was that the state was paying the municipal judge/mayor based on his conviction rate! [412] The municipal judge/mayor deprived defendants of due process when he heard their cases, because "the judge … has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case." [413]

Similarly, *Ward v. Village of Monroeville* held that due process concerns prevented a mayor from sitting as a magistrate to hear ordinance violations and traffic offenses when the budget situation demonstrated that the mayor had an interest in "maintain[ing] the high level of contribution from the mayor's court." [414] Between 1964 and 1968, the fines, forfeitures, costs and fees that the mayor's court had imposed supplied between one-third and one-half of the Village of Monroeville's annual revenue. [415] One does not need a degree in particle physics to understand the mayor's financial incentive to convict—the mayor also had responsibilities for revenue production and law enforcement—was inconsistent with his duties as a disinterested and impartial judicial officer.

This same financial rule applies to civil cases as well as criminal. Consider, for example, *Aetna Life Insurance Co. v. Lavoie*. [416] In that situation, the plaintiff submitted a health insurance claim to Aetna, which paid approximately half of the amount requested ($1,650.22 out of $3,028.25). [417] Aetna refused to pay the remainder, claiming that the length of the hospitalization was unnecessary. [418] When the plaintiff complained, the national office of Aetna instructed its local office to continue to deny the request for full payment, but "if they act like they are going to file suit," then the office should reconsider. [419]

Plaintiff sued, seeking compensatory damages—the unpaid bill of $1,378.03—and "punitive damages for the tort of bad-faith refusal to pay a valid claim." [420] The jury agreed and awarded $3.5 million in punitive damages. [421] The Alabama Supreme Court affirmed (five to four) in an opinion written by Justice Embry. [422]

The problem was that Justice Embry was more than a disinterested bystander to this lawsuit.[423] While the *Lavoie* case was pending before the Alabama Supreme Court, Justice Embry had himself filed two actions against other insurance companies making similar allegations and seeking punitive damages.[424] He refused to disqualify himself.[425]

Chief Justice Burger, speaking for Supreme Court, held that due process would not require disqualification merely because of Embry's "general frustration with insurance companies."[426] Only "in the most extreme of cases" does the Constitution mandate disqualification for bias or prejudice, and "appellant's arguments [based on the judge's general hostility toward insurance companies] here fall well below that level."[427] Many of us experience frustration with insurance companies, and that general reaction does not mandate disqualification.

However, Justice Embry exhibited much more than general hostility to insurance companies. The legal issue before the court did not involve a settled principle of law.[428] This was the first case where the Alabama Supreme Court clearly established that the right of action upon which Justice Embry was seeking to rely in his own simultaneous litigation.[429] In fact, Justice Embry obtained a favorable settlement in his own lawsuit several months *after* the Alabama Supreme Court handed down its decision in *Lavoie*.[430]

A decision that the judge rendered under these circumstances violates due process.[431] "Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case," Burger said.[432] "We hold simply that when Justice Embry made that judgment, he acted as 'a judge in his own case.'"[433]

The majority noted that this situation involved a case "when a disqualified judge casts the deciding vote."[434] It was a point that the majority made several times. In this case, "Justice Embry's vote was decisive in the 5-to-4 decision."[435] Justice Embry "cast the deciding vote"; there was a "close division in deciding this case"; and when "Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law."[436]

There were no dissents, but two justices concurring in the judgment made the common sense point that they would have found Justice Embry's participation improper (1) even if his had not been the deciding vote in the case, and (2) even if he had not written the majority opinion.[437]

Whether it is necessary under due process that the disqualified judge must be the deciding vote is an issue that was not resolved because it was not necessary for the *Lavoie* to decide it.[438] Still, one can easily appreciate the concern of the two justices concurring.[439] One does not know—before the court decides and publishes its opinion—whether or not one vote would be the "deciding vote." A lawyer who wishes to move to disqualify the judge should make that motion before the judges render their opinion, not afterwards, or it looks like the lawyer is planting error, seeking to hold in reserve an argument that he only will use if the opinion comes out wrong from his client's perspective. For the litigants, it would be a strange rule that says that they do not know whether they should move to disqualify the judge until after they had read the published decision.

The judges, of course, will know if one judge would be the deciding vote before they publish their opinion. But, it still would be an unusual rule that says that the judge need not disqualify himself until after he has learned that his view tips a delicate balance. That would apparently mean that after he has learned that his legal arguments during the bench conference were persuasive to almost half the court, but not the other half, only then should the judge, sua sponte, recuse himself. Whether or not Justice Embry was the deciding vote, he participated in the decision-making process.[440] Even if the court were closely divided, Embry's participation could well have influenced the outcome.[441]

Hence, one should not conclude that *Lavoie* is limited to cases that are closely divided. Although the Court has not yet decided that precise question, a wise lawyer should move to recuse in a *Lavoie* situation before the judges issue their ruling, or his client may be estopped from raising the disqualification issue.

### § 10.2.11(o)(2) The Judge Who Acts as Prosecutor, Jury, Complaining Witness, Victim, and Judge

The second scenario when the Due Process Clause mandates judicial disqualification occurs when the judge is multitasking, by being prosecutor, complaining witness, jury and judge. [442] Due process requires the judge to recuse himself when he presides over a criminal contempt case that resulted from the defendant's hostility towards the very same judge who now sits in judgment of the person whom that same judge accused. [443]

The facts in *Mayberry v. Pennsylvania* illustrate the problem. [444] The state prosecuted the defendant and two others for a prison breach and for holding hostages in a prison. [445] The defendant—who was representing himself pro se at the trial—directed a steady stream of expletives and *ad hominem* attacks at the judge. [446] For example, he referred to the judge as a "hatchet man for the State," a "dirty sonofabitch" and "dirty, tyrannical old dog" who "ought to be [in] Gilbert and Sullivan." [447] (One doubts that the judge was amused by this incongruous literary allusion.)

But there is more: when the judge prepared to give his instructions to the jury, the defendant—speaking in the third person—interrupted and warned the judge:

> Before Your *Honor* begins the charge to the jury defendant Mayberry wishes to place his objection on the record to the charge and to the whole proceedings from now on, and he wishes to make it known to the Court now that *he has no intention of remaining silent while the Court charges the jury*, and that he is *going to continually object* to the charge of the Court to the jury throughout the entire charge, and *he is not going to remain silent. He is going to disrupt the proceedings verbally throughout the entire charge* of the Court, and also he is going to be objecting to being forced to terminate his defense before he was finished. [448]

The judge then ordered the defendant removed from the courtroom. [449] The defendant later returned when he was gagged. [450] Still, the defendant "caused such a commotion under gag" that the judge ordered defendant removed to an adjacent room where he could hear the proceedings through a loudspeaker. [451]

Justice Douglas, for the Court, acknowledged that the defendant engaged in "brazen efforts to denounce, insult, and slander the court and to paralyze the trial," and used "tactics taken from street brawls and transported to the courtroom." [452] Nonetheless, when the judge charged that defendant with criminal contempt, the Court concluded that he "should be given a public trial before a judge *other than the one reviled by the contemnor*." [453]

Justice Douglas added that the rule may be different for situations where the judge responds immediately. [454] He conceded that the Court was not saying that "the more vicious the attack on the judge the less qualified he is to act," because no defendant should be able to drive a judge out of case. [455] The law should not benefit a defendant who baits the judge in his case.

Thus, it is important when the judge acts. The judge has the power to keep order in his courtroom if he acts immediately when the defendant engages in the contumacious conduct. But, if the judge waits until the end of the trial, *Mayberry* concludes that "it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." [456] The judge in *Mayberry*—the one who suffered the personal stings—decided to become the judge, jury, prosecutor, victim and complaining witness. [457] That is efficient, but due process is not about efficiency; it is about fairness. [458]

An unusual way that an appellate court can impose its views on a trial court is by using the power to place the judge in indirect criminal contempt. Courts of appeals obviously can overturn a judge. What is more troublesome is when the appellate court puts the trial judge in contempt simply because the trial judge disagrees with the mandate and recuses himself so that another judge can enforce it. In the case of, In re The Honorable Leon A. Kendall, [459] the Supreme Court of the United States Virgin Islands ordered the trial judge to be tried for indirect criminal contempt. The special master who presided over the contempt

trial recommended that acquittal of the trial judge of all courts, but the Supreme Court, flexing its muscle, still held him in contempt and set a hearing date.

The trial judge refused to follow the mandate of the supreme court of the Virgin Islands, criticized its opinion, and then recused himself from the case rather than disobey that court. The trial judge said that the reviewing court's decision was based primarily on "the erroneous finding that the 'trial court ignored clear, binding precedent from a court of superior jurisdiction' when it issued it January 30, 2009 Order"; consequently, the result of its mandamus was that the trial court could "either enforce a plea offer not originally tendered by the prosecutor or proceed to trial." The problem, said the trial court, was that either option would require it to condone blatant misconduct and deny Defendants their right to a fair and impartial jury trial, so the trial court decided to recuse itself from further consideration of the matter. [460]

The territorial supreme court then ordered a show cause hearing. The special master, who presided over that hearing, recommended acquittal of the trial judge on all counts. The supreme court, whom the trial judge (Leon A. Kendall) had strongly criticized, did not like that result, so it found him in contempt and, and then set a sentencing date.

The contempt ruling is troublesome on at least two grounds. First, in light of the due process requirements of Mayberry v. Pennsylvania, [461] the state supreme court should not have acted as both judge and jury. Second, the supreme court based its contempt on the mere words of the trial judge who was, in the view of the supreme court, insufficiently deferential. The trial judge, after all, did not obstruct the supreme court mandate, because the trial judge disqualified himself. There was no obstruction; another trial judge simply takes the place of the first one.

There are some cases, typically quite old, where the appellate court has placed the trial judge in contempt, but they all involved cases where the trial judge obstructed the mandate (e.g., refused to step aside when the appellate court ordered a new judge to decide the case). [462] But that is not what happened here. Judge Kendall disqualified himself from further proceedings, which assured that the trial court (with a different trial judge) would enforce the supreme court's mandate. Given the trial judge's strong beliefs, one might well conclude that his further participation in the case would call into question his own appearance of impartiality. Hence, his recusal was hardly improper. What is left is that the supreme court did not like his language. If that is enough to allow a court to impose contempt, we are all in trouble.

### § 10.2.11(o)(3) The Judge Who Receives Crucial Campaign Contributions or Benefits from Crucial Independent Expenditures

Before *Caperton v. A.T. Massey Coal Co.* [463] due process mandated disqualification in only the two categories discussed above: [464] (1) the judge had a direct, personal, substantial pecuniary interest in the case, or (2) the judge acted as judge, jury, prosecutor, and complaining witness when there was no need for an instant response. [465]

Besides these due process restrictions, there are a host of statutes, rules of court, professional codes, and regulations that impose other grounds for disqualification. [466] As the Court has explained, "matters of kinship, personal bias, state policy, remoteness of interest," are "matters merely of legislative discretion," not constitutional law. [467]

*Caperton* added a third category when due process requires judicial recusal. [468] Sometimes a judge must disqualify himself because of campaign contributions or independent expenditures by an individual who is not a lawyer or party before the Court but has an interest in a case that is before the court. [469] The question is when? *Caperton* does not answer that with any precision, except to say that it all depends. [470]

In *Caperton*, [471] a divided Court (five to four) described the question and the holding as follows:

> In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of $50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices

> in the majority denied a recusal motion. The basis for the motion was that the justice *had received campaign contributions in an extraordinary amount* from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages. [472]

Four justices dissented and appeared to reject the common sense notion that there is an obvious problem of judicial bias when, "without … the consent [of the other parties]—*a man chooses the judge in his own cause*." [473] The dissenters believed, with justification, that the italicized statement in the majority opinion was incorrect or seriously misleading. The board chairman (Blankenship) gave to Justice Benjamin's campaign the maximum allowable under state law, only $1,000. Blankenship did spend $3 million of his own money to attack Benjamin's opponent, the sitting judge, McGraw. No one argued that Blankenship coordinated with Benjamin's campaign.

The distinction between "contributions"—giving money to, or coordinating with the candidate—and "expenditures"—spending one's own money to advocate what one feels like advocating—is hardly technical. It is of constitutional dimension. Independent expenditures—those not coordinated with the candidate—are constitutionally protected as free speech. [474] "Money talks." [475] In contrast, the state has much greater leeway in regulating and limiting contributions. [476] "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." [477] Blankenship was exercising core First Amendment speech when he paid for attack-advertisements against Justice McGraw, the sitting Justice whom Benjamin defeated.

Justice Benjamin could not control Blankenship's independent expenditure because it was made independent of him. In addition, the state could not ban Blankenship's independent expenditures anymore than it could ban a political activist from purchasing a megaphone so that the crowd can hear his message more clearly. [478] Those who have more money—e.g., George Soros—can buy more expensive advertisements or rent a bigger hall to propagate their views. Those of us who do not have such deep pockets can associate with each other in an effort to pool our resources in order to promote our views. The idea that "government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." [479]

The state can regulate and limit contributions. Blankenship contributed only $1,000 directly to Benjamin's campaign. [480] The PAC (political action committee) of A.T. Massey Coal Company contributed $1,000 to Benjamin's campaign. However, neither A.T. Massey Coal Company (nor any of its subsidiaries) contributed any money to Benjamin's campaign, nor made any independent expenditure of funds that either supported Benjamin or criticized his opponent. Nor did Massey or any of its subsidiaries provide any money to *And for the Sake of the Kids* (ASK), [481] an organization that Blankenship funded from his personal funds. ASK published legal attack-advertisements against McGraw.

Kennedy never explains why he blurred the distinction between contributions and expenditures. All we know is that Kennedy acknowledges (only once) that Blankenship engaged in "independent expenditure." [482] But then, a dozen times he repeatedly relabels these "independent expenditures" as "contributions." [483] He discusses the precedent in disqualification cases, and quotes the relevant portions of those cases as referring to "contributions" to the judge, [484] not independent expenditures. Yet, he treats the two words as synonyms and never explains why.

Blankenship's independent expenditures against McGraw were hardly unusual for him. Blankenship is an activist who has made other independent expenditures to support his favored causes in West Virginia elections on issues entirely unrelated to Massey. For example, Blankenship spent millions to unseat candidates who opposed abolishing sales tax on food. [485] He also spent millions to defeat a bond referendum. [486]

Kennedy accepted—without discussion—the argument that this case meant a lot to Blankenship because of Blankenship's financial stake in the outcome. [487] Factually, that is not true. Although Blankenship was a principle officer of Massey [488] —he

was the Chairman, CEO, and President of Massey—his ownership interest was minor. Blankenship is a wealthy man, but his wealth did not depend on his financial interest in Massey. He owned only 0.35% of Massey's stock. [489] If we were to pierce the corporate veil and assume that the proportional share of *Caperton*'s damage claim against Massey came out of Blankenship's personal wallet, his share of the judgment in this case that was reversed by the West Virginia Supreme Court would be only $175,000. [490] If he really thought he could buy a judge, it still does not make any economic sense for him to spend $3 million of his own money in order to save $175,000. Kennedy's factual assumption was simply wrong.

It is difficult to predict the growth of this case. Justice Kennedy thought this case was an "extreme" one, and disqualification under it would be limited to "rare instances." [491]

What we know is that the Court will disqualify a judge on constitutional grounds if five members decide that the facts are "extreme." And, in making the determination, as an "*objective* matter," that a person who was not a party (but was interested in a case) "*cho[se] the judge in his own cause*," [492] the five members will not distinguish between campaign expenditures and independent campaign contributions. What else they will consider is something left to future cases.

Granted, not all legal tests have the nice precision of a jeweler's scale. [493] Still, the Supreme Court should be able to give judges a better test than "it all depends" in deciding whether the judge must recuse himself as a matter of constitutional law.

What we do know from this case excessive *contributions* or excessive *independent expenditures* may require judges to recuse themselves when a party (or a lawyer to a party) as a matter of due process.

State courts may not be impressed with the Supreme Court's efforts to muddy the distinction between contributions and independent expenditures. The Wisconsin Supreme Court, in response to *Caperton*, adopted a rule that explicitly provides that endorsements, campaign contributions and independently run advertisements in themselves are not enough to force a judge's recusal. [494]

*Caperton*, like any vague decision, raises many questions. If, as Justice Kennedy argued, independent expenditures create a "debt of gratitude" [495] in the judge who benefits from the expenditures, what if there is a debt of ingratitude? For example, if Benjamin had lost and his opponent won, should that opponent have to recuse himself because the opponent would feel animosity or ingratitude against Blankenship? Chief Justice Roberts' dissent in *Caperton* raised a host of unanswered questions for future litigants.

*Caperton* remanded the case to the West Virginia Supreme Court of Appeals. The state court once again reversed the judgment. Justice Benjamin recused himself, and another West Virginia judge sat in his place by special designation. The West Virginia Court, once again, overturned (four to one) the $50 million judgment against Massey Coal. [496] So, after all of the litigation, the case ended up exactly where it was before the U.S. Supreme Court reviewed the case.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 2.11(A) is Canon 3E(1). Rule 2.11 (A)(1) is Canon 3E(1)(a). Rule 2.11 (A)(2) is Canon 3E(1)(d). Rule 2.11 (A)(2)(a) is Canon 3E(1)(d)(i). Rule 2.11(A)(2)(b) is Canon 3E(1)(d)(ii). Rule 2.11(A)(2)(c) is Canon 3E(1)(d)(iii). Rule 2.11(A)(2)(d) is Canon 3E(1)(d)(iv). Rule 2.11(A)(3) is Canon 3E(1)(c). Rule 2.11(A)(4) is Canon 3E(1)(e). Rule 2.11(A)(5) combines Canons 3E(1)(f), 3E(1)(f)(i), and 3E(1)(f)(ii). Rule 2.11(A)(6) is the first two words of Canon 3E(1)(b). Rule 2.11(A)(6)(a) is the remainder of the first half of Canon 3E(1)(b). Rule 2.11(A)(6)(b) is the Commentary to Canon 3E(1)(b). Rule 2.11(A)(6)(c) is the second half of Canon 3E(1)(b). Rule 2.11(A)(6)(d) is new. Rule 2.11(B) is Canon 3E(2). Rule 2.11(C) is Canon 3F.

The Comments of the 2007 Code also differ little from the 1990 Code. Comment [1] is the first paragraph of Commentary to Canon 3E(1). Comment [2] is new. Comment [3] is the third paragraph of Commentary to Canon 3E(1). Comment [4] is the Commentary to Canon 3E(1)(f). Comment [5] is the second paragraph of Commentary to Cannon 3E(1). Comment [6] is new.

2 The framers deleted the Commentary to Canon 3F because they thought it was "largely redundant of the black letter and otherwise administrative, rather than ethical, in its recommendations." Reporters' Explanation of Changes to Rule 2.11, at 26 (ABA 2007).

3 28 U.S.C.A. § 455(e).

4 Reporters' Explanation of Changes to Rule 2.11, at 26 (ABA 2007).

5 Contrast the ABA Model Rules of Professional Conduct, Rule 1.7, Comment 11 (ABA, August 2003), which do not treat a spouse the same as a domestic partner. The Comment provides: "Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent." The Comment is concerned with lawyers who are "closely related by blood or marriage." *Id*.

With Rule 1.7, Comment 11, contrast Rule 1.8(c) of the Model Rules of Professional Conduct. Rule 1.8(c) restricts a lawyer who solicits a substantial gift or prepares an instrument giving a substantial gift from a client unless the lawyer or other person is "related" to the client. For purposes of Rule 1.8(c), "related persons include a spouse, child, grandchild, parent, grandparent or other relative or *individual with whom the lawyer or the client maintains a close, familial relationship*" [emphasis added]—a definition that could include what the Judicial Code calls "domestic partners."

6 Reporters' Explanation of Changes to Rule 2.11, at 27 (ABA 2007).

7 ABA Model Rules of Professional Conduct, Rule 1.11.

8 Reporters' Explanation of Changes to Rule 2.11, at 27 (ABA 2007).

9 2007 Code, Rule 3.11, corresponds to Canon 3E of the 1990 Judicial Code, and Canon 3C of the 1972 Judicial Code.

10 *See, e.g.*, Laird v. Tatum, 409 U.S. 824, 825, 93 S.Ct. 7, 8, 34 L.Ed.2d 50, 51 (1972) (Memorandum of Rehnquist, J., denying recusal motion and stating that ABA Judicial Conduct Standards are not "materially different" from standards in federal statute, 28 U.S.C.A. § 455.).

11 The Judicial Conference acts pursuant to the Rules Enabling Act, 28 U.S.C.A. §§ 2071 to 2077.

12 The Judicial Conference initially adopted the Code of Conduct for United States Judges on April 5, 1973; its title then was the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. In its September 1992 session, the Judicial Conference adopted substantial revisions to the Code. At the March 1996 Judicial Conference, the Conference revised Section C. of the Compliance section. Canons 3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference. See Code of Conduct for United States Judges, 101 F.R.D. 389 (1980); Code of Conduct for United States Judges, 175 F.R.D. 363 n.1.

13 Code of Conduct for United States Judges, 175 F.R.D. 362 (1998).

14 In 2009, the Judicial Conference adopted yet another total revision, which takes into account the prior work of the ABA. See Code of Conduct for United States Judges, effective July 1, 2009, reprinted at: http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf.

The Judicial Conference initially adopted the Code of Conduct for United States Judges on April 5, 1973, when it was known as the "Code of Judicial Conduct for United States Judges." Since then, the Judicial Conference has made the following changes to the Code:

- March 1987: deleted the word "Judicial" from the name of the Code;
- September 1992: adopted substantial revisions to the Code;
- March 1996: revised part C of the Compliance section, immediately following the Code;
- September 1996: revised Canons 3C(3)(a) and 5C(4);
- September 1999: revised Canon 3C(1)(c);
- September 2000: clarified the Compliance section.

15 175 F.R.D. 363, 379 n.1.

16 175 F.R.D. 363, 379 n.1. *See* Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, 1977 Utah L.Rev. 395, 395 (1977).

17 Chief Justice John Roberts, 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), at pp. 4, 5.

18 **Additional Federal Disqualification Statutes.** Two additional federal disqualification statutes of interest include: 28 U.S.C.A. § 47, which prohibits a judge from hearing an appeal in any case over which the judge presided as a trial judge; and, 28 U.S.C.A. § 144, which disqualifies district court judges for actual bias or prejudice as alleged in a party's affidavit.

19 2007 Code, Rule 2.11(A), corresponds to the 1990 Code, Canon 3E(1) (emphasis added).

20 2007 Code, Rule 2.11(A), Comment 1.
For a thorough and careful analysis of the disqualification rules governing federal judges, *see*, Charles Gardner Geyh, Judicial Disqualification: An Analysis of Federal Law (Fed. Judicial Center, 2nd ed. 2010).

21 *See* European Convention on the Protection of Human Rights and Fundamental Freedoms, article 6, Section 1, *opened for signature*, 213 UNTS 221 (Nov. 4, 1950); International Covenant on Political and Civil Rights, article 12, Section 1, 999 UNTS (Dec. 16, 1966). *See also United States v. Salim Ahmed Hamdan*, *United States v. David Matthews Hicks*, Appointing Authority Decision on Challenges for Cause, Decision No. 2004-001, Oct. 19, 2004, found at, http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf, 2004 WL 3088514 (USDDMC, Oct. 19, 2004).

22 Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 HOFSTRA L. REV. 1337 (2006).

23 Rule 2.11(A), Comment 2.

24 2007 Code, Rule 2.11, Comment 5; 1990 Code, Canon 3E(1), Comment 2.

25 ABA's Standing Committee Report on 1990 Code 26 (1990).

26 *E.g.*, United States v. Wolfson, 558 F.2d 59, 63 (2d Cir.1977).
Prior to the 1974 amendment to 28 U.S.C.A. § 455, federal courts generally held that a judge had a "duty to sit" in cases where there was no technical violation of the disqualification statute, although there may have been a "question" of impartiality. In 1974, 28 U.S.C.A. § 455(e) was amended, so that federal judges no longer have a duty to sit unless they must disqualify themselves.
On the prior version, *see*, *e.g.*, Tynan v. United States, 376 F.2d 761, 764 (D.C.Cir.1967) ("if the statutory requirements are not met, it is the duty of the judge to refuse to disqualify himself"), *cert. denied*, 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d 111 (1967).

27 H.R. Rep.No.1453, 93d Cong., 2d Sess. 5 (1974). See also the discussion above, in connection with Canon 3B(2) of the Model Judicial Code.

28 Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.), 579 F.2d 691, 699 (2d Cir.1978).

29 2007 Code, Rule 2.11(A) (emphasis added); 1990 Code, Canon 3E(1) (emphasis added).

30 2007 Code, Rule 2.7, corresponds to Canon 3B(1) of the 1990 Code; The 1990 Code added this provision as a new section.

31 ABA's Standing Committee on 1990 Code, Legislative Draft 15 (1990).

32 Ham v. Eighth Judicial Court, 93 Nev. 409, 566 P.2d 420 (1977). The Court issued writ of prohibition to prevent a judge from voluntarily disqualifying himself. The Court held that the trial judge was without authority to disqualify himself where he gave no explanation of the nature of the claimed bias or prejudice and where the trial judge had already ruled on certain litigated matters.

33 2007 Code, Rule 2.11(A)(emphasis added). 1990 Code, Canon 3E(1) (emphasis added).

34 Ronald D. Rotunda, *Thomas' Ethics and the Court*, 13 LEGAL TIMES (of Washington, D.C.) 20 (Aug. 26, 1991).

35 PepsiCo, Inc. v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985).

36 H. Rep. No. 1453, 1974 U.S. Code Cong. & Admin. News, 6351, 6355. *E.g.*, United States v. Mirkin, 649 F.2d 78, 82 (1st Cir. 1981).

37 In re United States, 666 F.2d 690, 695 (1st Cir. 1981)(refusing to require recusal of district judge).

38 *See* H. Rep. No. 1453, 1974 U.S. Code Cong. & Admin. News, 6351, 6355.

39 Microsoft Corp. v. United States, 530 U.S. 1301, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000) (Rehnquist, C.J.) (opinion regarding recusal); Cheney v. U.S. District Court for District of Columbia, 542 U.S. 913, 124 S.Ct. 1391, 158 L.Ed.2d 225 (2004)(Memorandum Opinion of Scalia, J., denying motion for disqualification).
*See also* Ronald D. Rotunda, *The Judicial Recusal Hunting*, WASHINGTON TIMES, Mar. 28, 2004 (discussing the *Cheney* case). For a contrary view, see Lawrence J. Fox, *I Did Not Sleep with that Vice President*, 15 THE PROFESSIONAL LAWYER 1 (ABA, Summer 2004).

40 S.Rep. No. 93-419, at 5 (1973); H.R.Rep. No. 93-1453 (1974), discussing 28 U.S.C.A. § 455, which is the federal statute governing disqualification of judges:

> "[D]isqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."

41 United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir.1992) (emphasis added).

42 Deluca v. Long Island Lighting Co., Inc., 862 F.2d 427, 428–29 (2d Cir.1988); Apple v. Jewish Hospital & Medical Center, 829 F.2d 326, 333 (2d Cir.1987). United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir.1992).

43 In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir.1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989). In re Allied Signal Inc., 891 F.2d 974, 976 (1st Cir.1989). United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir.1992).

44 1990 ABA Model Code of Judicial Conduct, Canon 3E(1), Comment 1.

45 S.Rep. No. 93-419, at 5 (1973); H.R.Rep. No. 93-1453 (1974), discussing 28 U.S.C.A. § 455.

46 In re Aguinda, 241 F.3d 194 (2d Cir.2001).

47 In re Aguinda, 241 F.3d 194, 198 (2d Cir.2001).

48 241 F.3d 194, 199 (2d Cir.2001).

49 241 F.3d 194, 199 (2d Cir.2001).

50 In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001), quoting Administrative Office of U.S. Courts, Codes of Conduct for Judges and Judicial Employees, in GUIDE TO JUDICIARY POLICIES AND PROCEDURES, IV-151 (1999):

> "The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them."

51 Rule 2.11, Comment 3.

52 Rule 2.11, Comment 3.

53 Rule 2.11, Comment 3.

54 United States v. Will, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980).

55 449 U.S. at 217, 101 S.Ct. at 481, 66 L.Ed.2d at 407.

56 Williams v. United States, 48 F.Supp.2d 52 (D.D.C.1999).

57 Judicial Conference of the United States, Committee on Code of Conduct for United States Judges, Compendium of Selected Opinions, § 2.5 (2003).

*See also* 1990 Judicial Code, Canon 3E(1), Comment 1. The Judicial Code deals with the specific example of the judge moving to "a law firm." It does not refer to the other possibilities, such as a judge elevated to another judgeship, or a judge who assumes a position in the executive branch. The negative pregnant of the Comment suggests that these other offices are different, but the Comment does not make that statement explicitly. The 2007 Code does not contain this Comment, but its deletion had no substantive significance. The Reporters' Explanation of Changes does not mention the omission of this example as having any significant meaning.

58 Judicial Conference of the United States, Committee on Code of Conduct for United States Judges, COMPENDIUM OF SELECTED OPINIONS, § 2.5 (2003). *See also* Rule 1.12(b) of the ABA Model Rules of Professional Conduct, which governs lawyers negotiating with judges, arbitrators, etc. for private employment.

59 In re CBI Holding Co., Inc., 424 F.3d 265 (2d Cir. 2005).

60 1990 Judicial Code, Canon 3E(1) & Comment 1.

61 PepsiCo, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985).

62 PepsiCo, Inc. v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985) (emphasis added).

63 764 F.2d at 461 (emphasis added). Other cases make this same point: the judge sought a job from each of the law firms appearing before him.

As Judge Jose A. Cabranes said in McCann v. Communications Design Corp., 775 F.Supp. 1535, 1544 (D. Conn. 1991) (in the course of refusing to read that case broadly and refusing to motion to disqualify): "PepsiCo, as plaintiff himself points out, involved the direct approach of a 'headhunter' seeking to find employment for the judge to the law firms appearing before him."

The Court of Appeals for the District of Columbia has also emphasized this distinction. Anderson v. United States, 754 A.2d 920 (D.C. Ct. App. 2000). This court held that recusal is unnecessary based on the claim that the judge was a potential candidate for federal prosecutor's position, when there was no showing that judge had sought the position. 754 A.2d at 924: "Here, there is not even a hint that Judge Walton had sought, applied for, or negotiated with anyone for the position."

64 764 F.2d at 461.

65 PepsiCo, Inc. v. McMillen, 764 F.2d 458, 460.

66 764 F.2d at 461. *See also* McCann v. Communications Design Corp., 775 F.Supp. 1535, 1543–44 (D. Conn. 1991), distinguishing *PepsiCo*: "I find that a reasonable person, knowing and understanding all of the relevant facts, would not conclude that my impartiality might reasonably be questioned."

67 764 F.2d at 461.

68 764 F.2d at 461.

69 PepsiCo, Inc. v. McMillen, 764 F.2d 458, 460.

70 ABA Judicial Code, Canon 3E(1), Comment 1.

71 Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

72 The Court noted that, "since Commission members receive a salary equal to that of a court of appeals judge, 28 U.S.C. § 992(c), district court judges appointed to the Commission receives an increase in salary." 488 U.S. 361, 11 n.32, 109 S.Ct. 647, 675 n.32. The Court did not decide whether a district judge removed from the Commission must continue to receive the higher salary. *Id*.

73 *Mistretta* rejected the argument that the President could tempt federal judges with offers of appointment to another judicial office or to an executive office. The case upheld the constitutionality of the Federal Sentencing Guidelines when plaintiffs attacked him on separation of powers grounds. Later, the Supreme Court reversed the practical result of *Mistretta*, although it did not reverse the opinion itself, in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Justice Stevens, speaking for the Court said, "Our holding today does not call into question any aspect of our decision in *Mistretta*." 543 U.S. at 241–42, 125 S.Ct. at 754–55.

74 488 U.S. 361, 409–10, 109 S.Ct. 647, 674.

75 Baker v. City of Detroit, 458 F.Supp. 374 (E.D. Mich.1978).

76 The judge explained:

> "The pertinent allegations of plaintiffs' motion to disqualify are as follows: that Mayor Young and I are friends, that *Mayor Young served as a member of the selection committee which submitted my name*, along with four other nominees, to the President as candidates for appointment to the United States Court of Appeals for the Sixth Circuit, and that Mayor Young was one of several dignitaries who, in his official capacity as Mayor of the City of Detroit, made welcoming remarks to guests and judges of the Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan at my swearing-in ceremony to the Sixth Circuit. From these facts, plaintiffs allege that extra-judicial contact between myself and Mayor Young during the pendency of this litigation is likely and thus creates an appearance of impropriety." 458 F.Supp. at 375–76 (emphasis added).

77 http://www.ca6.uscourts.gov/internet/courtofappeals/courtappealsjudges.htm

78 Laxalt v. McClatchy, 602 F.Supp. 214 (D. Nev. 1985).

79 602 F.Supp. at 218.

80 A new opening on the Court was certainly expected. Justice Blackmun had announced in June 1992: "I am 83 years old. I cannot remain on this Court forever." Planned Parenthood v. Casey, 505 U.S. 833, 943, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)(Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting). Justice Stephen G. Breyer, took his judicial oath of office on August 3, 1994. CONGRESSIONAL RESEARCH SERVICE, REPORT TO CONGRESS, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, July 6, 2005, at p. 4.

81 Stephen Gillers, David J. Luban, and Steven Lubet, Opinion Letter to Senator Specter, Sept. 6, 2005, *reprinted in* 6 *Engage: The Journal of the Federalist Society's Practice Groups* 134 (No. 2, Oct. 2005).

82 28 U.S.C. § 455(a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

83 Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2005).

84 See Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and their Aftermath*, 57 SYRACUSE L. REV. 1 (2006); Ronald D. Rotunda, *Holding Enemy Combatants in the Wake of Hamdan*, 8 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 52 (Issue 3, June 2007).

85 Ronald D. Rotunda, *A Shaky Ethics Charge*, WASHINGTON POST, Sept. 6, 2005, at p. A25.

86 Robinson v. Boeing Co., 79 F.3d 1053, 1055–56 (11th Cir.1996), which discusses the district court's suspicion "that in this district the choice of lawyers may sometimes be motivated by a desire to disqualify the trial judge to whom the case has been randomly assigned." McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1265 (5th Cir. 1983), holding that a "lawyer may not enter a case for the primary purpose of forcing the presiding judge's recusal." A litigant should not be able to "veto the allotment and obtain a new judge by the simple expedient of finding one of the judge's relatives who is willing to act as counsel, it would become possible for any party to disrupt preparation for, or, indeed, the trial itself." 714 F.2d at 1264.

Grievance Administrator v. Fried, 456 Mich. 234, 570 N.W.2d 262 (1997). Two judges in a county had close relatives who practiced there. Local lawyers advised clients to hire the relevant relative as co-counsel to force the recusal of the judge if the client wanted his case reassigned from one judge to the other. The Attorney Disciplinary Board dismissed the charges against the lawyers, but the Michigan Supreme Court reversed and remanded for further proceedings. The Supreme Court held a lawyer is subject to discipline

if that lawyer participates as co-counsel in a suit for the *sole* purpose of recusing a judge because of the lawyer's familial relationship with that judge.

87 Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEORGETOWN J. OF LEGAL ETHICS 1187 (2006).

88 Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

89 Mistretta v. United States, 488 U.S. 361, 409–10, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

90 United States v. Ellsberg and Russo, 5/12/73 N.Y. Times (Abstracts) 1, 1973 WLNR 64561; 7/27/73 N.Y. Times (Abstracts) 10, 1973 WLNR 122747; 8/9/73 N.Y. Times (Abstracts) 35, 1973 WLNR 41043.

91 Scott v. United States, 559 A.2d 745 (D.C. 1989).

92 559 A.2d at 750. *See also* 559 A.2d 745, 755.

93 559 A.2d 745, 765 (Schwelb, Associate Judge, concurring in the result).

94 559 A.2d at 750: "Nevertheless, presented with the facts before us, the court concludes that there is a violation of Canon 3(C)(1) when the trial judge who is presiding at the prosecution by the United States Department of Justice through the United States Attorney's Office is actively negotiating for employment with the Department's Executive Office for United States Attorneys."

95 559 A.2d 745, 751 (D.C. 1989).

96 McCann v. Communications Design Corp., 775 F.Supp. 1535, 1543–44 (D. Conn. 1991).

97 2007 Code, Rule 2.11C); 1990 Code, Canon 3F.

98 559 A.2d 745, 750 (D.C. 1989).

99 559 A.2d at 761 (Schwelb, Associate Judge, concurring in the result).

100 559 A.2d at 768 (Schwelb, Associate Judge, concurring in the result).

101 559 A.2d at 755.

102 559 A.2d at 755.

103 559 A.2d at 750 (emphasis added).

104 559 A.2d at 750 (emphasis added).

105 559 A.2d at 747.

106 Scott v. United States, 559 A.2d 745, 755 (D.C.1989) (emphasis added). The Canon in question provided: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned …." 559 A.2d at 758.

107 Anderson v. United States, 754 A.2d 920, 924 (D.C. Ct. App. 2000): "Nowhere in the article does it say that Judge Walton had either applied for, or was seeking the position [in the Department of Justice]." Unlike *Scott*, "Here, there is not even a hint that Judge Walton had sought, applied for, or negotiated with anyone for the position."

108 2007 Code, Rule 2.11(A)(2) corresponds to the 1990 Code, Canon 3E(1)(d).

109 ABA Informal Opinion 1477 (Aug. 12, 1981).
Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir.1965) (trial judge disqualified because counsel for a party had recently represented judge in unrelated case against judge for civil damages because of judge's official activity).

110 ABA Formal Opinion 07-449 (Aug. 9, 2007).

111 2007 Judicial Code, Rule 2.11(C) does not allow the parties to waive the judge's personal bias or prejudice about a party or lawyer, under Rule 2.11(A)(1).

112 2007 Judicial Code, Rule 2.11(C) is the waiver provision.

113 ABA Model Rules of Professional Conduct, Model Rule 1.16(a)(1). ABA Formal Opinion 07-449 also concludes that the duty of confidentiality that the lawyer owes to the judge as a client prohibits the lawyer from disclosing the judge's violation of the Judicial Code to the appropriate disciplinary agency, as Model Rule 8.3 would otherwise require.

114 ABA Formal Opinion 07-449 (Aug. 9, 2007).

115 New York Adv. Committee on Jud. Eth. Op. 05-143 (Jan. 26, 2006), available at http://www.nycourts.gov/ip/judicialethics/opinions/05-143.htm. The judge must recuse when a law firm represents party before judge, and the judge consulted with the law firm about a pending investigation of a complaint that the judge believes was filed against the judge with the State Commission on Judicial Conduct. "If, however, no charges are brought by the Commission against the judge, the judge need not recuse him/herself following the expiration of two years from the time that the judge has last consulted the attorney on the matter."

116 Rinden v. Marx, 116 N.H. 58, 351 A.2d 559 (1976).

117 Amidon v. State, 604 P.2d 575 (Alaska, 1979).

118 Smith v. State, 239 Ga. 477, 238 S.E.2d 116 (1977).

119 Commonwealth v. Perry, 468 Pa. 515, 364 A.2d 312 (1976).

120 Matthews v. Rodgers, 279 Ark. 328, 651 S.W.2d 453 (1983).

121 651 S.W.2d at 456. *See also United States v. Salim Ahmed Hamdan, United States v. David Matthews Hicks*, Appointing Authority Decision on Challenges for Cause, Decision No. 2004-001, Oct. 19, 2004, found at, http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf, 2004 WL 3088514 (USDDMC, Oct. 19, 2004). (opinion refusing to disqualify judge presiding over military commission trying alleged war criminals).

122 Matthews v. Rodgers, 279 Ark. 328, 333–34, 651 S.W.2d 453, 456 (1983).

123 T.R.M. v. State, 1979 OK CR 59, 596 P.2d 902 (Okla.Crim.App., 1979). *See* Ronald D. Rotunda, *Duck Hunting Benchmarks*, WASHINGTON TIMES, Mar. 28, 2004, at B4.

124 T. R. M. v. State, 596 P.2d 902, 905 (Okla.Crim.App., 1979).

125 Amidon v. State, 604 P.2d 575 (Alaska, 1979).

126 United States v. Tucker, 78 F.3d 1313 (8th Cir. 1996).

127 78 F.3d at 1325.

128 Ronald D. Rotunda, *Duck Hunting Benchmarks*, WASHINGTON TIMES, Mar. 28, 2004, at B4:

> Years ago, when I was clerking for a federal judge, he asked me, after the oral argument, what I thought of the two lawyers' performances. Before I answered, he said: "Those are two of the finest lawyers you'll ever meet. One was the best man at my wedding, and the other is one of my very best friends." The judge did not think of disqualifying himself.

129 G. Edward White, *The Working Life of the Marshall Court*, 1815–1835, 70 VA. L. REV. 1 (1984).

130 5 MEMOIRS OF JOHN QUINCY ADAMS 322–23 (C. Adams ed. 1969) (Diary Entry of Mar. 8, 1821).

131 JOHN M. HARLAN, SOME MEMORIES OF A LONG LIFE, 1854–1911, p. 99 (2001).

132 2 MEMOIRS OF HERBERT HOOVER 327 (1952).

133 Quoting historian William E. Leuchtenberg, in Jeffrey Rosen, *Social Court: The Justice Who Came to Dinner*,NEW YORK TIMES, Feb. 1, 2004, at § 4, p.1.

134 SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 264 (Little Brown & Co., 1989), pointing out that "Holmes and Fanny dined at the White House every week or two. …"

135 Northern Securities Co. v. United States, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904).

136 RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 174 (Thomson West, 7th ed. 2003).

137 JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 220–21 (Harper & Row 1980); DAVID MCCULLOUGH, TRUMAN 511 (Simon & Schuster, 1992).

138 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

139 Ross Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG, 2D SERIES 79 (2006).

140 Milliken v. Bradley, 418 U.S. 717, 781, 94 S.Ct. 3112, 3145, 41 L.Ed.2d 1069 (1974)(Marshall, J., dissenting), discussed in, Ross Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG, 2D SERIES 79, 85–86 (2006).

141 The Court discusses this incident in Cheney v. U.S. District Court for the District of Columbia, 541 U.S. 913, at 924–25, 124 S.Ct. 1391, 1400–1401, 158 L.Ed.2d 225 (2004). *See also* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 342 (The Free Press, 1998). The two cases are Gastelum-Quinones v. Kennedy, 374 U.S. 469, 83 S.Ct. 1819, 10 L.Ed.2d 1013 (1963) and Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

142 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). In this case, the Department of Justice ordered the deportation of a resident alien because he had been a member of the Communist Party. The Court held that the Department of Justice's evidence was inadequate.

143 *E.g.*, In re United States, 666 F.2d 690 (1st Cir.1981); Parrish v. Board of Commissioners, 524 F.2d 98 (5th Cir.1975) (en banc). *Cf.* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir.), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 529, 78 L.Ed.2d 711 (1983).

144 Memorandum of Scalia, J., at 541 U.S. 913, 124 S.Ct. 1391, 158 L.Ed.2d 225 (2004). For a criticism of this decision, see Lawrence J. Fox, *I Did Not Sleep with that Vice President*, 15 THE PROFESSIONAL LAWYER 1 (ABA, Summer 2004).

145 541 U.S. at 916, 124 S.Ct. at 1394–95.

146 Wall Street Journal, Mar. 19, 2004, at p. A.14, 2004 WL-WSJ 56923414, reprints this letter of Oct. 28, 2003 to Justice Scalia. It starts with: "*Dear Nino*," The author of this letter, Alan B. Morrison of the Public Citizen Litigation Group, concludes by suggesting, "we can get together before" before Mr. Morrison leaves for California. He closes by sending his, "Best to Maureen," [Justice Scalia's wife].

147 Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

148 Robert S. Greenberger, *Scalia Defends His Impartiality in Cheney Case*, WALL STREET JOURNAL, Mar. 19, 2004, at pp. B1, B2.

149 In re Conduct of Jordan, 290 Or. 669, 624 P.2d 1074 (1981) (per curiam).

150 United States v. Murphy, 768 F.2d 1518 (7th Cir.1985).

151 768 F.2d 1518, 1538 (7th Cir.1985).

152 "Although Lydon [the defense lawyer] has filed an affidavit stating that he did not know of the plans for the 1984 vacation, he admitted that he knew of the close relation between Webb and Kocoras and did not deny the probability of future vacations at what is apparently the favorite resort of former members of the U.S. Attorney's office in Chicago." 768 F.2d 1518, 1538 (7th Cir.1985).

153 768 F.2d 1518, 1539 (7th Cir.1985).

154 ABA Model Rules of Professional Conduct, Rule 1.12(b).

155 The screening is pursuant to Model Rule 1.12(c)(1), & (2). *See also* Model Rule 1.12(b)(law clerk for judge may negotiate for employment with law firm that has a case before the judge in which the judicial clerk is participating personally and substantially but only after the judicial clerk first notifies the judge). *See* John Paul Jones, *Some Ethical Considerations for Judicial Clerks*, 4 GEORGETOWN J. LEGAL ETHICS 771 (1991).

156 Model Rules of Professional Conduct, Rule 1.9, Comment 2, explains that "matter" as used in that Rule is a question of degree. It implies a "specific transaction," and not a recurrent type of problem.

157 The corresponding federal statutory provision is 28 U.S.C.A. § 455(a).

158 Simonson v. General Motors Corp., 425 F.Supp. 574 (E.D.Pa.1976).

159 Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251 (5th Cir.1978). *See also* Monument Builders of Pennsylvania, Inc. v. The Catholic Cemeteries Ass'n, Inc., 1999-2 Trade Cases ¶72,727, 190 F.R.D. 164 (E.D.Pa.1999). The court disqualified the former law clerk of a judge (this judge had presided over an antitrust class action) from representing the plaintiff in a subsequent action alleging a breach of the settlement agreements reached in the first suit.

160 569 F.2d at 256.

161 2007 Code, Rule 2.11(A)(1) corresponds to the 1990 Code, Canon 3E(1)(a).

162 2007 Code, Rule 2.11(A)(1) corresponds to the 1990 Code, Canon 3E(1)(a).

163 28 U.S.C.A. § 455(b)(1).

164 *E.g.*, Samuel v. University of Pittsburgh, 395 F.Supp. 1275 (W.D.Pa.1975).

165 Papa v. New Haven Fed'n of Teachers, 186 Conn. 725, 444 A.2d 196 (1982).

166 More precisely, that conduct violated Canon 3A(6) of the 1972 Code, a provision that is now found in Canon 3B(9) of the 1990 Code and of Rule 2.10 of the 2007 Code.

167 In the Matter of Sheffield, 465 So.2d 350 (Ala.1984).

168 465 So.2d at 353.

169 465 So.2d at 355.

170 The same rule applies in the federal courts. Bias sufficient to disqualify a judge under § 455(a) and § 455(b)(1) must stem from extrajudicial sources, unless the judge's acts demonstrate "such pervasive bias and prejudice that it unfairly prejudices one of the parties." United States v. Ramos, 933 F.2d 968, 973 (11th Cir.1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1269, 117 L.Ed.2d 496 (1992); United States v. Bailey, 175 F.3d 966, 968 (11th Cir.1999).

171 United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 249, 629 P.2d 231, 325 (1980), quoting In re International Business Machines Corp., 618 F.2d 923, 930 (2d Cir.1980).

172 *See* United States v. Cowden, 545 F.2d 257 (1st Cir.1976), *cert. denied*, 430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed.2d 585 (1977).

173 United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

174 384 U.S. at 583, 86 S.Ct. at 1710.

175 State v. Harry, 311 N.W.2d 108 (Iowa 1981).

176 The Court relied on Canon 3A(3) of the 1972 Model Judicial Code, which is Canon 3B(4) of the 1990 Model Judicial Code and Rule 2.8(B).

177 Reserve Mining Co. v. Lord, 529 F.2d 181, 186 (8th Cir.1976), *citing* Berger v. United States, 255 U.S. 22, 35–36, 41 S.Ct. 230, 235, 65 L.Ed. 481 (1921). Steven Lubet, *Bullying from the Bench*, 5 THE GREEN BAG, 2ND SERIES 11 (2001).

178 Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir.1979).

179 596 F.2d 152, at 155.

180 596 F.2d at 156, n. 9, *citing* Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir.1975).
*See also* In re Blake, 912 So.2d 907 (Miss. 2005). A lawyer and his clients filed petitions for writ of mandamus seeking the recusal of circuit judge in seven pending cases and all future cases in which attorney appeared as counsel. The court held that the hostility

that the trial judge exhibited toward the lawyer would lead a reasonable person aware of all circumstances to question whether the lawyer's clients could get fair hearing in her court. Hence, the court required the judge's recusal in all seven pending cases.

However, the court denied the petitions to the extent that they requested Judge Tomie T. Green's recusal in all future cases in which Robinson appears as counsel. The Court said it would review any request for recusal in future cases on a case-by-case basis.

In this case, the state Supreme Court found that the record before it demonstrated that the judge entertained high degree of hostility, animosity, and bad temper toward this lawyer. This hostility continued beyond the trial to the lawyer's post-trial efforts to obtain an accurate record. Moreover, nothing in the record suggested that the judge's actions were responsive to improper conduct on the lawyer's part. When invited to explain the circumstances, Circuit Judge Tomie T. Green made allegations of racial and gender prejudice, which the Supreme Court found had no support in the record.

Rotunda, Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts, 41 Loy. U. Chi. L. Rev. 301, 307–14 (2010) (discussing federal judges, such as Judge Sam Kent, who have been intemperate, some of whom were later indicted and found guilty). *See also* Richmond, Bullies on the Bench, 72 La. L. Rev. 325 (2012).

181 In re International Business Machines Corp., 618 F.2d 923 (2d Cir.1980).

182 618 F.2d at 929. *See also* Lazofsky v. Sommerset Bus Co., 389 F.Supp. 1041 (E.D.N.Y.1975) (judge does not demonstrate partiality merely because his rulings in a proceeding favor one party over the other).

183 Idaho v. Freeman, 507 F.Supp. 706 (D. Idaho 1981).

184 U.S. Constitution, Article VI, clause 3. The free exercise clause of the First Amendment would apply a similar rule to state officials.

185 Commonwealth v. Leventhal, 364 Mass. 718, 307 N.E.2d 839 (1974).

186 Department of Revenue v. Golder, 322 So.2d 1 (Fla.1975).

187 State v. Linsky, 117 N.H. 866, 379 A.2d 813 (1977).

188 State v. Ahearn, 137 Vt. 253, 403 A.2d 696 (1979).

189 Commonwealth v. Boyle, 498 Pa. 486, 447 A.2d 250 (1982).

190 498 Pa. at 491, 447 A.2d at 252.

191 Lazofsky v. Sommerset Bus Co., 389 F.Supp. 1041 (E.D.N.Y.1975).

192 United States v. Poludniak, 657 F.2d 948 (8th Cir.1981).

193 United States v. Brown, 539 F.2d 467 (5th Cir.1976) (per curiam). The defendant in this case was H. Rap Brown, a notorious black radical of the 1970's. *See also* Bell v. Haley, 2000 WL 33682804, *15 (M.D.Ala.2000) (even if "the biased judge neither is the trier of fact nor is shown to have conveyed his bias to the jury that is the trier of fact, there can be a violation of due process which requires a reversal of the conviction.").

194 539 F.2d at 470.

195 United States v. Holland, 655 F.2d 44 (5th Cir.1981) (per curiam).

196 2007 Code, Terminology, ¶5.

197 Reporters' Explanation of Changes to Terminology, at 4 (ABA 2007).

198 Reporter Notes to 1972 Judicial Code at 67 to 68.

199 2007 Judicial Code, Terminology, ¶24; 1990 Judicial Code, Terminology ¶21.

200 *See, e.g.*, Gray v. Barlow, 241 Ga. 347, 245 S.E.2d 299 (1978) (judge disqualified where relatives were related in the 6th degree but also held security interests in the parties' property in case where plaintiff sought removal of obstruction to his property).

201 Davis v. Jones, 506 F.3d 1325, 1332 (11th Cir. 2007), holding that the state court did not unreasonably apply federal law by finding that judge-prosecutor kinship in the juvenile court proceedings was not a due process violation.

202 Dyas v. State, 260 Ark. 303, 323, 539 S.W.2d 251, 263 (1976).

203 Railey v. Webb, 540 F.3d 393 (6th Cir. 2008). The court held that the state court holding that that the kinship between the judge and prosecutor did not violate the defendant's due process rights when the trial judge failed to disqualify himself. Nor was there ineffective assistance of counsel when the defendant's counsel failed to inform the defendant, his client, of the kinship between the judge and prosecutor.

204 Railey v. Webb, 540 F.3d 393, 397 (6th Cir. 2008). Prosecutor Bertram participated personally in two of the hearings before Judge Bertram; (1) a hearing on a motion to reduce bond and (2) the plea hearing.

Dyas v. Lockhart, 705 F.2d 993 (8th Cir. 1983), cert. denied, 464 U.S. 982, 104 S. Ct. 424, 78 L. Ed. 2d 359 (1983), concluding that, standing alone, the state trial judge's family relationship to the prosecuting attorneys was insufficient to raise a conclusive presumption of actual bias, for due process purposes. Judge Bobby Steele, the presiding judge, was the uncle of the Prosecuting Attorney and the brother and father of the two Deputy Prosecuting Attorneys who participated in the prosecution of Dyas. "Before trial, Judge Steele sua sponte wrote Dyas' trial counsel and offered to disqualify himself because of his relationships with the Prosecuting Attorneys. Dyas' counsel refused Judge Steele's offer to disqualify." *Dyas v. Lockhart*, 705 F.2d at 995.

205 2007 Judicial Code, Rule 2.11(A)(2)(a), corresponds to 1990 Judicial Code, Canon 3E(1)(d)(i)

206 Reporters' Explanation of Changes to Rule 2.11, at 26 (ABA, 2007).

207 2007 Judicial Code, Rule 2.11, Comment 6.

208 Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded, 47 Ohio App.2d 28, 351 N.E.2d 777 (1975).

209 Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).
*See also* Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Steven Breyer*, 30 OKLA. CITY U. L. REV. 513, 519–21, 531-32 (2005).

210 28 U.S.C.A. § 455(a). This provision is, frankly, a bit vague. It provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."
Congress had amended this statute in 1974 to clarify and broaden the grounds for judicial disqualification and to conform to various provisions of the then recently-adopted ABA Model Code of Judicial Conduct (1987). *See* S. Rep. No. 93-419, p. 1 (1973); H. R. Rep. No. 93-1453, pp. 1–2 (1974), U. S. Code Cong. & Admin. News 1974, at p. 6351. The Court did not cite ABA Judicial Canon 4E(1), or 28 U.S.C.A. § 455(b)(5)(i), which is the analogue section. Instead, it cited 28 U.S.C.A. § 455(a): "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

211 486 U.S. 847, 849, 108 S.Ct. 2194, 2197.

212 486 U.S. 847, 848, 108 S.Ct. 2194, 2196.

213 486 U.S. 847, 861, 108 S.Ct. 2194, 2203.

214 486 U.S. 847, 868, 108 S.Ct. 2194, 2206. 28 U.S.C.A. § 455(c) provides: "A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."

215 2007 Judicial Code, Rule 2.11(A)(2(b), corresponds to the 1990 Judicial Code, Canon 3E(1)(d)(ii).

216 Recall that Rule 2.11(A)(6)(a), and Canon 3E(1)(b) [*cf.* 28 U.S.C.A. § 455(b)(2) & (3)] also require a judge to disqualify himself if he had served as a lawyer in the matter in controversy, or was associated with a lawyer to had participated personally and substantially in the matter in controversy.

217 2007 Judicial Code, Rule 2.11, Comment 4; 1990 Code, Canon 3E(1)(d)(ii), Comment 1.

218 Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.1980), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980) (judge was not *per se* disqualified simply because partner in defense counsel's law firm was related to judge).

219 609 F.2d at 1112.

220 609 F.2d at 1113, *quoting* § 455(b)(5)(iii).

221 In Pashaian v. Eccelston Properties, Ltd., 88 F.3d 77 (2d Cir.1996), the Second Circuit held: "We reject the Fifth Circuit's rule of automatic recusal." 88 F.3d at 83. *Pashaian* went on to state: "It would simply be unrealistic to assume, with Potashnick, that partners in today's law firms invariably 'have an interest that could be substantially affected by the outcome of any case in which any other partner is involved.'" 88 F.3d 77, 83.

222 88 F.3d 77, 84 (2d Cir.1996).

223 United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir.1977).

224 *See also* United States ex rel. Weinberger v. Equifax, 557 F.2d 456, 463 (5th Cir.1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978) (relative's salary interest as an associate insufficient to require recusal); Wilmington Towing Co., Inc., v. Cape Fear Towing Co., Inc., 624 F.Supp. 1210, 1211 (E.D.N.C.1986) (similar result involving a summer associate); Miller Industries, Inc. v. Caterpillar Tractor Co., 516 F.Supp. 84, 86 (S.D.Ala.1980) (similar result involving of counsel); Keene Corp. v. Rogers, 863 S.W.2d 168, 172 (Tex.Ct.App.1993) (similar result involving of counsel); United States v. Tierney, 947 F.2d 854, 865 (8th Cir.1991); Welch v. Board of Directors of Wildwood Golf Club, 1996 WL 115433, *4 (W.D.Pa. Mar. 5, 1996); Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 258 (Utah 1992); Reilly v. S.E. Pennsylvania Transportation Authority, 330 Pa.Super. 420, 479 A.2d 973, 982 (Pa.Super.Ct.1984); In re National Union Fire Insurance Co., 839 F.2d 1226 (7th Cir.1988); Stewart v. GNP Commodities, Inc., 1992 WL 121545, * 2 (N.D.Ill. May 26, 1992).
In Nobelpharma Ab v. Implant Innovations, Inc., 930 F.Supp. 1241, 1267 (N.D.Ill. 1996), Judge B.B. Duff held that the fact that his daughter was a partner at defendant's law firm did not warrant recusal. His daughter was a salaried partner, not an equity partner. His daughter performed no work on the case, and his daughter did not represent the defendant in any matter

225 SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir.1977).

226 557 F.2d 110, 115.

227 557 F.2d 110, 115.

228 S.J. Groves & Sons Co. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 627, 581 F.2d 1241 (7th Cir.1978).

229 McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir.1983).

230 714 F.2d 1255, 1261.

231 714 F.2d 1255, 1261.

232 714 F.2d 1255, 1257.

233 714 F.2d 1255, 1264.

234 Comment, *Ethical Concerns of Lawyers who are Related by Kinship or Marriage*, 60 OR. L. REV. 399 (1981). Texas Ethics Committee Opinion 148 said it was unethical for a lawyer who is member of the legislature to accept employment to enable the client to obtain a mandatory continuance for legislator-counsel), *reprinted in* 18 BAYLOR L. REV. 257–58 (1966).

235 714 F.2d at 1265.

236 714 F.2d at 1265.

237 714 F.2d at 1264.

238 *Compare* Grievance Administrator v. Fried, 456 Mich. 234, 570 N.W.2d 262 (Mich.1997). In this case, two judges in a county had close relatives who practiced there. If a client desired that his case be reassigned from one judge to the other, local lawyers advised the clients to hire the relevant relative as co-counsel to force the recusal of the judge. The Attorney Disciplinary Board dismissed the charges against the lawyers but the Michigan Supreme Court reversed and remanded for further proceedings. The Supreme Court held a lawyer is subject to discipline if that lawyer participates as co-counsel in a suit for the sole purpose of obtaining the recusal of a judges because of the lawyer's familial relationships with the judge.
Robinson v. Boeing Co., 79 F.3d 1053, 1055–56 (11th Cir.1996), discusses the district court's suspicion "that in this district the choice of lawyers may sometimes be motivated by a desire to disqualify the trial judge to whom the case has been randomly assigned."

239 Microsoft Corp. v. United States, 530 U.S. 1301, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000).

240 530 U.S. at 1301, 121 S.Ct. at 26 (Statement of Rehnquist, C.J.).

241 530 U.S. at 1301, 121 S.Ct. at 26.

242 In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1309 (2d Cir.1988); Liteky v. United States, 510 U.S. 540, 548, 114 S.Ct. 1147, 1153, 127 L.Ed.2d 474 (1994).

243 530 U.S. at 1301, 121 S.Ct. at 26. *See also* Ronald D. Rotunda, *Rubbish about Recusal*, WALL ST. J., Dec. 13, 2000, at A26.

244 530 U.S. at 1301, 121 S.Ct. at 26.

245 530 U.S. at 1301, 121 S.Ct. at 27.

246 Chief Justice John Roberts, 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), at pp. 4, 5.

247 2007 Model Code, Rule 2.11(A)(2)(c), corresponds to 1990 Canons, Canon 3E(1)(d)(iii). Note that 28 U.S.C.A. § 455(b)(5)(iii) is analogous to Rule 2.11(A)(2)(c) and Canon 3E(1)(d)(iii) except the federal statute does not allow even de minimis interests.

248 2007 Code, Terminology, ¶14.

249 2007 Code, Rule 2.11(B); 1990 Code, Canon 3E(2).

250 2007 Code, Terminology, ¶4.

251 Huffman v. Arkansas Judicial Discipline & Disability Comm'n, 344 Ark. 274, 280, 42 S.W.3d 386, 391 (2001).

252 28 U.S.C.A. § 455 (b)(5)(iii).

253 2007 Code, Rule 2.11(A)(2)(d), corresponds to the 1990 Code, Canon 3E(1)(d), and 28 U.S.C.A. § 455(b)(5).

254 2007 Code, Rule 2.11(A)(3) corresponds to 1990 Code, Canon 3E(1)(c). The corresponding provision in the federal statute is 28 U.S.C.A. § 455(b)(4). It provides:

> "He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

255 20007 Code, Terminology, ¶7.

256 2007 Code, Terminology, ¶18.

257 2007 Code, Terminology, ¶4.

258 2007 Code, Terminology, ¶6 (emphasis added).

259 Rule 2.11, Comment 6.

260 In re Virginia Electric & Power Co., 539 F.2d 357 (4th Cir.1976).

261 *See also* Dacey v. Connecticut Bar Ass'n, 170 Conn. 520, 368 A.2d 125 (1976) (judge did not have legal or equitable financial interest in case where plaintiff was suing the state bar association for libel and any judgment adverse to the bar association could raise bar dues).

262 Taylor v. Public Convalescent Service, 245 Ga. 805, 267 S.E.2d 242 (1980).

263 Commonwealth v. Keigney, 3 Mass.App.Ct. 347, 329 N.E.2d 778 (1975).

264 *See* ABA Model Judicial Code of 1972, Canons 3C(1)(c) & 3D.

265 Canon 3C(3)(b) of the 1972 Judicial Code.

266 JEFFREY SHAMAN, STEVEN LUBET, & JAMES ALFINI, JUDICIAL CONDUCT AND ETHICS § 5.20 at 138 (Michie Pub. 2d ed., 1990).

267 *See* Reporter's Notes [1972] at 65.

268 In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d 1297 (9th Cir.1982), *aff'd*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983) (per curiam).

269 28 U.S.C.A. § 455(d)(4), also defines "financial interest" to include "a legal or equitable interest, however small."

270 688 F.2d at 1313.

271 Union Carbide Corp. v. United States Cutting Service, Inc., 782 F.2d 710 (7th Cir.1986).

272 28 U.S.C.A. § 455(f).

273 1990 Judicial Code, Terminology ¶7.

274 1990 Judicial Code, Terminology ¶6.

275 1990 Judicial Code, Terminology ¶9.

276 2007 Judicial Code, Terminology, ¶¶4 ("de minimis"); 5 ("economic interest"), 8 ("impartial"). The 2007 Code uses different language to define "impartial," but the final product is still vague.

277 2007 Code, Rule 2.11(A)(3). 1990 Code, Canon 3E(1)(c).

278 ABA's Standing Committee Report on 1990 Code, Report, at 6 (ABA 1990). *See also* ABA's Standing Committee on 1990 Code, Legislative Draft, at 5 (ABA 1990) ("more than de minimis" was included "to preclude disqualification based on any de minimis legal or equitable interest …"). M. Peter Moser, *The 1990 ABA Code of Judicial Conduct*, 4 GEORGETOWN J. LEGAL ETHICS 731, 752 & n.82 (1991), simply repeats the definition in the Terminology section.

279 2007 Code, Terminology, ¶4.

Given the punctuation in Canon 3E(1)(c), the more natural reading is that if the judge (or relevant family member) *has a relationship such as an officer*, director, etc. in a party, or has *more than a de minimis economic interest* in the subject matter in controversy or a party to the proceeding, then the judge must be disqualified. However, if the judge (or relevant family member) has *any other interest*, then this other interest must satisfy two criteria: *first*, it must be *more than de minimis*, and *second*, this interest is such that it *could be substantially affected by the proceeding*.

280 1990 Code, Canon 4I, Comment 1.

281 *See* 28 U.S.C.A. § 455(d)(4). 28 U.S.C. § 455(b)(5) provides:

> "He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, *has a financial interest* in the subject matter in controversy or *in a party* to the proceeding, *or any other interest* that could be substantially affected by the outcome of the proceeding." (emphasis added).

Then, 28 U.S.C. § 455(d)(4) defines "financial interest" as the "ownership of a legal or equitable interest, *however small*," subject to various exceptions not applicable here. See also, Federal Committee on Codes of Conduct, Advisory Opinion No. 20 (as revised on July 10, 1998), http://www.uscourts.gov/guide/vol2/20.html.

282 28 U.S.C.A. § 455(e).

283 Canon 3D of the 1973 Model Judicial Code allowed the parties to waive, outside the presence of the judge, in writing. Reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1989 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 336 (Foundation Press 1989).

284 Huffman v. Arkansas Judicial Discipline & Disability Comm'n, 344 Ark. 274, 42 S.W.3d 386 (2001).

285 The 1990 Judicial Code defines this expression in Terminology, ¶14. The 2007 Judicial Code defines this expression at Terminology ¶18.

286 2007 Code, Rule 2.11(B) ("A judge shall keep informed …"). 1990 Code, Canon 3E(2) ("A judge shall keep informed …."). And 28 U.S.C.A. § 455(c) ("A judge shall inform himself about his personal and fiduciary financial interests ….").

*See also* Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859–60, 108 S.Ct. 2194, 2202, 100 L.Ed.2d 855 (1988), interpreting 28 U.S.C.A. § 455(a), which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. The Court held that this law requires the judge's disqualification when a reasonable person, knowing the

relevant facts, would expect that the judge knew of circumstances creating an appearance of partiality, notwithstanding finding that the judge was not actually conscious of those circumstances.

287 Reporter's Notes to 1972 Judicial Code, at 64 to 65.

288 *Compare* 1972 Judicial Code, Canon 3C(2), *with* 1990 Judicial Code, Canon 3E(2).

289 2007 Code, Rule 2.11(B).

290 Reporter's Notes to 1972 Judicial Code at 68.

291 2007 Code, Rule 2.11(B), corresponds to the 1990 Code, Canon 3E(2).

292 2007 Code, Rule 2.11(A)(3), corresponds to the 1990 Code, Canon 3E(1)(c).

293 2007 Judicial Code, Terminology, ¶6. 1990 Code, Terminology ¶7. *Cf.* 28 U.S.C.A. § 455(d)(4).

294 2007 Judicial Code, Rule 2.11(A)(3) corresponds to the 1990 Code, Canon 3E(1)(c).

295 2007 Code, Terminology, ¶6(1). 1990 Code, Terminology, ¶7(i).

296 *See* § 10.3-34.(c)(2). *See also* 28 U.S.C.A. § 455(b)(5), and 28 U.S.C.A. § 455(d)(4), defines "financial interest" as the ownership of a legal or equitable interest, *however small*," subject to various exceptions that are not applicable here.

297 2007 Code, Terminology, ¶6; 1990 Code, Terminology, ¶7.

298 2007 Code, Terminology, ¶6; 1990 Code, Terminology, ¶7.

299 28 U.S.C.A. § 455(d)(4) provides: "'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund; …."

300 2007 Code, Terminology, ¶6; 1990 Code, Terminology, ¶7.

301 2007 Code, Terminology, ¶6(1), (3), and Rule 2.11, Comment 6. 1990 Code, Terminology, ¶7(iii).

302 In Canon 3C(3)(c) of the 1972 Judicial Code, "the Committee endeavored to set a standard for economic disqualification for indirect and technical interests that assures impartiality and the appearance of impartiality but at the same time makes available to a judge some types of nondisqualifying investments." WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 69–70 (ABA 1973). The 1990 Code followed these rules, except it added the "*de minimis*" test, making it a littler harder to disqualify the judge. The 2007 Code followed the 1990 Code.

303 2007 Code, Terminology, ¶6(1), (3), and Rule 2.11, Comment 6. 1990 Code, Terminology, ¶7(iii). See also, Committee On Codes Of Conduct Advisory Opinion No. 49, revised July 10, 1998, http://www.uscourts.gov/guide/vol2/49.html (emphasis added): A "depositor in a mutual savings association, or a similar proprietary interest [e.g., Vanguard], is a 'financial interest' in the organization *only if* the outcome of the proceeding could substantially affect the value of the interest."

304 *E.g.*, Advisory Opinion No. 57 (July 10, 1998), concludes that the judge's interest in mutual savings associations or mutual insurance companies are "technical" and not disqualifying, "even though the association or company is a party to a proceeding before him, unless the value of his interest could be substantially affected by the outcome of the proceeding or the broad test of Canon 3C(1) is applicable." http://www.uscourts.gov/guide/vol2/57.html.

Federal Committee on Codes of Conduct, Advisory Opinion No. 49 July 10, 1998) concludes that the: "Code of Judicial Conduct does not require a judge to disqualify in a case where a trade association appears as a party because judge owns a small percentage of outstanding, publicly-traded shares of one or more members of trade association." It also said:

> "the Committee sees no impropriety in a judge serving in a proceeding where a trade association appears as a party, even though the judge owns a small percentage of the publicly-traded shares of one or more members of the association, subject, of course, to the general qualifications set forth in Canon 3C(1)(c) and 3C(3)(c) of the Code of Conduct." http://www.uscourts.gov/guide/vol2/49.html.

305 2007 Code, Rule 2.11(A)(3); 1990 Code, Canon 3E(1)(c).

306 Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 HOFSTRA L. REV. 1337, 1365 & n.133 (2006)

307 A typical Vanguard Fund prospectus explains that it "is owned jointly by the funds it oversees and thus indirectly by the shareholders in those funds." *E.g.*, Vanguard Morgan Growth Fund, Prospectus at p. 9 (emphasis added) (under heading, "Plain Talk about Vanguard's Unique Corporate Structure") (2005).

308 The Reporter's Notes explain that that "these technical interests, and other similar ones" should not be a basis for disqualification. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 69–70 (ABA 1973).

309 2007 Code, Terminology, ¶6(2); 1990 Code, Terminology ¶7(ii).

310 2007 Code, Terminology, ¶7(3); 1990 Code, Terminology ¶7(iii).

311 2007 Code, Terminology, ¶7(4); 1990 Code, Terminology ¶7(iv).

312 In Matter of Fuchsberg, 426 N.Y.S.2d 639 (N.Y.Ct.Jud.1978), the New York Court of Appeals formally censured a judge for his transactions in New York City bonds while cases affecting the value of those bonds were before the New York courts, including the Court of Appeals.

313 2007 Code, Rule 2.11(A)(4) corresponds to the 1990 Code, Canon 3E(1)(e).

314 2007 Code, Rule 4.4(B)(1) is essentially the same as Canon 5C(3), of the 1990 Code, but also includes an element from Canon 5C(2).

315 1990 ABA Model Code of Judicial Conduct, Canon 3E(1)(e), footnote 4.

316 Originally, it was Canon 3E(1)(e) in the prior Code, *i.e.*, the 1990 Code as amended.

317 Oddly enough, one is unable to establish, by empirical or statistical analysis, a correlation between lawyers' or litigants' contributions to judges' political campaigns and success of those lawyers or litigants when appearing before that judge. *See* Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION LAW JOURNAL 79 (2003); Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, 14 THE PROFESSIONAL LAWYER 16 (ABA, No. 2, 2003).

318 2007 Code, Terminology, ¶1.

319 2007 Code, Terminology, ¶23 defines “public election” to include

320 ABA Ad Hoc Committee on Judicial Campaign Finance, American. Bar Association, Report to the House of Delegates (May 5, 1999). The ABA created this Ad Hoc Committee in 1998 to review recommendations on the subject of contributions to judges' election campaigns that emerged from a special Task Force on Lawyers' Political Contributions. “The Task Force on Lawyers' Political Contributions investigated the phenomenon of ‘pay to play’ campaign contributions—lawyers' campaign contributions made to secure legal work from government entities—as well as the effect of contributions in judicial elections.” Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TULANE L. REV. 235, 282 n.243 (1999).

321 Roy A. Schotland, *National Summit on Improving Judicial Selection: Campaign Finance in Judicial Elections*, 34 LOYOLA L.A. L. REV. 1489, 1499 (2001), concluding that this provision is “inartfully” drafted.

322 2007 Code, Rule 2.11(A)(5) combines Canons 3E(1)(f), 3E(1)(f)(i), and 3E(1)(f)(ii) of the 1990 Code.

323 2007 Code, Terminology, ¶8, which corresponds to the 1990 Code, Terminology, ¶9.

324 Rule 2.11(A)(5) of the 2007 Code corresponds to the 1990 Code, Canon 3E(1)(f)(ii).

325 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.9 (“The Void-for-Vagueness Doctrine”), § 2042(e) (“Restrictions on a Judge's Judicial Speech and Judicial Campaign Speech)” (Thomson–West, 4th ed. 2008) (6 volumes).

326 Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The majority held that the Eighth and Fourteenth Amendments prohibit the execution of individuals less than 18 years of age at time of their capital crimes. The Court overruled one of its own opinions from 1989. The majority opinion cited the International Covenant on Civil and Political Rights, although the United States, when it ratified that treaty, specifically reserved the right to impose capital punishment on people less than 18 years of age. And it relied on the UN Convention on the Rights of the Child, which the United States did *not* ratify. The Court said, it “is proper” for the Court to acknowledge “the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.” 543 U.S. at 577, 125 S.Ct. at 1200.

Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003), held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home. Kennedy, J., for the Court, said:

> “And, to the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights, and that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”

Lawrence v. Texas, 539 U.S. 558, 560, 123 S.Ct. 2472, 2474, 156 L.Ed.2d 508, on remand to, 2003 WL 22453791 (Tex. App. Houston 14th Dist. 2003).

327 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 23.37 (“Looking to Foreign Law and Sociological Data”)(Thomson–West, 4th ed. 2008) (6 volumes).

328 Rule 2.11(A)(5).

329 Steven Breyer, speech, ABA Annual Meeting, “Is the Independence of the Judiciary at Risk?” Aug. 9, 2005, http://www.abanet.org/media/docs/judiciarydebatetrans8905.pdf, at p. 13 (emphasis added).

330 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

331 See discussion in, Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEORGETOWN J. LEGAL ETHICS 1059 (1996); Ronald D. Rotunda, *Judicial Campaigns in the Shadow of Republican Party v. White*, 14 THE PROFESSIONAL LAWYER 2 (ABA, No. 1, 2002).

332 The ABA, in the 1972 version of its Model Code, had an "announce clause," but, because of First Amendment concerns, dropped it and replaced it with the "appear to commit" language. *See* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50 (ABA 1992).

333 The Court said: "We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question." 536 U.S. at 773 n.5, 122 S.Ct. at 2534 n.5.

334 1990 Code, Canon 5A(3)(d)(i).

335 19 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Current Report 467 (Aug. 13, 2003).

336 Seth Andersen, *An Interdisciplinary Examination of State Courts, State Constitutional Law, and State Constitutional Adjudication Perspectives: Judicial Elections Versus Merit Selection, Examining The Decline In Support For Merit Selection In The States*, 67 ALBANY L. REV. 793, 798 (2004).

337 Rule 2.11(A)(6)(a) of the 2007 Code corresponds to the first half of Canon 3E(1)(b) of the 1990 Code. Rule 2.11(A)(6)(b) of the 2007 Code corresponds to the Commentary of Canon 3E(1)(b).

338 Reporters' Explanation of Changes to Rule 2.11, at 27 (ABA 2007).

339 28 U.S.C.A. § 455(b)(2) (emphasis added).

340 28 U.S.C.A. §§ 455(b)(3).

341 28 U.S.C.A. §§ 455(b)(3) (emphasis added).

342 Mixon v. United States, 608 F.2d 588 (5th Cir.1979).

343 *See* H.R.Rep. No. 1453, 93d Cong., 2d Sess. 6 (1974).

344 Department of Revenue v. Golder, 322 So.2d 1 (Fla.1975).

345 Laird v. Tatum, Memorandum of Justice Rehnquist, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972).

346 Justice Stevens later said that Justice Rehnquist had received some undeserved flack and complaints for taking part in *Laird v. Tatum*. Professor Ross Davies reprints and analyzes Justice Stevens' letter in, Ross Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79, 106 (2006) (reprinting letter for Justice Stevens to Justice Marshall).

347 H.R. Rep. No. 1453, 93rd Cong., 2nd Sess. 1974, 1974 U.S. Code Cong. & Admin. News 6351, 6356, 1974 WL 11635 (Leg. History).

348 Public Citizen v. Department of Justice, 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). The Court, speaking through Justice Brennan, held that the Federal Advisory Committee Act did not apply to the Justice Department's solicitation of committee's views on prospective judicial nominees.

349 Cheney v. U.S. District Court for the District of Columbia, 541 U.S. 913, 922 n.3, 124 S.Ct. 1391, 1399 n.3, 158 L.Ed.2d 225 2004). *See* Ronald D. Rotunda, *Duck Hunting Benchmarks*, THE WASHINGTON TIMES, Mar. 28, 2004, at B4.

350 Baker & Hostetler LLP v. U.S. Dept. of Commerce, 471 F.3d 1355, 1357 (D.C. Cir. 2006).

351 Senate Committee on the Judiciary, Committee Hearing on the Nomination of Elena Kagan, July 1, 2010, 2010 WL 2637747 (F.D.C.H.).

352 In addition, 28 U.S.C.A. § 455(d)(1) goes on to define "proceeding" quite broadly, as including *pretrial*, the trial itself, appellate review, or other stages of litigation. Section 455(d) then provides that the parties may not waive this disqualification.

353 Ronald D. Rotunda, *The Point of No Return: Kagan's Recusals Are No Excuse for Retiree Curtain Calls*, WASHINGTON TIMES, Oct. 11, 2010, at p. B3.

354 http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx (emphasis added) (accessed March 11, 2011). *See also, e.g.*, GUIDE TO JUDICIARY POLICY, *Ethics and Judicial Conduct*, volume 2, at 55-1 (June 2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02-OGC-Post2USCOURTS-PublAdvisoryOps.pdf ("To start, a 'judge should not make public comment on the merits of a matter *pending or impending* in any court.'") (emphasis added) (accessed Mar. 11, 2011).

355 United States v. Arnpriester, 37 F.3d 466 (9th Cir. 1994). See Rotunda, Judicial Disqualification When a Solicitor General Moves to the Bench, 11 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 94 (Issue 3, Nov. 2010), http://www.fed-soc.org/publications/pubid.2067/pub_detail.asp (accessed Mar. 10, 2011).

356 37 F.3d at 466 (emphasis added).

357 37 F.3d at 467.

358 Mixon v. United States, 620 F.2d 486 (5th Cir. 1980) (per curiam).

359 1990 ABA Model Code of Judicial Conduct, Canon 3E(1)(b), Comment 1.

360 ABA Standing Committee Report on 1990 Code, Legislative Draft 27 (1990).

361 Matter of O'Brien, 437 N.E.2d 972 (Ind.1982) (per curiam).

362 It also violated DR 9-101(A) and DR 1-102(A)(5) of the ABA Model Code of Professional Responsibility. Model Rule 1.12(a) of the Model Rules of Professional Conduct allows a lawyer to represent a party in connection with a matter in which that lawyer had participated personally and substantially "as a judge" if all parties consent.

363 Department of Revenue v. Golder, 322 So.2d 1 (Fla.1975).

364 28 U.S.C.A. § 455(b)(3) (emphasis added).

365 *See also* 28 U.S.C.A. § 455(b)(2) (same).

366 Hall v. Hall, 242 Ga. 15, 247 S.E.2d 754 (1978).

367 2007 Code, Rule 2.11(A)(6)(c), corresponds to Canon 3E(1)(d) of the 1990 Code.

368 Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *reversed*, 548 U.S. 557, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006). Roberts, C.J., did not participate.

369 Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEORGETOWN J. LEGAL ETHICS 1187, 1212 n.4 (.2006).

370 Reporters' Explanation of Changes to Rule 2.11, at 27 (ABA 2007).

371 The ABA reprints this bold warning throughout the Reporters' Explanations, e.g., *id*. at p. 36 (ABA 2007).

372 State v. Cabiness, 273 S.C. 56, 254 S.E.2d 291 (1979).

373 Panico v. United States, 412 F.2d 1151 (2d Cir.1969), *cert. denied*, 397 U.S. 921, 90 S.Ct. 901, 25 L.Ed.2d 102 (1970).

374 Mayberry v. Maroney, 558 F.2d 1159 (3d Cir.1977).

375 State v. Beshaw, 134 Vt. 347, 359 A.2d 654 (1976).

376 Meeropol v. Nizer, 429 U.S. 1337, 97 S.Ct. 687, 50 L.Ed.2d 729 (1977).

377 429 U.S. at 1338 n.2, 97 S.Ct. at 689 n.2, 50 L.Ed.2d at 731 n.2.

378 Rice v. McKenzie, 581 F.2d 1114 (4th Cir.1978).

379 28 U.S.C.A. § 47.

380 2007 Code, Rule 2.11(B) corresponds to the 1990 Code, Canon 3E(1)(c).

381 Rule 2.11(B)("A judge shall keep informed …."). Canon 3E(2) ("A judge shall keep informed. …"). And, 28 U.S.C.A. § 455(c) ("A judge shall inform himself about his personal and fiduciary financial interests ….").

382 Reporter's Notes to 1972 Judicial Code, at 64 to 65.

383 *Compare* 1972 Judicial Code, Canon 3C(2), *with* 1990 Judicial Code, Canon 3E(2).

384 Reporter's Notes to 1972 Judicial Code at 68.

385 2007 Code, Terminology, ¶14.

386 2007 Code, Rule 2.11(B); 1990 Code, Canon 3E(2).

387 28 U.S.C.A. § 455(c).

388 *See, e.g.*, Joe Stephens, *Judges Rule on Firms in Their Portfolios*, WASHINGTON POST, Sept. 13, 1999, at A1.

389 28 U.S.C.A. § 455(e).

390 The 1990 Code, Canon 3F, actually states that the judge may participate if "the judge is then willing to participate," but one would think that the judge would not have asked the parties to waive the disqualification to begin with if she had not been willing to participate once the parties waive.

391 Rule 2.11(C), and the 1990 Code, Canon 3F, Comment 1. The 2007 Rules deleted this Commentary "as being largely redundant of the black letter and otherwise administrative, rather than ethical, in its recommendations." Reporters' Explanation of Changes to Rule 2.11, at 26.

392 Canon 3D, 1972 ABA Model Judicial Code.

393 Canon 3F, Comment [last sentence].

394 *E.g.*, Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436 (1976), stating that: "A waiver of disqualification of a judge may be effected expressly by agreement, or *impliedly* by proceeding without objection with the trial of the case with knowledge of the disqualification." (emphasis added).

395 28 U.S.C.A. § 455(e).

396 H.R.Rep. No. 1453, 93d Cong., 2d Sess. 7 (1974).

397 101 F.R.D. 373, 392 to 393 (1980); Code of Conduct for United States Judges, Canon 3D (Remittal of Disqualification) (July 1, 2009), at p. 6, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf.

398 28 U.S.C.A. § 455(f).

399 28 U.S.C.A. § 455(f).

400 Union Carbide Corp. v. United States Cutting Serv., Inc., 782 F.2d 710 (7th Cir.1986).

401 Judge Flaum's dissent argued that nothing in 28 U.S.C. § 455(b)(4)—which corresponds to Canon 3E(1)(c)—permits a judge to "cure" a disqualifying situation in this way: "Congress desired to rid the statute of flexibility where financial interests are concerned." 782 F.2d 710, 717.

402 In re Certain Underwriter, 294 F.3d 297, 304 (2d Cir. 2002).

403 Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120 (2d Cir. 2003), *cert. dismissed*, 541 U.S. 913, 124 S. Ct. 1652, 158 L. Ed. 2d 262 (2004) and *cert. dismissed*, 541 U.S. 913, 124 S. Ct. 1652, 158 L. Ed. 2d 263 (2004).

404 Tumey v. State of Ohio, 273 U.S. 510, 531, 47 S. Ct. 437, 71 L. Ed. 749 (1927). See Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247 (2010).

405 Tumey v. Ohio, 273 U.S. 510, at 520.

406 273 U.S. 510, at 516.

407 273 U.S. 510, at 517 (quoting Ohio Rev. Code Ann. § 6212-18 (1926)).

408 273 U.S. 510, at 520.

409 *Tumey*, 273 U.S. at 517 (quoting Ohio Rev. Code Ann. § 6212-19) (emphasis added).

410 273 U.S. at 519.

411 273 U.S. at 520. In Connally v. Georgia, 429 U.S. 245, 251, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977) (per curiam), the Court held that there was a violation of the U.S. Const. Amend. IV and XIV when a Georgia Justice of the Peace issued a search warrant, where that same Justice of the Peace was not salaried and his compensation was set up so that he earned a fee for issuing a warrant but nothing for denying a warrant.

412 *See Tumey*, 273 U.S. at 520.

413 *Tumey*, 273 U.S. at 523.

414 Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972).

415 *See* 409 U.S. 57, 58 (1972).

416 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

417 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 815, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

418 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 815, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

419 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 815, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986) (internal quotation marks omitted).

420 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 816, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

421 *Lavoie*, 475 U.S. at 816.

422 *Lavoie*, 475 U.S. at 816.

423 *See Lavoie*, 475 U.S. at 817.

424 *See Lavoie*, 475 U.S. at 817.

425 While *Lavoie* was pending before Embry's court, he filed two lawsuits against insurance companies, both alleging the same cause of action: bad-faith refusal to pay a claim. *Id.* He sued Maryland Casualty Company because of its alleged failure to pay for the loss of a valuable mink coat. *Id.* His second lawsuit was a class action. *Id.* He was the class representative of a class of all Alabama state employees insured by a Blue Cross-Blue Shield of Alabama group plan. *Id.* This suit alleged "a willful and intentional plan to withhold payment on valid claims." *Id.* In both cases, Embry sued for punitive damages. *Id.* The *Lavoie* plaintiff also challenged the participation of the other justices because this class action included "apparently, all justices of the Alabama Supreme Court." *Id.* The Court rejected that claim. These justices might have "a slight pecuniary interest," but it was not "'direct, personal, substantial, [and] pecuniary.'" *Id.* at 825-26 (quoting Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972)) (footnote omitted).

426 *Lavoie*, 475 U.S. at 821.

427 475 U.S. at 821.

428 475 U.S. at 822.

429 *See* 475 U.S. at 822-23.

430 475 U.S. at 818-19 (emphasis added). Justice Embry settled his claim against Blue Cross $30,000, under the settlement agreement on a "basic compensatory claim of unspecified amount." 475 U.S. at 818-19. Maryland Casualty also settled, sometime earlier, Embry's suit against by the payment of Justice Embry's claim. 475 U.S. at 818 n.1.

431 *Lavoie*, 475 U.S. at 825.

432 475 U.S. at 824.

433 475 U.S. at 824. (citing In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). This principle is hardly new. Nearly 40 years earlier, John Frank summarized the common law rule as follows:

> "The common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else. Although Bracton tried unsuccessfully to incorporate into English law the view that mere 'suspicion' by a party was a basis for disqualification, it was Coke who, with reference to cases in which the judge's pocketbook was involved, set the standards for his time in his injunction that 'no man shall be a judge in his own case.' Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest." John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-10 (1947).

434 *Lavoie*, 475 U.S. at 828.

435 475 U.S. at 828 (footnote omitted).

436 475 U.S. at 822.

437 475 U.S. at 831 (Blackmun, J., concurring).

438 *See* 475 U.S. at 823 (majority opinion).

439 *Lavoie*, 475 U.S. at 831 (Blackmun, J., concurring).

440 475 U.S. at 817 (majority opinion).

441 475 U.S. at 831 (Blackmun, J., concurring) ("[T]he constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court's analysis. For me, Justice Embry's mere participation in the shared enterprise of appellate decision-making—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion—posed an unacceptable danger of subtly distorting the decision-making process."). 475 U.S. at 831.

442 *See* Mayberry v. Pennsylvania, 400 U.S. 455, 465, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971).

443 400 U.S. 455, 466.

444 400 U.S. 455.

445 400 U.S. 455.

446 400 U.S. 455. 456-61.

447 *Mayberry*, 400 U.S. at 456-57.

448 400 U.S. at. at 462 (emphasis added).

449 400 U.S. at 462.

450 400 U.S. at 462.

451 400 U.S. at 462.

452 *Mayberry*, 400 U.S. at 462.

453 *Mayberry*, 400 U.S. at 466 (emphasis added); *accord*, *e.g.*, Taylor v. Hayes, 418 U.S. 488, 499-500, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974) (holding that a trial judge violated due process in proceeding summarily after trial to punish a lawyer for contempt committed during trial without giving that lawyer an opportunity to be heard in defense or mitigation; moreover, another judge should have tried the judge rather than the judge who initiated the contempt).

454 *See Mayberry*, 400 U.S. at 463-64.

455 400 U.S. at 463.

456 400 U.S. at 464; *see also* In re Murchison, 349 U.S. 133, 139, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (holding that it violates due process for a judge to serve as a one-man grand jury and then preside over the criminal contempt hearing).

457 *See Mayberry*, 400 U.S. at 465.

458 *See* Cooke v. U.S., 267 U.S. 517, 539, 45 S. Ct. 390, 69 L. Ed. 767 (1925).

459 In re Kendall, 2011 WL 4852282 (V.I. 2011) (per curiam). While this case was pending, Judge Kendall retired as a Superior Court judge at the conclusion of his term in October 2009. 2011 WL 4852282, *1, n.2.

460 People v. Ford, http://www.visuperiorcourt.org/opinions/pdfs/Ford&Paris.pdf (July 7, 2009).

461 Mayberry v. Pennsylvania, 400 U.S. 455, 465, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971).

462 *Annotation*, *Contempt for Disobedience of Mandamus*, 30 A.L.R. 148 (originally published, 1924).

463 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2266, 173 L. Ed. 2d 1208 (2009). See Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247 (2010).
The ABA and others have sought to draft rules to codify *Caperton*, but that has proven difficult because the Court's majority really offered no test but rather added together a series of facts and found them, as a whole, relevant. Rotunda, *Trying to Codify Caperton*, 42 MCGEORGE L. REV. 95 (2010)

464 129 S. Ct. 2252, 2267 (2009).

465 *See id.*

466 *E.g.*, Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997) ("Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the U.S. Const. Amend. XIV establishes a constitutional floor, not a uniform standard.") (emphasis from original omitted) (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986)).

467 Tumey v. State of Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (citing City of Wheeling v. Black, 25 W. Va. 266, 270, 1884 WL 2709 (1884)).

468 *See Caperton*, 129 S. Ct. at 2256-57.

469 129 S. Ct. at 2256-57.

470 129 S. Ct. at 2267.

471 129 S. Ct. 2252, 2266 (2009).

472 129 S. Ct. at 2256-57 (majority opinion) (emphasis from original omitted) (second emphasis added).

473 129 S. Ct. at 2265, 2267 (Roberts, J., dissenting) (emphasis added).

474 *E.g.*, *Buckley v. Valeo*, 424 U.S. at 24-25 (citations omitted).

475 424 U.S. at 262 (White, J., concurring in part and dissenting in part).

476 424 U.S. at 262.

477 424 U.S. 1, 48 (footnote omitted).

478 *See* ROTUNDA AND NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.51(b)(i), (b)(iii), (b)(v), (c)(ii), (d)(viii) (Thomson-West 4th ed. 2008) (six volumes).

479 *Buckley*, 424 U.S. at 48-49.

480 Joint Appendix, Vol. I at 208a, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (Benjamin for Supreme Court Committee, State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year).

481 ASK was an organization established under 26 U.S.C.A. § 527(e).

482 *Caperton*, 129 S. Ct. at 2257 ("independent expenditures").

483 *See Caperton*, 129 S. Ct. at 2256 ("[T]he justice had received *campaign contributions* in an extraordinary amount from, and through the efforts of, the board chairman."); *Caperton*, 129 S. Ct. at 2257 ("Blankenship's $3 million in *contributions*"); *Caperton*, 129 S. Ct. at 2263 ("Not every *campaign contribution* by a litigant or attorney creates a probability of bias that requires a judge's recusal …."); *Caperton*, 129 S. Ct. at 2264 ("The inquiry centers on the *contribution's* relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such *contribution* had on the outcome of the election."); *Caperton*, 129 S. Ct. at 2264 ("Blankenship *contributed* some $3 million to unseat the incumbent and replace him with Benjamin. His *contributions* eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee"); *Caperton*, 129 S. Ct. at 2264 ("Whether Blankenship's campaign *contributions* were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry"); *Caperton*, 129 S. Ct. at 2264 ("Blankenship's *campaign contributions*—in comparison to the total amount *contributed* to the campaign"); *Caperton*, 129 S. Ct. at 2264 ("The temporal relationship between the *campaign contributions*, the justice's election, and the pendency of the case is also critical."); *Caperton*, 129 S. Ct. at 2264 ("when the *campaign contributions* were made"); *Caperton*, 129 S. Ct. at 2265 ("Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship's extraordinary *contributions* were made."); *Caperton*, 129 S. Ct. at 2265 ("The parties point to no other instance involving judicial *campaign contributions* that presents a potential for bias comparable to the circumstances in this case." This comment is intriguing. Of course the parties point to no other case—there is no precedent because Justice Kennedy created the rule for the first time in this case. One could just as well say, there is no precedent supporting Caperton's position. That is a fact of life, not a reason why petitioner should win.); *Caperton*, 129 S. Ct. at 2266 ("[S]ome states require recusal based on *campaign contributions*.") (emphasis added in all cases; Court's original emphasis of "quid pro quo" removed).

484 *Caperton*, 129 S. Ct. at 2260 (citing Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 60, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972)).

485 Brief for Respondents, *supra* note 112, at 6.

486 *Id.*

487 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2265, 173 L. Ed. 2d 1208 (2009).

488 129 S. Ct. 2252, 2265.

489 Brief for Respondents, at 5, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

490 *See id.* (comparing MASSEY ENERGY CO., QUARTERLY REPORT (FORM 10-Q) (Nov. 7, 2008), http://secfilings.com/searchresultswide.aspx?TabIndex=2&FilingID=6235842&type=convpdf&companyid=11418&ppu=%2fdefault.aspx%3fticker%3d%26amp%3bname%3dmassey%2benergy%26amp%3bformgroupid%3d2%26amp%3bauth%3d1

(85.1 million shares outstanding), with STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP (FORM 4) (Nov. 18, 2008) (296,935 shares owned by Blankenship)).

491 *See Caperton*, 129 S. Ct. at 2265-67.

492 *See Caperton*, 129 S. Ct. at 2265-66 (emphasis added).

493 *See generally* Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337 (2006).

494 Patrick Marley, *State High Court Says Campaign Donations Can't Force Recusals*, MILWAUKEE J. SENTINEL, Oct. 28, 2009, *available at* http://www.jsonline.com/news/statepolitics/67012672.html.

495 *Caperton*, 129 S. Ct. at 2262.

496 Caperton v. A.T. Massey Coal Co., Inc., 2009 WL 3806071, 690 S.E. 2d 3222 (W. Va. 2009).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.12 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.12 Rule 2.12

## § 10.2-2.12(a) The Text of Rule 2.12

The text of Rule 2.12 provides:

**RULE 2.12. *Supervisory Duties***

**(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.**
**(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.**

**COMMENTARY**

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

## § 10.2-2.12(b) Supervisory Duties

Rule 2.12(a) [1] mandates that judges require their staff and those court officials subject to their control to observe the standards that apply to the judge and act in a manner consistent with all of the judge's obligations under the Code. The 2007 revisions changed the language to make clear that the judge must insist that court staff and officials act in a way that is consistent with all of the judge's obligations. The judge, obviously, must not direct court personnel to do that which the judge himself may not do. [2]

A judge violated this Canon when he refused to take action against his clerk after learning that the clerk illegally granted a limited driving privilege to her brother-in-law and reduced traffic fines without authority to do so. [3]

Rule 2.12(b) [4] governs judges with supervisory power over other judges. Supervisory judges must take "reasonable measures" to assure that other judges *promptly* dispose of matters before them and they properly perform their other judicial responsibilities. This section first appeared in the 1990 Code. Justice delayed is justice denied, so a supervisory judge must ensure that judges under her supervisory authority administer their workloads promptly. [5]

Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 2.12(A), corresponds to the 1990 Code, Canon 3C(2)

2 Rule 2.12, Comment 1.

3 Matter of Briggs, 595 S.W.2d 270 (Mo.1980).

4 2007 Code, Rule 2.12(B), corresponds to the 1990 Code, Canon 3C(3).

5 Rule 2.12, Comment 2.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.13 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.13 Rule 2.13

## § 10.2-2.13(a) The Text of Rule 2.12

The text of Rule 2.12 provides:

**RULE 2.13. *Administrative Appointments***

**(A) In making administrative appointments, a judge:**
**(1) shall exercise the power of appointment impartially* and on the basis of merit; and**
**(2) shall avoid nepotism, favoritism, and unnecessary appointments.**
**(B) A judge shall not appoint a lawyer to a position if the judge either knows* that the lawyer, or the lawyer's spouse or domestic partner,* has contributed more than $[insert amount] within the prior [insert number] year[s] to the judge's election campaign, or learns of such a contribution* by means of a timely motion by a party or other person properly interested in the matter, unless:**
**(1) the position is substantially uncompensated;**
**(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or**
**(3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.**
**(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.**

**COMMENTARY**

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is 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.

[3] The rule against making administrative appointments of lawyers who have contributed in excess of a specified dollar amount to a judge's election campaign includes an exception for positions that are substantially uncompensated, such as those for which the lawyer's compensation is limited to reimbursement for out-of-pocket expenses.

## § 10.2-2.13(b) Making Appointments Not on Merit

Rule 2.13(a) [1] provides that a judge shall not make unnecessary appointments to employment positions. She must appoint impartially, only based on merit, avoiding nepotism and favoritism. The Rules define "nepotism" as appointing 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. [2]

Appointees, for purposes of this Rule, include assigned counsel, referees, commissioners, special masters, receivers, guardians, and personnel such as clerks, secretaries, and bailiffs. The fact that the parties to the case consented to the appointment is not a defense. [3]

*Spruance v. Commission on Judicial Qualifications* [4] held that a judge violated Canon 3C(4) when he overwhelmingly appointed his friends and political supporters to represent indigent defendants in criminal cases. The problem in *Spruance* was not that the judge appointed people he knew; it was that he did not appoint impartially. And, he did not appoint based on merit. A judge may properly appoint someone (other than a close relative) whom he knows well, "if the appointment itself is necessary and the person objectively merits the appointment." [5]

Difficult cases arise where a judge appoints someone because of merit, yet there is also evidence of favoritism. In one case, a divided court refused to censure a judge who appointed his lover as chief cashier because the appointee was "well qualified for the appointment." [6] Some judges may think that the appointee's friendship with the judge should not be disqualifying, while others might think, "There but for the grace of God go I."

A judge obviously violated Rule 2.13(A)(1) where he made sexual relations a condition of employment, terminated one employee for refusing to continue having sex with him, and terminated another employee for refusing to have sex with him. [7]

It is perhaps less obvious but just as clear that a judge cannot evade Rule 2.13(A) by "laundering" judicial appointments. For example, *Spector v. State Commission on Judicial Conduct* [8] relied on what is now Rule 2.13(A) in admonishing a judge who appointed other judges' sons to represent defendants, knowing that those judges would in return appoint his son.

A judge also may not ethically approve compensation beyond the fair value of services rendered. [9] If the compensation is excessive, the judge may not raise as a defense that the parties had consented to the award of compensation. [10]

### § 10.2-2.13(c) Making Appointments Based on Campaign Contributions

Rule 2.13(B) [11] places important limits on a judge from appointing a lawyer to a position if the lawyer (or the lawyer's spouse or domestic partner) contributed more than a certain amount to the judge's election campaign. This rule applies wherever judges are subject to public election. The ABA Model Judicial Code does not insert any specific amount or time limitations. In general, a judge should not appoint a lawyer to a particular position if the judge learns or knows that the appointee has contributed more than a certain amount (the local jurisdiction sets the amount that triggers this prohibition) within a certain period of years (the local jurisdiction also sets the relevant time).

In 1999, the ABA added Canon 3C(5) to the 1990 Judicial Code. That Canon became Rule 2.13(B) of the 2007 Rules. This Rule is the judicial version of a provision of the ABA Model Rules of Professional Responsibility, dealing with lawyers' efforts to make political contributions in order to obtain government legal engagements or appointments by judges. [12] This new Rule reflects the concern that some people have about the appearance of impropriety if lawyers make a political contribution to the judge, and the judge then rewards those lawyers by appointing them as special masters, guardians, receivers, or similar positions.

This rule also includes several exceptions, addressing situations in which there is no reason for the prohibition because there is no realistic appearance of impropriety. For example, if the appointed position is substantially uncompensated, [13] there is no real risk that the judge is favoring a political contributor, for the simple reason that one is not "favored" by being appointed to a job that pays nothing or very little. [14] Similarly, there is no appearance of impropriety if the appointee is selected by rotation

from a list created without regard to one having made political contributions. [15] In addition, this rule does not apply if the judge affirmatively finds that there is no other lawyer willing, competent and able to accept the position. [16]

### § 10.2-2.13(d) Approving Excessive Compensation

Rule 2.13(C) [17] provides that a judge may not approve any excessive compensation, that is, the judge may not approve compensation for appointees that is beyond the fair value of services rendered. If the judge approves excessive compensation, it is no defense that the parties had consented to the compensation amount. [18]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 2.13(A), corresponds to the 1990 Code, Canon 3C(4).

2 Rule 2.13, Comment 2.

3 Rule 2.13, Comment 1. 1990 Code, Canon 3C(4), Comment 1.

4 Spruance v. Commission on Judicial Qualifications, 13 Cal.3d 778, 119 Cal.Rptr. 841, 532 P.2d 1209 (1975). In that case, 44 percent; of cases appointed to the judge's two friends; the remaining 56 percent; of appointments were received by 22 other attorneys, no one of whom received more than 3 appointments. The judge should have known the proper procedures required in appointing counsel.

5 ABA Standing Committee Report on 1990 Code, Legislative Draft 24 (1990).

6 Matter of Dalessandro, 483 Pa. 431, 397 A.2d 743, 759 (1979) (per curiam).

7 In re Hammond, 224 Kan. 745, 585 P.2d 1066 (1978) (judge censured, although he would have been removed if ill health had not already forced his retirement).

8 Spector v. State Commission on Judicial Conduct, 47 N.Y.2d 462, 418 N.Y.S.2d 565, 392 N.E.2d 552 (1979).

9 ABA Model Code of Judicial Conduct, Canon 3B(4).

10 2007 Code, Rule 2.13, Comment 1; 1990 Code, Canon 3C(4), Comment 1.

11 2007 Code, Rule 2.13(B), corresponds to 1990 Code, Canon 3C(5).

12 ABA Model Rules of Professional Conduct, Rule 7.6, “Political Contributions to Obtain Government Legal Engagements or Appointment by Judges.” See discussion in, Ronald D. Rotunda, *Competitive Bidding Would End “Pay-to-Play,”* 20 NATIONAL L.J. A23 (June 29, 1998).

13 A position is “uncompensated” if the lawyer only receives reimbursement for out-of-pocket expenses.

14 Rule 2.13(B(1).

15 Rule 2.13(B(2).

16 Rule 2.13(B(3).

17 2007 Code, Rule 2.13(C), corresponds to 1990 Code, Canon 3C(4).

18 Rule 2.13, Comment 1.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.14 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.14 Rule 2.14

## § 10.2-2.14(a) The Text of Rule 2.14

The text of Rule 2.14 provides:

**RULE 2.14. *Disability and Impairment***

**A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.**

**COMMENTARY**

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

## § 10.2-2.14(b) Disability and Impairment

Rule 2.14 is a new addition to the 2007 Model Code of Judicial Conduct. For the first time, the Model Code imposes an obligation on a judge to undertake "appropriate action" when the judge reasonably believes that drugs, or alcohol, or any medical, emotional, or physical condition impairs the performance of a lawyer or another judge.

What is "appropriate action" depends on the circumstances. It may include confidentially referring the judge or lawyer to a lawyer or judicial assistance program. It also may include the judge speaking directly to the impaired person, or notifying an individual with supervisory responsibility over the impaired person. [1] Sometimes the judge must go further, and report the impaired judge or lawyer to another authority, agency, or body. [2]

Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 2.14, Comment 1.

2 Rule 2.14, Comment 2. *See* Rule 2.15., "Responding to Judicial and Lawyer Misconduct."

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.15 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.15 Rule 2.15

## § 10.2-2.15(a) The Text of Rule 2.15

The text of Rule 2.15 provides:

**RULE 2.15.** ***Responding to Judicial and Lawyer Misconduct***

**(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.***

**[*Ed. Note:** "Knowledge" means "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."Terminology, ¶14.

**[*Ed. Note:** "appropriate authority" means "the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported."Terminology ¶2.**]**

**(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.**

**(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.**

**(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.**

**COMMENTARY**

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken

> in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

### § 10.2-2.15(b) Judges Reporting Judges

Rule 2.14 derives from Canon 3D of the 1990 Code. Rule 2.14 governs the judge's disciplinary responsibilities. The first part governs judges reporting judges, and the second part governs judges reporting lawyers. Canon 3D(3), part of the 1990 Code, provided that judges may not be subject to civil liability because they have discharged their disciplinary responsibilities, an activity that is "absolutely privileged." The 2007 Code deletes this provision.

Rule 2.14, is analogous to the lawyer's duty to report under Rule 8.3 of the Model Rules of Professional Conduct. Although the duties are comparable, the little empirical evidence that exists suggests that courts are not very likely to discipline a judge for failure to report. [1]

If a judge *knows* that another judge has violated the Judicial Code, and if that violation raises a "substantial question" regarding that other judge's "honesty, trustworthiness, or fitness for office," then that judge *"shall* inform the *appropriate authority."* [2]

The "*appropriate action*" may include direct communication with the judge or lawyer in question, or other direct action, or reporting a lawyer's misconduct to the "appropriate authority." [3] The "*appropriate authority*" is the "authority with responsibility for initiation of disciplinary process with respect to the violation to be reported," [4] in other words, the agency in charge of judicial (or attorney) discipline.

"*Knowledge*" means "actual knowledge of the fact in question." However, one may infer a person's knowledge from circumstances. [5]

Sometimes the judge does not have "knowledge," but does have some information. Rule 2.15(C) deals with this situation. [6] If the judge "receives knowledge" indicating a "substantial likelihood" that another judge has violated the Judicial Code, then the first judge (the one with the knowledge of the other judge) must take "appropriate action."

### § 10.2-2.15(c) Judges Reporting Lawyers

Rule 2.15(B) and (D) [7] parallel Rule 2.15(A) and (C). These two Rules apply to judges reporting lawyers. The judge "shall" take "appropriate action" if the judge receives information indicating a "substantial likelihood" that the lawyer has violated the state's version of the ABA Model Rules of Professional Conduct. If the judge has "knowledge" that the lawyer has committed a violation that "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," the judge "shall" inform the "appropriate authority."

Although a judge violates the Judicial Code—at least in theory—if she does not report misconduct within the requirements of Rule 2.15, judges rarely bring violations of the lawyers' or judges' ethical codes to the attention of the proper authorities. Statistics indicate that lay persons file the greatest percentage of disciplinary complaints, not lawyers or other judges. (And many of these lay people are disgruntled litigants, with complaints that are not necessarily valid.)

In light of these statistics, the drafters of the 1990 Judicial Code tried to encourage more reporting. The 1990 Judicial Code changed the rule regarding reporting from the 1972 Judicial Code to require judges to report to a disciplinary authority "significant misconduct of lawyers and other judges, thus diminishing the number of instances in which judges take it upon themselves to impose sanctions for professional misconduct without such reporting." [8] This purpose of this reporting requirement is to encourage judges to take other remedial steps, such as referring, in appropriate cases, a lawyer or judge to a bar-sponsored substance abuse treatment agency. [9]

### § 10.2-2.15(d) Judicial Privilege

To encourage reporting, Canon 3D(3) of the 1990 Rules provided that judicial activities under Canon 3D(1) & (2) are "absolutely privileged" and that there shall be "no civil action" against the judge for such reporting. In contrast, the equivalent reporting section of the ABA Model Rules of Professional Conduct provides no "absolute privilege" for lawyers who report other lawyers or judges. [10]

The 2007 Judicial Code deleted Canon 3D(3). It announced that a judge is absolutely privileged in engaging in the discharge of disciplinary responsibilities. The drafters of the 2007 Model Code did not object to this idea of absolute judicial immunity in such cases. However, the Commission to evaluate the Model Code of Judicial Conduct "concluded that such a provision was inappropriate for the Model Code of Judicial Conduct. Neither the ABA nor an adopting court is in a position to grant or deny judicial immunity in the context of judicial conduct standards. Accordingly, Canon 3D(3) was viewed as a generalized statement of support for judicial immunity, which, in the Commission's view, was not appropriate for the Code." [11]

Hence, whether the law of torts gives the judge an absolute privilege is a matter for substantive law, not the court rules governing judicial ethics.

If a judge refers a lawyer's unethical conduct to the proper disciplinary authority, the judge does not necessarily have to recuse himself from hearing the post-conviction motions of the attorney's client, particularly where that attorney no longer represents the client. [12]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Conduct in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 991.

2 Rule 2.15(A) (emphasis added). The corresponding language in the 1990 Code is the second sentence of Canon 3D(1) (emphasis added).

3 Rule 2.15, Comment 2; 1990 Code, Canon 3D, Comment 1.

4 2007 Code, Terminology, ¶2; 1990 Code, Terminology ¶2.

5 2007 Code, Terminology, ¶14; 1990 Code, Terminology ¶10.

6 Rule 2.15(C). The corresponding language in the 1990 Code is the first sentence of Canon 3D(1).

7 Rule 2.15(B) corresponds to the 1990 Code, the second sentence of Canon 3D(2). Rule 2.15(D) corresponds to the 1990 Code, the first sentence of Canon 3D(2).

8 ABA's Standing Committee on 1990 Code, Legislative Draft 25 (1990).

9 ABA's Standing Committee on 1990 Code, Legislative Draft 25 (1990).

10 ABA Model Rules of Professional Conduct, Model Rule 8.3. Its predecessor section, DR 1-103(A), of the ABA Model Code of Professional Responsibility, similarly provided no absolute immunity.

11 Reporters' Explanation of Changes to Rule 2.15, at 31 (ABA 2007).

12 Honneus v. United States, 425 F.Supp. 164 (D.Mass.1977).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.2-2.16 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.2. Canon 2 the Appearance of Impropriety

§ 10.2-2.16 Rule 2.16

## § 10.2-2.16(a) The Text of Rule 2.16

The text of Rule 2.16 provides:

**RULE 2.16.** ***Cooperation with Disciplinary Authorities***

**(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.**
**(B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.**
**[*Ed. Note:** "Known" means "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."Terminology, ¶14.**]**

**COMMENTARY**

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

## § 10.2-2.16(b) Cooperating with Discipline Authorities

Rule 2.16 is new and has no counterpart in the 1990 Model Code of Judicial Conduct. It requires judges to cooperate with lawyer and judicial disciplinary agencies. Judges must also be "candid and honest." [1] That should instill public confidence in the commitment of judges to the integrity of the judicial system and the protection of the public. [2]

Rule 2.16(B) prohibits judges from retaliating against anyone they know or suspect has assisted or cooperated with the investigation of a judge or lawyer. This anti-retaliation rule is well-known in the law. The Equal Employment Opportunity Commission, for example, and the law it enforces provide that an employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. [3]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.
a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 2.16(A).
2 Rule 2.16, Comment 1.
3 EEOC Compliance Manual, Section 8, Retaliation (May 20, 1998), http://www.eeoc.gov/policy/docs/retal.html.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.0 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.0 Canon 3

## § 10.3-3.0(a) The Text of Canon 1

Canon 3 provides:

**CANON 3. A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.**

## § 10.3-3.0(b) Introduction

The 1972 Judicial Code had three separate Canons dealing with a judge's extrajudicial activities. Canon 4 of the 1972 Code stated: "A judge may engage in activities to improve the law, the legal system and the administration of justice." Canon 5 of the 1972 Code provided: "A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties." And Canon 6 of the 1972 Code created a reporting section: "A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities." All three of these Canons dealt with the same general subject: a judge's extra-curricular activities. Moreover, under the 1972 Judicial Code, it was very important whether Canon 4 or Canon 5 governed an organization, because Canon 5 placed significantly more limitations on a judge's participation than did Canon 4 of the 1972 Code. Unfortunately, the 1972 Judicial Code was ambiguous in distinguishing between these two types of organizations.

Happily, the 1990 Code eliminated the confusion between a Canon 4 and a Canon 5 organization by lumping together these two Canons, along with Canon 6. They now are all part of Canon 4 of the 1990 Code. For the most part, Canon 3 of the 2007 Judicial Code corresponds to Canon 4 of the 1990 Judicial Code. However, the drafters repositioned some material involving the "personal" activities of a judge to this Canon from Canon 2 of the 1990 Code.

The title of Canon 4 of the 1990 Code focused on "extra-judicial" activities. The drafters of the 2007 Code added the word "personal" to the Canon title to emphasize that this Canon applies to the accepting gifts or participating in private clubs, even if they have nothing to do with judicial duties.

The framers of the 2007 Code also replaced the phrase, "conflict with judicial obligations," and substituted the phrase, "conflict with the obligations of judicial office." The framers did not intend to make any substantive change. They simply changed it "as a reminder that judges have a variety of duties—including administrative duties—that go with the judicial *office*." [1]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Reporters' Explanation of Changes to Canon 3, at 32 (ABA 2007) (emphasis in original). The Reporters' Explanation warns us, in black letter bold type, that the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has not approved the "Reporters' Explanations of Changes." The Commission's Reporters did draft these notes based on the proceedings and record of the

Commission, in order to inform the ABA House of Delegates about each of the proposed amendments to the Model Code prior to their being considered at the ABA 2007 Midyear Meeting. The warning note concludes (in all capital letters), “They are not to be adopted as part of the Model Code.”

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.1 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.1 Rule 3.1

## § 10.3-3.1(a) The Text of Rule 3.1

The text of Rule 3.1 provides:

**RULE 3.1.** ***Extrajudicial Activities in General***

**A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:**

**[*Ed. Note:** "law" includes "court rules as well as statutes, constitutional provisions, and decisional law."Terminology, ¶15.**]**

**(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;**

**(B) participate in activities that will lead to frequent disqualification of the judge;**

**(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality;***

**[*Ed. Note:** "Independence" means that the judge is free "from influence or controls other than those established by law."Terminology, ¶11

**[*Ed. Note:** "Integrity" means "probity, fairness, honesty, uprightness, and soundness of character."Terminology, ¶12

**[*Ed. Note:** "impartially" mean there is the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."Terminology, ¶8.]

**(D) engage in conduct that would appear to a reasonable person to be coercive; or**

**(E) make use of court premises, staff, stationery, equipment, or other resources, 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.**

**COMMENT**

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

> [3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.
>
> [4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

### § 10.3-3.1(b) Extrajudicial Activities in General: The Five Major Restrictions

Rule 3.1 provides that the judge may engage in extrajudicial activities subject to five major restrictions. These five restrictions apply to all of Canon 3, not just to Rule 3.1.[1] Other Rules in Canon 3 frequently cross reference them.

FIRST, the judge may not participate in activities that "interfere with the proper performance of the judge's judicial duties."[2] For example, a judge may not engage in volunteer work for a charitable group such as the Utah Special Olympics when the work required his weekly absence from the bench. That amount of commitment—an average of one day per week during regular business hours—interfered impermissibly with the judge's discharge of his official duties.[3] The problem was not the participation but rather the time commitment.

SECOND, the judge may not participate in activities that will lead to her frequent disqualification.[4] This Rule is really a specific example of the general prohibition of Rule 3.1(A). If the judge becomes involved in extrajudicial activities that will lead to his frequent disqualification, he is interfering with the proper performance of his judicial duties.

THIRD, the judge may not participate in activities that a reasonable person would view as undermining the judge's independence, integrity, or impartiality.[5] This reference to what a "reasonable person" would view harkens to the "might reasonably be questioned" standard in 28 U.S.C.A. § 455. Unlike Canon 4A(1), which just focuses on the judge's impartiality, the 2007 Code focuses on the judge's independence, integrity, and impartiality—all words defined in the Terminology section of the Model Code.

FOURTH, when participating in extrajudicial activities, the judge may not engage in conduct that a reasonable person would view as coercive.[6] Obviously, when the judge engages in judicial duties, he often acts coercively, such as when he places someone in contempt. When the judge engages in nonjudicial duties, he may act coercively. For example, the judge who is an officer in the Army Reserve will act coercively (giving orders) when he is serving in the Reserve. The framers of Rule 3.1(D) were concerned with the situation where the judge uses his judicial influence, either overtly or subtly, to coerce others into participating in extrajudicial activities that he favors.[7] As the drafters of Rule 3.1(D) explained:

> The Commission heard testimony suggesting that coercion of this kind can be a significant problem in small communities with only one judge or a small number of judges, and a small number of lawyers who need to maintain good relations with the judiciary.[8]

FIFTH, the judge may not use court facilities, judicial staff, stationery, or other judicial resources for a judge's extrajudicial activities.[9] The framers were concerned that if the judge favored a particular charity or other extrajudicial event by providing access to facilities that are closed to others, there is "an abuse of the prestige of judicial office,"[10] which Rule 1.3 prohibits.

However, Rule 3.1(E) provides an exception if the extrajudicial activities relate to the administration of justice. For example, "opening a real courtroom for use in a moot court competition or using a court's conference room for a meeting of a bar association task force that includes the judge, are not abuses of judicial office." [11]

### § 10.3-3.1(c) Law-Related and Nonprofit Activities

Rule 3.1 of the 2007 Code and Canon 3A of the 1990 Code both agree that a judge's judicial duties take precedence over all the judge's other activities. Yet Rule 3.1(A) also advises that we should encourage judges to "engage in appropriate extrajudicial activities." [12]

Hence, Rule 3.1(A) permits a judge to engage in extrajudicial activities in general, so long as these activities do not interfere with the proper performance of the judge's judicial duties. The Rule does not prohibit merely "undignified" conduct. [13] The 2007 Rules deleted a provision in the 1990 Code that provided that judges could not engage in conduct that would "demean the judicial office." [14]

Indeed, the drafters changed the language of the 2007 Code in order to be more encouraging of judges to "reach out to the communities" and "avoid isolating themselves." [15]

To the extent time permits, and assuming that these extrajudicial activities do not compromise the judge's judicial independence and impartiality, the Rules positively *encourage* judges to engage in appropriate extrajudicial activities. If the activity is law-related, judges are "uniquely qualified" to participate. [16]

If the activity is not law-related, the Rules encourage judges to participate, if such educational, religious, charitable, fraternal, or civil activities are not for profit. [17]

### § 10.3-3.1(d) Speaking, Writing, and Teaching

The Commentary to Rule 3.1 recognizes that a judge's legal experience makes him "uniquely qualified" to improve the law. [18] Public policy encourages judges to engage in quasi-judicial activities either alone or through bar associations, judicial conferences, or other such organizations. That the judge publicly advocates her opinions on the law, that she has prejudged the *law*, does not imply that she will prejudge the *facts* of a case.

As Judge Jerome Frank observed, if we define "bias" and "partiality" to mean "the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular cases and which, therefore, by definition, are prejudices." [19]

Moreover, as a practical matter, whether or not the judge participates in such activities, she will have definite views on what the law is and what it should be. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." [20] For this reason, the court did not require a judge to disqualify himself in a homicide case simply because he was a member of the Criminal Law Revision Commission that had drafted the criminal code under which the defendant was convicted. [21]

Canon 4B of the 1990 Code broadly authorized a judge to speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, and administration of justice, *and non-legal subjects as well*, unless such activities violate other sections of the Judicial Code. [22] The 2007 Judicial Code did not incorporate a Rule that corresponds to Canon 4B, but the Comments to Rule 3.1 continue this broad authorization. [23]

Judges may seek improvement in the law, both procedurally and substantively, and they "may express opposition to the persecution of lawyers and judges in other countries because of their professional activities." [24] Thus, a judge may teach a law course, write law review articles, and publish his judicial philosophy without being required to disqualify himself.

The fact that a judge has published his views prior to his confirmation does not affect his ability to sit on a case raising a similar legal issue. For example, Justice Jackson participated in the decision of one case that raised an issue on which he had earlier written an opinion as Attorney General. [25] Jackson, by the way, concurred in the opinion of the Court even though it was contrary to a legal opinion he issued when he was Attorney General. [26] Jackson quoted Lord Westbury who had earlier stated (when his Lordship repudiated one of his previous opinions): "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." [27]

Professor Alexander Bickel once said that when a President appoints a Justice, he shoots "an arrow into a far-distant future [and] not the man himself can tell you what he will think about some of the problems he will face." [28] This simple fact is illustrated by no less a judicial titan than Judge Henry Friendly, a great judge and prolific author. In one case, one of the parties cited to him one of his own articles indicating how an issue should be decided. Judge Friendly decided that he disagreed with what he himself had earlier written. The genius of the common law system, he recognized, is that judges must make the decisions in the context of concrete cases, not in the context of law review articles. Judge Friendly dissented, [29] while the majority relied on Friendly's law review article. [30]

Judge Friendly did not know how he would rule on the legal issue until he had to decide the legal issue, even though the Judge had thought about the problem and had written an article about it coming to a firm conclusion, a conclusion that he later firmly rejected. [31]

### § 10.3-3.1(e) Discriminatory Actions and Expressions

If the judge indicates bias, even during off-bench behavior, that bias may cast reasonable doubt on the judge's ability to act with impartiality. [32] Even "jokes or other remarks demeaning individuals on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation or socioeconomic status" fall in this category. [33] Hence, the judge must not engage in extrajudicial activities by affiliating with an organization that practices invidious discrimination. [34]

The judge can try to change the practice of the discriminatory club, but that effort either must be successful within two years or he should leave. In re Complaint of Judicial Misconduct [35] rejected a judge's defense that he was trying to change the club's discriminatory policy:

"Judge Paine [the judge in question], however, was aware of the Club's 'perceived exclusionary policies' at least 21 years ago, when he urged the Club to diversify. Any two-year remediation period came and went long ago." The Federal judicial canons "plainly does not permit a judge to belong to an organization that invidiously discriminates for as long as he or she keeps trying to change its practices, however long that may be."

The court imposed discipline of a "public reprimand" on Judge George C. Paine, II, Chief Judge of the United States Bankruptcy Court for the Middle District of Tennessee. The court explained that Judge Paine had already announced his retirement at the end of 2011. "For that reason, and because this decision represents the first enforcement of Canon 2C, there is no cause for us at this point to order Judge Paine's removal from office or to take disciplinary action beyond the public reprimand that this opinion represents. Should Judge Paine change his retirement plans, however, we would be required to revisit this conclusion." [36]

To the extent that the state seeks to discipline a judge for what she *says* as opposed to what she *does*, particularly when the judge makes his comments while *not* on the bench and while *not* acting as a judge, there are significant First Amendment problems.

As one noted judge has remarked, a judge's off-bench comments should receive full First Amendment protection even if her remarks are "discourteous, offensive, vile, insulting, degrading, humiliating, ill-mannered and boorish." [37]

Consider this example. The judge says to a neighbor, "I oppose lowering the capital gain rates, because I hate the idle rich." Is the judge making a remark that demeans a group of individuals based on their "socioeconomic status?" [38] When the drafters listed "socioeconomic status," they may not have been thinking about criticizing the ultra rich, but that simply means that they have drafted this section less carefully than they might. [39]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Reporters' Explanation of Changes to Rule 3.1, at 33 (ABA 2007).

2 2007 Code, Rule 3.1(A), which corresponds to the 1990 Code, Canon 4A(3).

3 Utah Judicial Ethics Informal Opinion No. 89-11 (August 10, 1989), at http://www.utcourts.gov/resources/ethadv/ethics_opinions/1989/89-11.htm (12 February 2009).

4 2007 Code, Rule 3.1(B), derives from the 1990 Code, Canon 4A(3).

5 2007 Code, Rule 3.1(C), is based on the 1990 Code, Canon 4A(1), although Rule 3.1(C) expands coverage and revises the language of the former Canon.

6 2007 Code, Rule 3.1(D). This Rule is new.

7 Rule 3.1, Comment 4.

8 Reporters' Explanation of Changes to Rule 3.1, at 33 (ABA 2007).

9 2007 Code, Rule 3.1(E). This Rule is new. See, Raymond J. McKoski, Ethical Considerations in the Use of Judicial Stationery for Private Purposes, 112 PENN. ST. L. REV. 471 (2007).

10 Reporters' Explanation of Changes to Rule 3.1, at 34 (ABA 2007).

11 Reporters' Explanation of Changes to Rule 3.1, at 34 (ABA 2007).

12 Rule 3.1, Comment 1. Canon 4 also advises that a "judge should not become isolated from the community in which the judge serves." To separate completely a judge from extra-judicial activities "is neither possible nor wise." 1990 Code, Canon 4, Comment 1.

13 ABA Standing Committee on 1990 Code, Legislative Draft 34 (1990).

14 1990 Code, Canon 4A(3).

15 Reporters' Explanation of Changes to Rule 3.1, at 34 (ABA 2007).

16 Rule 3.1, Comment 1.

17 Rule 3.1, Comment 1; Reporters' Explanation of Changes to Rule 3.1, at 34 (ABA 2007).

18 Rule 3.1, Comment 1.

19 In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir.1943). *See* Ronald D. Rotunda, *Thomas' Ethics and the Court*, 13 LEGAL TIMES 20 (Aug. 26, 1991); Ronald D. Rotunda, *A Red Herring Confirmation Issue*, THE INDIANAPOLIS STAR, Sept. 10, 1991, at p. A7, col. 1–3.

20 Laird v. Tatum, 409 U.S. 824, 835, 93 S.Ct. 7, 14, 34 L.Ed.2d 50 (1972) (memorandum of Rehnquist, J.).

21 State v. McKenzie, 186 Mont. 481, 608 P.2d 428 (1980) (relying on Canon 4 of the 1972 Judicial Code). Later, the defendant sought habeas relief on other grounds. McKenzie v. Risley, 915 F.2d 1396 (9th Cir.1990).

22 1990 Code, Canon 4B, Comment 2.

23 2007 Code, Rule 3.1, Comments, 1, 2.

24 1990 Code, Canon 4B, Comment 1.

25 McGrath v. Kristensen, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173 (1950).

26 *Compare* 340 U.S. at 176, 71 S.Ct. at 233, *with* 39 Op.Atty.Gen. 504 (1940). *See* Ronald D. Rotunda, *Statement before the Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 523 (2002)(discussing inability to predict how a judicial nominee will vote based on his or her past statements and conduct).

27 340 U.S. at 178, 71 S.Ct. at 233. Over a century earlier, Justice Story, explaining his rejection of his own former opinion, responded as follows: "My own error, however, can furnish no ground for its being adopted by this Court. …" United States v. Gooding, 25 U.S. (12 Wheat.) 460, 478, 6 L.Ed. 693 (1827).

28 *Judgment on a Justice*, TIME, May 23, 1969, at 23–24 (quoting Alexander Bickel).

29 Williams v. Adams, 436 F.2d 30, 35 (2d Cir. 1970) (Friendly, J., dissenting). Judge Friendly (the Judge, not the author) was vindicated when the Second Circuit, *en banc*, reversed the panel decision, in 441 F.2d 394 (2d Cir. 1971) (per curiam). But the U.S. Supreme Court agreed with Henry Friendly, the author, and not Henry Friendly, the judge, and it reversed the Second Circuit. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

30 Williams v. Adams, 436 F.2d 30, 34 n.2 (2d Cir. 1970), *quoting* Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952 (1965).

31 Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEORGETOWN JOURNAL LEGAL ETHICS 127 (2001).

32 2007 Code, Rule 3.1, Comment 3; 1990 Code, Canon 4A, Comment 1.

33 2007 Code, Rule 3.1, Comment 3; 1990 Code, Canon 4A, Comment 1.

34 Rule 3.1, Comment 3. Rule 3.6.

35 In re Judicial Misconduct, 664 F.3d 332 (U.S. Jud. Conf. 2011). The court concluded that a federal judge's membership a in private social club that practiced invidious discrimination against women and blacks violated the Code of Conduct for United States Judges. There is nothing about the club's "stated aims or activities" that offer any "justification for the total absence of any female or African American Resident Members." The club invidiously discriminated even though it has "gay, Jewish, and other non-African American persons of color who are Resident members of" the club. The issue is "whether an organization invidiously discriminates on one —not all—of the listed bases." Accepting gays does not allow it to discriminate against blacks and women. This opinion has no page numbers.

36 This opinion, In re Judicial Misconduct, 664 F.3d 332 (U.S. Jud. Conf. 2011).

37 *See* Stanley Mosk, *Judges Have First Amendment Rights*, 2 CALIF. LAWYER 30, 76 (Oct. 1982). *See also* Alan F. Westin, *Out-of-Court Commentary by U.S. Supreme Court Justices, 1790–1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM.L.REV. 633 (1961); 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.42(d) ("Restrictions on Extra-Judicial Speech of Judges") (Thomson West, 4th ed. 2008) (6 volumes).

38 Rule 3.1, Comment 3 prohibits jokes or other remarks that demean anyone based on a litany of characteristics, including "socioeconomic status."

39 Ronald D. Rotunda, *What Next? Outlawing Lawyer Jokes?*, WALL ST. J., Aug. 8, 1995, at A12, col. 3–5.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.2 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.2 Rule 3.2

## § 10.3-3.2(a) The Text of Rule 3.2

The text of Rule 3.2 provides:

**RULE 3.2.** ***Appearances before Governmental Bodies and Consultation with Government Officials***

**A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:**
**(A) in connection with matters concerning the law, the legal system, or the administration of justice;**
**(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or**
**(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary* capacity.**

**[* Ed. Note:** "Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. Terminology, ¶7**]**

**COMMENT**

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

## § 10.3-3.2(b) Appearing Before Governmental Bodies and Consulting with Government Officials

Rule 3.2 [1] provides that a judge may not testify voluntarily at a public hearing or otherwise consult with an executive body or official except in accordance with this Rule. The judge can always testify pursuant to subpoena. Rule 3.2 provides no privilege excusing the judge from testifying. It is not "unethical" for a judge to respond to a subpoena. [2]

The Rule then lists three important exceptions to this general rule. Prohibiting a Judge from testifying voluntarily.

First, the judge may testify at public hearings before a legislative or administrative body, or otherwise consult with an executive or legislative body or official on any legal matters. It does not matter whether these legal matters are substantive or procedural, and whether or not they relate to court organization. [3] When testifying, the judge should not use the prestige of judicial office to advance the judge's private interests or the interests of a third party. [4]

Second, the judge may voluntarily testify or consult in connection with matters about which the judge acquired knowledge or expertise in the course of his judicial duties. [5] Although the former 1972 Judicial Code drew various distinctions between public hearings and private consultations, the 1990 Code and the 2007 Code draw no such distinctions.

Third, if the judge is acting *pro se*, or in a fiduciary capacity, he may also testify or consult in matters affecting the judge's legal or economic interests. [6] The judge, for example, could testify about a zoning proposal, just as any other citizen could testify about the zoning proposal. Yes, in doing so, the judge must be careful not to use the prestige of his judicial office to advance his private viewpoint. [7]

Rule 3.2, Comment 2, warns judges that they should not use "the prestige of judicial office to advance their own or others' interests." [8] A state Supreme Court justice does not violate this provision when he publicly supports a United States Supreme Court nominee. Life tenure and the power and prestige of the office are public interests, rather than private interests. [9] Judges must not use their office for a personal or individual financial advantage or other benefit. [10] But that is not what is happening when one judge gives his honest opinion of another person.

Similarly, *In re Jimenez* [11] held that a judge's private letters to the chief of police and district attorney accusing a police officer within their jurisdiction of perjury and selective prosecution, and the judge's subsequent testimony and media interviews to the same effect, did not violate the Judicial Codes. The judge's purpose was to advance the public interest, and what is now Rule 3.2(A)—or Canon 4B—permits judges to consult with executive officials on matters concerning administration of justice.

In addition, *In re Jimenez* approved of the judge's letter to the chief of police. This letter stated that the police officer had criticized the judge in a private telephone conversation. The judge did not use the prestige of judicial office to advance the judge's private interest, *i.e.*, retaliation against the officer. Instead, the judge already had concerns about officer's credibility before he wrote the letter, and his letter reflected those legitimate interests. Moreover, others in the criminal justice system suspected the officer of crimes.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.2, is derived from Canon 4C(1), with some minor revisions and additions. Rule 3.2(B) is new. Reporters' Explanation of Changes to Rule 3.2, at 34 (ABA 2007).

2 Reporters' Explanation of Changes to Rule 3.2, at 35 (ABA 2007).

3 Rule 3.2(A). This Rule comes from the middle clause of Canon 4C(1) of the 1990 Code.

4 Rule 3.2, Comment 2.

5 Rule 3.2(B) is new and does not come from any provision in the 1990 Code.

6 2007 Code, Rule 3.2(C) corresponds to the 1990 Code, Canon 4C(1) (last clause).

7 Rule 3.2, Comment 3.

8 Rule 3.2, Comment 2. *See also* Rule 1.3.

9 In re Hecht, 213 S.W.3d 547, 576 (Tex. Spec. Ct. Rev.) (Tex. Spec. Ct. Rev. 2006).

10 In re Sanders, 135 Wash.2d 175, 955 P.2d 369, 376 (1998).

11 In re Jimenez, 841 S.W.2d 572 (Tex. Spec. Ct. Rev. 1992).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.3 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

# § 10.3-3.3 Rule 3.3

## § 10.3-3.3(a) The Text of Rule 3.3

The text of Rule 3.3 provides:

**RULE 3.3. *Testifying as a Character Witness***

**A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.**

**COMMENT**

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

## § 10.3-3.3(b) The Judge as a Witness: Introduction

The popular mind may view a judge as lending his or her prestige to advance the interests of others if the judge testifies as a witness on behalf of one party. The judge, of course, is not presiding, but the fact-finder, knowing that the witness is also a judge, may feel the judge should know who should win a given case because of the authority and legal knowledge associated with the judicial office. Moreover, the lawyer questioning the judge (both on direct and cross examination) will likely be extremely deferential to the witness and address him as "Your Honor."

On the other hand, the judicial office should not excuse the judge from offering eyewitness or other factual information, any more than the prestige of a Bishop would immunize the holder of that office from offering relevant factual testimony.

Thus, Rule 3.3 of the 2007 Code [1] distinguishes two situations when the judge is not presiding—that is, is not acting as a judge—but is witness. First, the judge may be an eyewitness; second, the judge may be a character witness. When the judge testifies as a character witness, the ethics rules impose special restrictions.

## § 10.3-3.3(c) The Judge Testifying as to Factual Matters

A judge, who is not presiding at the trial, may testify as an eyewitness. In one case, a lawyer approached the judge who was to preside over a criminal matter. The participants agreed that the lawyer asked about the timing of the trial. The lawyer claimed that at this *ex parte* meeting he spoke *only* of the *timing* of the trial, and did not discuss, or state any concern regarding, the *outcome* of the trial. The judge said that he had cautioned the lawyer not to talk about any of his assigned cases, but that nonetheless the lawyer talked not only about the timing of the case but also about his interest in the outcome. The judge then wrote to the parties of his meeting and recused himself.

At the trial, to establish that this lawyer (whom defendants called as a witness) had an interest in the case, the new presiding judge allowed the Government to call the former presiding judge to testify as to his version of the meeting in order to attack the credibility of the other witness. In *United States v. Frankenthal*,[2] the court found no error and explicitly declined to adopt any rule that a judge who is *not* presiding in a case may never testify in a criminal case.[3]

There is no federal rule generally exempting a nonpresiding judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding.[4] This principle is also generally true in the state courts.[5] In short, a *nonpresiding* judge does not violate the Model Code of Judicial Conduct by testifying as to factual matters.[6]

### § 10.3-3.3(d) The Judge Testifying as a Character Witness

In contrast to the rule regarding a nonpresiding judge's testimony as a fact witness is the rule regarding a nonpresiding judge's testimony as a character witness. Rule 3.3 prohibits a judge from testifying as a character witness except when "duly summoned." Canon 2B of the 1990 Code has a similar prohibition—the judge may not "voluntarily" testify as a character witness.

The change in language does not signify any change in substance. The drafters of the 2007 Code used the language of "duly summoned," but a Comment to the 1990 Code also said that the judge may testify "when properly summoned."[7] The 2007 Code also says that the judge may not "otherwise vouch for the character of a person in a legal proceeding." This reference to "vouching" is simply a way of emphasizing that "testimony under oath is not the only mode in which judges might abuse the prestige of judicial office when the character of a person is in issue in a legal proceeding."[8]

The purpose of Rule 3.3 is to prevent the judge from exploiting the dignity and prestige of judicial office by testifying voluntarily as a character witness. On the other hand, a judge does not have any privilege to refuse to testify if a party has officially subpoenaed him.

If a party wishes a judge to testify as a character witness, the party must subpoena the judge. The judge then must obey the subpoena. If the party asks the judge to appear *voluntarily* as a character witness, the judge must refuse.[9]

A judge, however, may ask the party to subpoena him. In fact, that is what the ethics rule seems to require.

The 2007 Judicial Code and the 1990 Code have a Comment that advises:

> Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.[10]

One wonders how that works in practice. When does a party (or the judge) decide that the circumstances are "unusual"? The Comment does not tell us how to determine when the circumstances are "unusual." Nor does it explain whether the party or the judge makes this determination. Nor does it explain who makes this determination, the judge/character witness or the party. It is clear that the presiding judge does not make this determination because Rule 3.3 gives the judge/character witness no immunity from testifying. It simply tells the judge/character witness not to appear voluntarily. Indeed, the Comment that advises the judge to "discourage" the party is not in the black letter Rule at all.

Rule 3.3 does not prevent the judge/character witness from telling the party the truth and announcing the law, *i.e.*, from notifying the party, "I will not seek to evade a subpoena." The judge/character witness cannot lie about his belief in the good character of the party calling him as a witness, even if the judge/character witness would have preferred not to get involved.

If the lawyer subpoenas the judge to be a character witness, then her testimony may look more persuasive to the jury when —in response to a question—the judge truthfully answers: "I am testifying here today pursuant to a subpoena." It is as if the party is telling the jury: "The judge did not want to be here today, but I subpoenaed her and she is forced to testify, and she has testified to the good character of the accused."

Not all courts appreciate the limits of Rule 3.3, or its predecessor, Canon 2B. Consider *United States v. Callahan*. [11] The defendant's attorney called a judge as a character witness in a prosecution for tax evasion. The attorney subpoenaed the judge, but the district court questioned the purpose of the subpoena. The trial judge claimed that if the judge/witness was really a voluntary witness, and the subpoena was a mere technical strategy to comply with the Code, then the judge might still violate the Code by being in effect a "voluntary" character witness. The district court allowed the judge to decide for himself whether he would testify, and the following day the judge/witness refused to testify. On appeal, the circuit court concluded that the district court was in error. *Callahan* held that the trial court had no power to bar the judge/witness from testifying under a legally valid subpoena, even if the judge/witness, in order to comply with the rule, had asked for the subpoena. [12]

The conclusion in *Callahan*, that the district court erred, is sound because the Code specifically bars only voluntary, *i.e.*, nonsubpoenaed, testimony. If the party issues the subpoena, then the testimony is no longer voluntary. Any other result would open to question all character witness testimony by a judge and would erode the Code's policy of *permitting* testimony by judicial witnesses who are subject to subpoena. [13] This section offers no privilege against testifying. Any other rule would permit the judge to create an immunity merely by stating that the summons was "welcomed."

It should be difficult if not impossible to enforce a requirement that a judge *discourage* a party from seeking lawful testimony.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Rule 3.3 of the 2007 Code corresponds to the last sentence of Canon 2B of the 1990 Code.

2 United States v. Frankenthal, 582 F.2d 1102 (7th Cir.1978).

3 An unusual case is, In re Disciplinary Proceeding against Sanders, 159 Wash.2d 517, 145 P.3d 1208 (2006). The justice has visited special facility for sexually violent predators and had conversations with facility residents who had matters pending before the Supreme Court. The court affirmed the admonishment and agreed that the Justice's conduct violated the Code of Judicial Conduct forbidding the failure to enforce high standards of judicial conduct and the failure to promote public confidence in the integrity and impartiality of the judiciary. The court said:

> By asking questions of inmates who were litigants or should have been recognized as potential litigants on issues currently pending before the court, Justice Richard B. Sanders violated the Code of Judicial Conduct. His conduct created an appearance of partiality as a result of ex parte contact.

In re Disciplinary Proceeding against Sanders, 159 Wash.2d 517, 145 P.3d 1208, 1209 (2006).

What makes this case unusual is that the Judicial Commission decided that Justice Sanders did *not* violate the Canon that prohibits the judge from considering *ex parte* or other communications concerning a pending or impending proceeding. 145 P.3d at 1210, citing Canon 3(A)(4) of the Washington State Judicial Code, corresponding to Canon 3B(7) of the ABA Model Judicial Code.

The court noted that "Justice Sanders claims that a violation of Canons 1 and 2(A) cannot be found without a concomitant violation of a proscribed act or canon and thus the Commission's failure to find a direct violation of Canon 3(A)(4) precludes it from finding a violation of the other canons." 145 P.3d at 1211. The court, without offering any real analysis, simply responded: "We disagree." *Id.*

4 Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

5 *See* 97 CORPUS JURIS SECUNDUM, Witnesses § 16.

6 Note that Rule 605, Federal Rules of Evidence, only prohibits a *presiding* judge from testifying at the trial.

7 1990 Code, Canon 2B, Comment 5.

8 Reporters' Explanation of Changes to Rule 3.3, at 36 (ABA 2007).

9 2007 Judicial Code, Rule 3.3. 1990 Judicial Code, Canon 2B: "A judge shall not testify voluntarily as a character witness."

10 2007 Code, Rule 3.3, Comment 1. See also, Comment 5 of Canon 2B: "Except in unusual circumstances where the demands of justice require, a judge *should discourage* a party from requiring the judge to testify as a character witness." The 1972 Code did not include this Comment.

11 United States v. Callahan, 588 F.2d 1078 (5th Cir.1979), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979).

12 *Callahan*, however, concluded that the error in this case was harmless because the witness had (the court claimed) himself decided not to testify after having heard the trial judge's gratuitous and erroneous lecture on the Judicial Code.

13 1990 Model Code of Judicial Conduct, Canon 2B, Comment 5 states that the judge may "testify when properly summoned." The 2007 Model Code similarly provides that the judge testify "when duly summoned." Rule 3.3.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.4 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

# § 10.3-3.4 Rule 3.4

## § 10.3-3.4(a) The Text of Rule 3.4

The text of Rule 3.4 provides:

**RULE 3.4. *Appointments to Governmental Positions***

**A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.**

**COMMENT**

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

## § 10.3-3.4(b) Accepting Appointments to Government Positions

Rule 3.4 [1] provides that a judge shall not accept appointment to a governmental position that is concerned with issues of fact or policy on matters unless it concerns "the law, the legal system, or the administration of justice." The purpose for this prohibition is to conserve judicial manpower and to protect the courts from involvement in extra-judicial matters that may be unnecessarily controversial. [2] A judge, however, may represent units of government on ceremonial occasions. [3] There is nothing wrong when a judge cuts the "red ribbon." The ceremony does not involve the judge in controversy, and it should not affect judicial manpower.

For similar reasons, this Rule also makes an exception for the judge representing her country, state, or locality in connection with historical, educational, and cultural activities. [4] Otherwise, a judge should not accept appointment to any governmental committee or commission unless it relates to "the improvement of the law." In other words, a judge may accept appointment to a commission on law reform or a committee in charge of drafting a new version of the rules of civil procedure because the Code defines "law" to include "court rules." [5]

The Model Judicial Code disapproves of other governmental appointments of judges to nonjudicial duties. Rule 3.4 does not concern itself with nongovernment appointments (a private university, for example). But it does not approve of, for example,

President Johnson's appointment of Chief Justice Earl Warren to preside over the Commission investigating President John Kennedy's assassination, or President Roosevelt's appointment of Justice Robert Jackson to be the Chief American Prosecutor at the Nuremberg trials.

Rule 3.4 and Canon 4C(2) cover only *governmental* appointments, not non-governmental appointments. Thus, a judge may not accept appointment to serve on the Board of Trustees of the State University, because that is a governmental appointment: the State University is a state entity. But a judge can accept appointment to serve on the Board of Trustees of a State *Law School*, because this law school, although a governmental agency, is also an agency devoted to the improvement of law, the legal system, or the administration of justice. [6] And, under Rule 3.7 and Canon 4C(3), discussed below, the judge may generally accept appointment to the Board of Trustees of a *private* university, because Rule 3.7(A)(6) and Canon 4C(3) say so. Such an appointment is not a governmental appointment because the university is private. [7]

These bright-line distinctions are not without rhyme or reason. First, whenever we draw bright lines, items that are very close to the line could, perhaps, be just as comfortable on the other side of the line. In addition, the distinctions reflect an assessment that judges, who often are elected and who work for the government, may find it more difficult to reject political pressure to serve on various *government* committees or accept government positions. But, judges do not face similar political pressure to accept private appointments, so the ethics rules allow judges to make up their own minds on this question.

### § 10.3-3.4(c) The Federal Experience with Appointing Judges to Extra-Judicial Duties

There is a long history of federal judges accepting appointments to nonjudicial duties. That is not to say that the ABA Model Code is incorrect in rejecting this history.

John Jay, while holding the office of the first Chief Justice, for example, was ambassador to England, where he negotiated the Jay Treaty. He wrote Justice James Iredell that such extrajudicial service, “far from thinking it illegal or unconstitutional” was proper as long as such extrajudicial service was “consistent and compatible” with the “judicial function.” [8] When the Senate considered Jay's nomination, it rejected a resolution (18 to 8) complaining that Jay's proposed extra-judicial service was “contrary to the spirit of the Constitution.” [9]

Chief Justice Oliver Ellsworth, while Chief, also accepted (albeit with reluctance) a position as Minister to France. Jefferson, Madison, and Pinckney opposed Ellsworth's appointment on constitutional grounds, but they were unsuccessful, and the Senate confirmed him. [10] Chief Justice John Marshall was also, for a short time, Secretary of State (when appointed to the Court, he agreed to stay on as Secretary only until a replacement could be found), and later was a member of the Sinking Fund Commission, which had responsibility for refunding the Revolutionary War debt. [11]

In 1877, the Electoral Commission, which Congress created to decide the disputed Hayes-Tilden Presidential Election of 1876, included five Supreme Court Justices among its members. In addition, Justices Nelson, Fuller, Brewer, Hughes, Day, Roberts, and VanDevanter all served on various arbitration commissions. Justice Owen Roberts served on the Commission that investigated the attack on Pearl Harbor, and Justice Jackson, was one of the prosecutors in the Nuremberg trials. In 1942, Justice Murphy joined the Army Reserve as a Lieutenant Colonel, which caused him to disqualify himself in *Ex Parte Quirin*, [12] a habeas corpus case involving German saboteurs. Although Justice Murphy was technically on inactive status, he did go on maneuvers.

Chief Justice Warren headed the Commission that investigated the assassination of President John F. Kennedy. Chief Justice Burger, before he retired, had begun serving as Chairman of the Bicentennial Commission (formed to celebrate the 200th anniversary of the United States Constitution). By statute, the Chief Justice is also a member of the Board of Regents of the Smithsonian Institution and a trustee of the National Gallery. [13] Moreover, lower court Article III judges have also served on various presidential commissions or other national commissions over the years. [14]

To be sure, some federal judges have had reservations about the practice on both constitutional and policy grounds. Yet even those who have been the most vocal critics of such extrajudicial activities have also accepted appointment to such presidential commissions because, in their view, duty called. [15]

The Judicial Conference of the United States—composed of Article III judges—approved a Code of Conduct for United States Judges. That Judicial Code (like the ABA Model Code of Judicial Conduct, on which the Judicial Conference Code is based) provides that a judge may serve on such extrajudicial committees if they relate to the improvement of law, the legal system, or the administration of justice, or if required by an Act of Congress. [16]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.4, corresponds to the 1990 Code, Canon 4C(2). The last sentence of Canon 4C(2) corresponds to Rule 3.4, Comment 2.

2 2007 Code, Rule 3.4, Comment 1; 1990 Code, Canon 4C(2), Comment 1.

3 Rule 3.4, Comment 2.

4 Rule 3.4, Comment 2.

5 2007 Code, Terminology, ¶15. 1990 Code, Terminology, ¶11.

6 *See* 2007 Code, Rule 3.7 and 1990 Code, Canon 4C(3), discussed below.

7 A Comment to the 1990 Code makes this distinction—which is not immediately apparent—clear. “For example, service on the board of a public educational institution, *unless it were a law school*, would be prohibited under Section 4C(2), but service on the board of a public law school or any *private* educational institution would generally be permitted under Section C(3).” Canon 4C(2), Comment 2 (emphasis added).

8 The quoted portions are from a draft of a letter that Jay intended for President Washington; this draft was included in a letter of September 15, 1790, from Jay to Justice Iredell. *See* 2 G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL, 293, 294 (1949).

9 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 119 (rev. ed. 1926). *See also* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123.

10 *See* NONJUDICIAL ACTIVITIES OF SUPREME COURT JUSTICES AND OTHER FEDERAL JUDGES, HEARINGS BEFORE THE SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY, 91st CONG., 1ST SESS. (1969).

11 *See* Mistretta v. United States, 488 U.S. 361, 397–402, & n.22, 109 S.Ct. 647, 668–69 & n.22, 102 L.Ed.2d 714 (1989).

12 Ex Parte Quirin, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942). For the factual background to *Ex Parte Quirin*, see, Tony Mauro, *A Mixed Precedent for Military Tribunals*, LEGAL TIMES, Nov. 19, 2001, at p. 15. *See also* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (Thompson West, 4th ed. 2007), (6 volumes) at § 6.13(b)(2) (discussing *Quirin* and the Detainee Cases of 2004). *See also* Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and their Aftermath*, 57 SYRACUSE L. REV. 1 (2006).

13 20 U.S.C.A. § 42 (Chief Justice made member of the Board of Regents of the Smithsonian Institution); 20 U.S.C.A. § 72(a) (Chief Justice made trustee of the National Gallery of Art); Pub.L. 98-101, 97 Stat. at Large 719 (regarding Chief Justice Burger, remaining Chief while serving as Chairman of the Commission on the Bicentennial of the United States Constitution).

14 Mistretta v. United States, 488 U.S. 361, 400 n.25, 109 S.Ct. 647, 669 n.25, 102 L.Ed.2d 714 (1989).

15 Chief Justice Warren served as Chairman of the Presidential Commission investigating the assassination of President John F. Kennedy. In Earl Warren's memoirs he said:

> First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court serve on a presidential commission; second, it would distract a Justice from the work of the Court, which had a heavy docket; and third, it was impossible to foresee what litigation such a commission might spawn, with resulting disqualification of the Justice from sitting in such cases. I then told them that, historically, the acceptance of diplomatic posts by Chief Justices Jay and Ellsworth had not contributed

> to the welfare of the Court, that the service of five Justices on the Hayes-Tilden Commission had demeaned it, that the appointment of Justice Roberts as chairman to investigate the Pearl Harbor disaster had served no good purpose, and the action of Justice Robert Jackson in leaving the Court for a year to become Chief Prosecutor at Nuremberg after World War II had resulted in divisiveness and internal bitterness on the Court.

EARL WARREN, THE MEMOIRS OF EARL WARREN 356 (Doubleday Pub., 1977).

16 Canon 5G states:

> A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, *unless appointment to a judge is required by an Act of Congress*. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the integrity, impartiality, or independence of the judiciary. A judge may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities. (emphasis added.)

Code of Judicial Conduct for United States Judges, *reprinted in* 101 F.R.D. 389, 396 (1984). The Commentary to this section states: "Valuable services have been rendered in the past to the states and the nation by judges appointed to the executive to undertake important extra-judicial assignments." 101 F.R.D. at 396.

The Commentary to Canon 4F of the Code of Conduct for United States Judges, (July 1, 2009), advises:

> Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary. http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.5 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

# § 10.3-3.5 Rule 3.5

## § 10.3-3.5(a) The Text of Rule 3.5

The text of Rule 3.5 provides:

**RULE 3.5.** ***Use of Nonpublic Information***

**A judge shall not intentionally disclose or use nonpublic information* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.**

**[*Ed. Note:** "Nonpublic information" means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. Terminology, ¶15.**]**

**COMMENT**

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

## § 10.3-3.5(b) General Principles

Rule 3.5 [1] provides that judges shall not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to judicial duties.

Nonpublic information is information that, by law, is not available to the public, such as information offered in grand jury proceedings, presentence reports, dependency cases, psychiatric reports, and information sealed by court order, impounded, or communicated in camera. [2]

Note that the Rule requires the judge to act intentionally—"intentionally disclose or use nonpublic information." The 2007 Model Code added this requirement. Hence, a judge who acts carelessly does not violate this Rule and should not be subject to discipline.

We live in an age when there are attacks on judges and members of their families. Rule 3.7 does not prohibit a judge using nonpublic information to protect herself, her family, court personnel, and other judicial officers. [3] The judge, in that case, would not be using nonpublic information for a purpose unrelated to the judge's judicial duties.

Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.5 corresponds to the 1990 Code, Canon 3B(12).

2 2007 Code, Terminology, ¶19. 1990 Code, Terminology ¶15.

3 Rule 3.5, Comment 2.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.6 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

# § 10.3-3.6 Rule 3.6

## § 10.3-3.6(a) The Text of Rule 3.6

The text of Rule 3.6 provides:

**RULE 3.6.** ***Affiliation with Discriminatory Organizations***

**(A) 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.**
**(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.**

**[* Ed. Note:** "Knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. Terminology, ¶14.**]**

**COMMENT**

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5] This Rule does not apply to national or state military service.

### § 10.3-3.6(b) Introduction

### § 10.3-3.6(b)(1) Historical Background

In August of 1984, the ABA added a Comment to Canon 2 prohibiting a judge from holding membership in a group that invidiously discriminates. In the 1990 Code, the ABA moved this prohibition into the black letter standard. Canon 2C mandated that a "judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." Notice that Canon 2C uses the term, "shall."

In the 2007 Code, the ABA moved this prohibition into Rule 3.6. This Rule corresponds to Canon 2C and its associated Commentary. The ABA moved some of the Commentary into black letter of Rule 3.6(B) and made a few substantive changes, discussed in this section and the following ones.

### § 10.3-3.6(b)(2) Gender and Sex

The 2007 Model Judicial Code expands the list of prohibited discrimination. Canon 2C included race, sex, gender, religion, national origin, ethnicity, or sexual orientation. Rule 3.6(A) includes both "gender" and "sex." The drafters do not explain the difference between "gender" and "sex," although—in connection with a different Rule, the drafters say that "sex" is "a term of art employed in sex discrimination statutes, but may not capture bias, prejudice, or harassment against trans-gendered individuals." [1]

This issue has generated a lot of controversy over the years. Some judges have complained that they should not be second class citizens. The Model Rules of Professional Conduct, after all, place no such restriction on lawyers. On the other hand, judges (unlike lawyers) are state employees who decide cases, including civil rights issues. The judge's membership in discriminatory organizations creates perceptions of partiality. [2]

### § 10.3-3.6(b)(3) State or Military Service

Rule 3.6, Comment 5 makes clear that the judge does not violate Rule 3.6 simply because he or she is a member of the national or state military service, e.g. a member of the Ready Reserve in the Army JAG. The provision is new to the 2007 Rules.

The framers of the 2007 Code listened to considerable commentary and considerable debate on this issue. Military organizations often engage in discrimination based on sexual orientation, for example, the so-called "don't ask, don't tell policy." The Supreme Court upheld that statute unanimously, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* [3]

The plaintiff in that case, Forum for Academic and Institutional Rights, Inc. (FAIR), was an association of law schools and law faculties whose members have policies opposing discrimination based on sexual orientation. They wanted to restrict military recruiting on their campuses because they objected to a federal statute placing restriction on homosexuals in the military. That law stated that, in general, a person may not serve in the Armed Forces if he or she has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex. [4] Another law, the Solomon Amendment, [5] provided that educational institutions denying military recruiters access equal to that provided other recruiters will lose certain federal funds. FAIR claimed that the law unconstitutionally forced them to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive those funds. The Court unanimously rejected that argument and went beyond the broad spending power to justify its conclusion. The First Amendment, the Court said, would not prevent Congress from directly imposing the Solomon Amendment's access requirement.

Under the Supremacy Clause, states cannot interfere with a constitutional federal statute. [6] As long as the federal statute, which places restrictions on gays in the military, is constitutional, states cannot interfere, even if a state does not approve of the practice. The Commission concluded that "the practical difficulties involved in enforcing a ban on holding membership in

military organizations, and the necessity for uniform rules across the military services, justified an interpretation that service in state and national military organizations does not violate this Rule." [7]

### § 10.3-3.6(b)(4) Invidious Discrimination

Note that Rules 3.6(A) and 3.6(B) impose the ban only on organizations that practice "invidious" discrimination. In other words, some organizations discriminate based on religion, but the discrimination is not "invidious." Every religious sect limits its membership to people who embrace the religious tenets. A judge who belongs to a Methodist Church holds membership in an organization that does not admit Roman Catholics. A judge who is a member of an Orthodox Jewish Synagogue holds membership in an organization that denies membership to Mormons. In all such cases, the organization does not practice "invidious" discrimination, so there is no violation of Rule 3.6(A). It should not be surprising that a Jewish Temple or a Christian Church limits it membership to people who are Christians or Jews. The judge's membership "in a religious organization as a lawful exercise of freedom of religion is not a violation of this Rule." [8]

The Rules recognize that it may be difficult to decide if an organization practices "invidious" discrimination. The mere fact that no member of a minority race is a member of a club does not necessarily mean that the club discriminates because of race. [9] An organization that may make membership of a particular religion a requirement of membership does not practice "invidious" discrimination. The Canons also acknowledge that an organization may properly be concerned with preserving "religious, ethnic or cultural values of legitimate common interest to it members." [10] For example, the judge may join a group promoting ethnic or cultural values, such as the "Sons of Italy."

In addition, the Canons concede that there are special constitutional protections—a right of freedom of association—for an "intimate, purely private organization." [11] Rule 3.6 and Canon 2C are inapplicable to groups whose membership limitations enjoy constitutional protection.

Consequently, the issue is what are the current practices of the organization and whether these practices "arbitrarily exclude" members based on the forbidden characteristics. [12] That is not to say that there are no standards. The drafters specifically rejected the alternative of leaving "to each individual's judge's conscience the determination of whether an organization practices invidious discrimination." [13]

Consider this example to illustrate the issue:

> Assume that a Judge belongs to a church as well as to a church-related fraternal organization. Membership in both organizations is limited to those who are church members. The Judge has not violated Rule 3.6(A)'s prohibition (or Canon 2C's prohibition) against discrimination based on religion, because the organizations are "dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members. …"

The "key test is a functional one: whether an excluded applicant (not possessing one of the listed characteristics) *would otherwise be eligible for admission to membership*." [14] In addition, certain organizations practicing some forms of discrimination are not practicing *invidious* or *improper* discrimination, "either because the discrimination is based upon rationales that are not socially harmful, or because the members of the organization have a constitutional right to associate without governmental interference." [15]

There is a "strong presumption of invidious discrimination" if "reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of" such discrimination, but the membership is not diverse. [16]

### § 10.3-3.6(c) Free Speech Concerns

A judge who publicly manifests approval of invidious discrimination violates Rule 3.6(A) and Canon 2A. [17]

The purpose of this Rule is honorable, but it can raise significant free speech concerns. For example, assume that a judge, while talking to a group of neighbors, argues that the state legislature should repeal a statute forbidding invidious discrimination. Assume further that, if there were no statute, the discrimination would not violate the Constitution. If the neighborhood group has construed the judge's comments to represent a "public manifestation of approval of invidious discrimination," [18] does Rule 3.6 subject the judge to discipline? Or, if this neighborhood group treats the judge's viewpoint as exhibiting "knowing approval" of this type of invidious discrimination, does Canon 2A come into play? [19]

To the extent that the state seeks to discipline a judge for what she *says* as opposed to what she *does*, particularly when the judge makes her comments while *not* on the bench and while *not* acting as a judge, there are significant First Amendment problems. As one noted judge has remarked, a judge's off-bench comments should receive full First Amendment protection even if her remarks are "discourteous, offensive, vile, insulting, degrading, humiliating, ill-mannered and boorish." [20]

### § 10.3-3.6(c) Using or Benefitting from Discriminatory Facilities

The 1990 Code advised that, even if the judge is not a member of an invidiously discriminatory club, the judge is still subject to discipline, if she regularly uses such a club, or arranges for meetings to be held there. The judge's conduct does not violate Canon 2C (because she does not "belong" to the organization), but it violates Canon 2 ("appearance of impropriety") and Canon 2A ("diminishes public confidence in the integrity and impartiality of the judiciary"). [21]

The 2007 Code raises the concerns of the 1990 Code from the Commentary to the black letter. Rule 3.6(B) provides that a judge may not use the benefits or facilities of an organization if the judge either knows or *should know* that the organization practices invidious discrimination in violation of Rule 3.6(A). The judge "knows" when he has "actual knowledge of the fact in question." [22] Because what is "invidious" is not always clear, [23] the judge may not "know." However, there is no benefit from studied ignorance. First, the fact finder can infer a person's knowledge from circumstances. [24] Second, the judge violates this section if he "should know," but does not—so that he has a duty to inquire.

The judge may not "use the benefits or facilities" of a discriminatory organization. However, he does not "use" merely by attending an event at the facility of an invidiously discriminatory organization. Normally, the judge's attendance at an isolated event "could not reasonably be perceived as an endorsement of the organization's practices." [25]

For example, the judge could not schedule her son's wedding reception at an invidiously discriminatory club. But that judge could attend the reception of someone else whom another party (a friend) scheduled at this club. If a relative of the judge scheduled the reception for the relative's child, the judge could accept the invitation and attend. The judge, in short, "cannot be the *initiating party* in scheduling an event or taking advantage of the facilities, but is permitted to attend an isolated event that has been scheduled or arranged by someone else, as long as it is clear that merely attending cannot reasonably be seen as an endorsement of the organization and its policies." [26]

### § 10.3-3.6(d) Time Limits

The 1990 Code had a provision that allowed a judge to be a member of an invidiously discriminatory organization for up to a year. The 1990 Code provided that if a judge learns that she belongs to a club that engages in invidious discrimination, then she should either resign or take "immediate efforts" to persuade the group to stop discriminating. While the judge is engaged in this effort to reform the club from within, she *must* suspend participation in the club. If the club has not stopped its invidious discrimination *within one year* after the judge first learned of its practices, then she must then resign "immediately." [27]

The 2007 Code rejects any one year grace period. If the judge "learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign *immediately* from the organization." [28] The ABA Commission to Evaluate the Model Code of Judicial Conduct concluded, after hearings, that "any active involvement would constitute too much of

an endorsement of the organization; even good-faith behind-the-scene activities would not sufficiently negate the public's perception of bias." [29]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Reporters' Explanation of Changes to Rule 2.3, at 15 (ABA 2007).

2 2007 Code, Comment 1. 1990 Code, Canon 2C, Comment 1. *See also* Ronald D. Rotunda, *Racist Speech and Attorney Discipline*, 6 THE PROFESSIONAL LAWYER 1 (A.B.A., No. 6, 1995).

3 Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 5.7, 6.2, 6.10 (Thomson-West, 4th ed. 2007) (6 volumes).

4 10 U.S.C.A § 654.

5 10 U.S.C.A. § 983.

6 U.S. Constitution, art. VI, cl. 2.

7 Reporters' Explanation of Changes to Rule 3.6, at 39–40 (ABA 2007).

8 Rule 3.6, Comment 4.

9 2007 Code, Comment 2; 1990 Code, Canon 2C, Comment 1.

10 2007 Code, Rule 3.6, Comment 2. 1990 Code, Canon 2C, Comment 1.

11 2007 Code, Rule 3.6, Comment 2. 1990 Code, Canon 2C, Comment 1. *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.41 (Thomson-West, 4th ed. 2008) (6 volumes).

12 2007 Code, Rule 3.6, Comment 2. 1990 Code, Canon 2C, Comment 1.

13 ABA Standing Committee Report on the 1990 Code, Legislative Draft 5 (1990).

14 Reporters' Explanation of Changes to Rule 3.6, at 39 (ABA 2007).

15 Reporters' Explanation of Changes to Rule 3.6, at 39 (ABA 2007). Rule 3.6, Comment 2.

16 In re Judicial Misconduct, 664 F.3d 332 (U.S. Jud. Conf. 2011). This opinion has no page numbers. In this case, the court noted, in finding invidious discrimination:

> [A]ccording to 2010 Census data, [Nashville] boasts a 28% African American population and its female population is over 50%. Although few organizations perfectly mirror the population trends of their surrounding locales, a member of the public would reasonably expect to see at least some women and African Americans among Belle Meade's Resident Membership barring (1) invidious discrimination or (2) something unique about the Club—"such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members,"—that would suggest otherwise. There is, however, nothing about Belle Meade's stated aims or activities that provides any such justification for the total absence of any female or African American Resident Members. The organization is a social club for prominent persons living in and around the Nashville area. Naturally, there is no shortage of women or—as Judge Paine proclaimed in his 1990 letter to the Club's Board—African Americans fitting that description.

17 2007 Code, Rule 3.6, Comment 1. 1990 Code, Canon 2C, Comment 2. Reporters' Explanation of Changes to Rule 3.6, at 39 (ABA 2007).

18 Rule 3.6, Comment 1.

19 Canon 2A, Comment 2.

20 Stanley Mosk, *Judges Have First Amendment Rights*, 2 CALIF. LAWYER 30, 76 (Oct. 1982). *See also* Alan F. Westin, *Out-of-Court Commentary by U.S. Supreme Court Justices, 1790–1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM.L.REV. 633 (1961); 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.42(d) ("Restrictions on Extra-Judicial Speech of Judges") (Thomson-West 4th ed. 2008) (6 volumes).

21 1990 Model Code of Judicial Conduct, Canon 2C, Comment 3.

22 2007 Code, Terminology, ¶14.
23 Rule 3.6, Comment 2.
24 2007 Code, Terminology, ¶14.
25 Rule 3.7(B).
26 Reporters' Explanation of Changes to Rule 3.6, at 38 (ABA 2007)(emphasis in original).
27 1990 Code, Canon 2C, Comment 3.
28 Rule 3.7, Comment 3 (emphasis added).
29 Reporters' Explanation of Changes to Rule 3.6, at 38–39 (ABA 2007).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.7 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.7 Rule 3.7

## § 10.3-3.7(a) The Text of Rule 3.7

The text of Rule 3.7 provides:

**RULE 3.7.** ***Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities***

**(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:**

**(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;**

**(2) soliciting* contributions* for such an organization or entity, but only from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;**

**[*Ed. Note:** "Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. Terminology, ¶3.

**[**"Personally solicit" means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication. Terminology, ¶21.

**[**"Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. Terminology, ¶17**]**

**(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;**

**(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;**

**(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and**

**(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:**

**(a) will be engaged in proceedings that would ordinarily come before the judge; or**

**(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.**

**(B) A judge may encourage lawyers to provide pro bono publico legal services.**

**COMMENT**

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph (A)(4). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

### § 10.3-3.7(b) Participating in Religious, Charitable, Fraternal, or Civic Organizations and Activities

Rule 3.7(A) corresponds to Canon 4C(3) of the 1990 Code. [1] This Rule lays out several important principles.

First, whenever a judge participates in any educational, religious, charitable, fraternal, or civil organization or activity, two sections govern the judge. In addition to Rule 3.7, the general, overarching principles of Rule 3.1 govern. That is, the judge must not participate in any extrajudicial activities that will interfere with the proper performance of the judge's judicial duties. [2] For example, the judge may not serve as the President of a major university because the time commitments would interfere with the judge's judicial duties. [3]

The judge also may not participate in any such activities if they will require her frequent disqualification. [4] The judge may not engage in any such activities that a reasonable person would view as coercive. [5] Finally, the judge may not use court premises, staff, stationery, etc. for activities that do not concern the law, the legal system, or the administration of justice—unless other law permits such use. [6]

Second, the judge must comply with Rule 3.7, which also governs the judge's participation in any educational, religious, charitable, fraternal, or civil organization or activity.

Rule 3.7(A) governs two types of organizations. The first part of Rule 3.7(A) authorizes the judge to participate in any activities that organizations or governmental entities sponsor *if* these organizations are "concerned with the law, the legal system, or the administration of justice." [7]

The second part of Rule 3.7(A) governs activities that other organizations sponsor. The Rule also authorizes the judge to participate *if* (1) any "educational, religious, charitable, fraternal, or civil" organization sponsors the activity and (2) the organization is "not conducted for profit."

Hence, the Rule authorizes the judge to engage in more activities if the sponsoring organization is "concerned with the law, the legal system, or the administration of justice," or if the sponsoring organization is "not conducted for profit."

Rule 3.7 then lists six subsections with specific activities that the judge may engage in. These examples are not exclusive ("including but not limited to").

**First**, the judge may help any such organization (law-related, or not-for-profit) in planning fund-raising. The judge may also participate in the management and investment of the organization's funds. [8] It is not necessary for the judge to be an officer, director, trustee, nonlegal advisor, or member of the organization. [9]

There is no problem if the judge merely attends an event, even if that event serves a fund-raising purpose. In general, the judge may also "serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations." The judge is not soliciting, and the circumstances "do not present an element of coercion or abuse the prestige of judicial office." [10] In short, it "is not logical to assume that someone will make a larger donation merely because a judge is tending the barbeque pit at a charity picnic." [11]

It would be helpful if the Comments offered examples of what is permissible or impermissible. May the judge, as a church usher, pass the collection plate? May the judge serve as the ticket-taker at a charity auction? The Rules tell us to look at all the circumstances. The framers of this Rule eschewed bright lines. "Whether such activities are appropriate depends upon analysis of the overall event, and the significance of the judge's participation. As long as there is no coercion—even *subtle and unstated coercion*—and as long as the judge's position as a judge is not being exploited, the activity is permissible." [12] The drafters of this Rule and the Comments talk of offering a "safe harbor," but this harbor contains unseen shoals and uncharted sandbars.

**Second**, the judge may solicit contributions for any such organization *only if* the judge solicits from the judge's family or from other judges over whom the soliciting judge does not exercise any supervisory or appellate authority. [13] That way, there can be no realistic charge that the judge is coercing anyone.

Rule 3.7 places an asterisk by the word "soliciting" in Rule 3.7(A)(2). The asterisk indicates that the terminology section of the Code defines this term. The closest definition is "personally solicit," which the Code defines as meaning "a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication." [14] The terminology section gives a list of which Rules use this term, [15] but it only lists Rule 4.1, [16] not Rule 3.7. Presumably, Rule 3.7 refers to a judge's direct request, which is how one would expect the judge to talk to members of his family and other judges.

Hence, Rule 3.7(A)(2), prohibits the judge from *personally* soliciting funds for organizations devoted to the law and nonprofit charitable, fraternal and civic organizations, *unless* the judge is soliciting from members of her family, or soliciting from other judges over whom she has no supervisory or appellate authority. Thus, the judge may not sign a solicitation letter, but the judge may allow her name to appear on the general letterhead of the organization. [17]

The exception regarding family members and certain judges assures that the judge is not soliciting from anyone over whom she has any special influence. She has no special influence over judges over whom she has no supervisory or appellate authority.

As for family members, there is little danger of over-reaching. Any parent knows that you cannot make a two-year old or a 22-year old say please or thank you; nor can you force them to contribute to a charity.

Judges sometimes participate in raising funds for courts when the amount that the state appropriates is insufficient to run the court. Oftentimes these courts are specialized courts such as "therapeutic" or "problem-solving" courts established in response to the special problems of drug abuse, veterans' issues, mental health, and domestic violence. Some such courts have been created by state judicial branch initiatives. Typically, the regular government budget provides for the staffing and physical space for the court, but these funds do not cover the more creative and less traditional remedies that these courts employ. The issue does not occur—and Rule 3.7 does not apply—when the judge merely asks a state agency to provide appropriated funds. [18]

The issue does occur when the judge seeks funds from *private* sources. In order to find funds to support the services of mentalhealth professionals, drug-testing laboratories, social workers, and monetary incentives that the court may award to those parties who successfully participate in the program, judges connected with these courts (either by being assigned to the courts or by being charged with administrative responsibility for these courts) may seek to raise private funding, by applying for grants or by soliciting donations from private individuals or organizations. In some jurisdictions, supporters of these therapeutic or problem-solving courts have created special nonprofit entities that seek to secure private funding and then funnel it to the courts. [19]

The ABA candidly admits that the Model Judicial Code "does not specifically address a judge's involvement in raising funds for a court." [20] However, several provisions of the Model Judicial Code are relevant, in particular Model Rule 3.7(A)(2), which appears to ban such solicitations outright—but the ABA does not interpret the language to reach that result. Rule 3.7(A)(2) allows the judge to *solicit* funds for an organization concerned with the law "but only from members of the judge's family or other judges over whom the judge does not exercise supervisory or appellate authority." [21] Because of the soliciting ban, the ABA advises that Rule 3.7(A)(2), "would preclude the judge from being a signatory on a solicitation letter." However, Rule 3.7(A)(6) "specifically authorizes a judge to be a director of certain not-for-profit organizations" and "*Inherent* in being a director of a not-for-profit organization is the permissibility of a judge allowing her name to appear on the letterhead of the organization." [22]

There is a special problem if the judge is soliciting gifts from lawyers or those who appear before him. Even though the judge is not soliciting the gifts for her *personal* use, she is soliciting from those who appear before her. Florida, for example, advised, bluntly and broadly, that a judge who presides over a drug court simply may not solicit or receive "incentive gifts" from lawyers or law firms for use as rewards to Drug Court program defendants/participants. [23] Ethics opinions have also found problems when the judge is soliciting from local businesses rather than nonprofit foundations. [24]

The judge may apply to these private nonprofits foundations for financial support for these special courts because the court's support or endorsement of its own grant applications to government agencies or private foundations for court-related projects, would not generally advance the private interests of the judge. [25] There would not be a prohibited "solicitation" under Rule 3.7(A)(2) because Rule 3.7(A)(5) specifically allows judges to make recommendations to "a public or private fund-granting organization or entity in connection with its programs and activities" if the organization is concerned with the law. [26]

**Third**, the judge may solicit membership for any organization concerned with the law, the legal system or the administration of justice, even though the organization may use the membership dues or fees to support the objectives of the organization. This power to solicit does not apply to any non-legal organization even if it is a not-for-profit. [27] The framers were concerned that people whom the judge solicits might feel coerced or attempt to curry favor with the judge.

The framers of the 2007 Code concluded that the public would perceive that it was more natural for a judge to solicit membership in a law-related organization, such as a bar association or moot court society. If the judge solicits membership in a fine arts society or the American Red Cross, people might think that that the judge may be abusing the prestige of judicial office. "A person who loves opera or is a dedicated member of an environmental protection organization, and who also happens to be a

judge, should not use that position as an added reason for someone else to join the cause. On the other hand, it is not inappropriate for judges to use their positions as leaders in the legal community to increase membership in law-related organizations." [28]

This provision has the added benefit of allowing the judge to reject, gracefully, any efforts by the local opera society or similar group to enlist the judge's help in fund raising efforts. In the meantime, the judge can be involved in efforts to promote the local bar association or judge's group. [29]

**Fourth**, the judge may appear at, speak at, receive an award, or accept any recognition of any organization that is law-related or nonprofit. The organization may also feature the judge on its program, and the judge may permit the organization to use the judge's title. There is one restriction: if the event serves a fund raising purpose, the judge may participate *only* if the event "concerns the law, the legal system, or the administration of justice." [30] It is not necessary that the organization be law-related; it is necessary that the "event" be law-related.

The 2007 Code is the first time that the ABA introduces this provision. Rule 3.7(A)(4) reverses what the Commentary to Canon 4C(3)(b) had embraced. [31] Instead, it adopts what the Code of Conduct for United States Judges embraces. [32] This new Rule also reflects what many judges already do in practice. [33]

**Fifth**, the judge may also make recommendations to a public or private fund-granting organization, *but only if* the organization or entity is concerned with the law, the legal system, or the administration of justice. [34] Under the 1990 Code, the judge's authority to make recommendations to fund-granting organizations and entities was not limited to officers, directors, and others directly associated with the organization or entity. [35]

**Sixth**, the judge, in general, may serve as the officer, director, trustee, or nonlegal advisor of an organization or entity. However, the judge may *not* do that if either of the following factors exits: (1) the organization will be engaged in proceedings that would ordinarily come before the judge; or, (2), the organization will be frequently engaged in proceedings in the court in which the judge is a member (or that court will be subject to the appellate jurisdiction of the court in which the judge is a member). [36]

If these two factors do not exist, it does not matter whether the organization is law-related or not.

Because the judge is not soliciting funds or soliciting members, the drafters of this Rule reasoned that there is no realistic danger that the judge will abuse the prestige of his office or engage in coercive activities. [37] The judge will be simply giving his time.

A Comment does advise us that an educational, religious, charitable, fraternal, or civic organization may identify the judge's position as a judge on its letterhead, even if the organization uses the letterhead for fund-raising or membership solicitation. The letterhead may list the judge's title or judicial office if it uses comparable designations for other persons. [38]

The drafters concluded that a letterhead simply including a judge's name and position is not coercive and does not abuse the prestige of judicial office, even when the organization uses the letterhead for fund-raising or membership solicitation purposes. Of course, the letterhead must identify the judge in the same way as other persons on the letterhead. In addition, it must also be the case that "the judge's service in some official position in the organization or entity is itself appropriate under other provisions of Rules 3.7 and 3.1." [39]

### § 10.3-3.7(c) Encouraging Pro Bono Activities

The 2007 Code adds a provision that the prior ABA Judicial Codes did not offer. The judge may encourage lawyers to provide pro bono services, [40] but must be careful not to use coercion or appear to abuse the prestige of judicial office. [41]

A judge, in short, may encourage lawyers to engage in *pro bono* service generally, in addition to situations where a judge may appoint a lawyer to represent an indigent party in an particular cases. The ABA Commission to Evaluate the Model Code of Judicial Conduct added this section to stress its importance by including a specific Rule on this issue. [42]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.7(A) corresponds to the 1990 Code, Canon 4C(3). The framers of the 2007 Code completely reorganized this section. In a few cases, discussed in this section, the framers made some sections more expansive or more restrictive.

2 Rule 3.1(A).
ABA Formal Opinion 08-452 (Oct. 17, 2008) (Judges soliciting for 'Therapeutic' or 'Problem-Solving' Courts).

3 Reporters' Explanation of Changes to Rule 3.7, at 42–43 (ABA 2007).

4 Rule 3.1(B). *Compare* Rule 3.7(A)(6)(b).

5 Rule 3.1(C). *Compare* Rule 3.7, Comment 3, 5.

6 Rule 3.1(D). Raymond J. McKoski, *Ethical Considerations in the Use of Judicial Stationery for Private Purposes*, 112 PENN. ST. L. REV. 471 (2007).

7 Rule 3.7(A).

8 2007 Code, Rule 3.7(A)(1), corresponds to the 1990 Code, first clause of Canon 4C(3)(b)(i).

9 The 1990 Code required that the judge be an officer, director, etc. Canon 4C(3)(b).

10 Rule 3.7, Comment 3.

11 Reporters' Explanation of Changes to Rule 3.7, at 43 (ABA 2007).

12 Reporters' Explanation of Changes to Rule 3.7, at 43 (ABA 2007) (emphasis added).

13 Rule 3.7(A)(2). This clause is similar to the 1990 Code, Canon 4C(b)(i), except that the 2007 Code allows the judge to solicit members of his own family—a new power of the judge that some family members may not appreciate.

14 2007 Code, Terminology, ¶21.

15 The Terminology section states at the beginning: "The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*)."

16 Rule 4.1(A)(8).

17 ABA Formal Opinion 08-452 (Oct. 17, 2008): "Inherent in being a director of a not-for-profit organization is the permissibility of a judge allowing her name to appear on the letterhead of the organization."

18 E.g., Oklahoma Judicial Ethics Opinion 2002-2 (Jan. 24, 2002), http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=364900 (12 February 2009). In this fact patten, the Committee agreed that a judge with Drug Court responsibilities could participate as an applicant or authorize an entity to apply for grant funding for administrative support for the State Drug Courts. "It is our opinion that a grant request under these circumstances is not a solicitation of funds as prohibited by [Rule 3.1 or Rule 3.7(A)]. We consider the request to be for allocation of appropriated funds to the existing and entitled Drug Court. This grant request is analogous to the mandated budget request for the operation of a District Court from funds appropriated in general for all such courts, and is not a 'fundraising activity.'"

19 See discussion in ABA Formal Opinion 08-452 (Oct. 17, 2008).

20 ABA Formal Opinion 08-452 (Oct. 17, 2008).

21 Rule 3.7(A)(2).

22 ABA Formal Opinion 08-452 (Oct. 17, 2008)(emphasis added).

23 Florida Supreme Court Judicial Ethics Advisory Committee, Opinion Number: 2007-05 (March 20, 2007), http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2007/2007-05.html.
Obviously, there are different concerns if a judge personally accepts gifts from lawyers who are appearing before him. See Rule 3.13(A)(judge may not accept gifts that would appear to undermine the judge's impartiality) and Rule 3.13(C)(3)(judge may accept, and must report, gifts from party or lawyer who appears before the judge). In one case, the judge accepted free tickets to Florida Marlins baseball games from lawyers in a law firm whose members not only were likely to appear before him but actually were before him as defense counsel in at least two cases. The Florida Supreme Court publicly reprimanded the judge for accepting these

gifts, although the aggregate value of all the tickets the judge received during the year in question was only between $160 and $180. In re Luzzo, 756 So. 2d 76 (Fla. 2000)(per curiam).

24 Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Opinion 2004-13 (Dec. 3, 2004), http://209.85.173.132/search?q=cache:a9fDNd7TEIcJ:www.supremecourtofohio.gov/BOC/Advisory_Opinions/2004/Op%252004-013.doc+Supreme+Court+of+Ohio+Board+of+Commissioners+on+Grievances+and+Discipline+Opinion+2004-13&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a.

In this case, the judge was not soliciting from persons likely to appear before him. Nor was he soliciting from nonprofit foundations. Instead, he was soliciting from local businesses. This Opinion advises that "a municipal court judge may not prepare and sign a letter requesting local businesses to donate small items for use as program rewards and incentives for defendants in the mental health court and the judge may not direct a court employee to solicit such donations. Use of the judicial office and judicial employees to solicit donations from local businesses for defendants in mental health court programs is improper."

ABA Formal Opinion 08-452 (Oct. 17, 2008) was less concerned about the judge soliciting from local businesses. It said, simply: "Additional concerns arise when solicitations are directed at lawyers, *as opposed to businesspersons* or the general public." (emphasis added).

25 Arizona Supreme Court Judicial Ethics Advisory Committee, Advisory Opinion 97-01 (February 7, 1997), Endorsing or Writing Letters of Support for Court-related Projects, http://www.supreme.state.az.us/ethics/ethics_opinions/1997/97-01.pdf (12 Feb. 2009).

26 ABA Formal Opinion 08-452 (Oct. 17, 2008).

27 Rule 3.7(A)(3). This section corresponds, roughly, with Canon 4C(3)(b)(iii).

For a careful and thorough analysis, see Raymond J. McKoski, Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct, 2008 MICH. ST. L. REV. 769 (2008). The author, a state judge, analyzes the ABA Judicial Code and concludes that some of the 2007 Code's fund-raising restrictions increase confidence in the judiciary. However, other provisions are not justified and prohibit conduct that is either harmless to, or actually enhances, the image of the judiciary.

28 Reporters' Explanation of Changes to Rule 3.7, at 41 (ABA 2007).

29 *Compare* Rule 3.7, Comment 5 (judge may participate in events to recognize lawyers who have done pro bono work, as long as judge does not use coercion or abuse the prestige of judicial office).

30 Rule 3.7(A)(4).

31 Canon 4C(3)(b), Comment 3.

32 Code of Conduct for United States Judges, Canon 4C, http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx [Last substantive revision (Transmittal GR-2) June 30, 2009; Last revised (minor technical changes) June 2, 2011.].

The Commentary to Canon 4C provides:

> "A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others."

In context, "the federal provision appears to be limited to non-law-related organizations and activities." Reporters' Explanation of Changes to Rule 3.7, at 41 (ABA 2007).

33 Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 HOFSTRA L. REV. 1337, 1366–67 & nn. 137–138 (2006).

34 Rule 3.7(A)(4).

35 1990 Code, Canon 4C(3)(b)(ii).

36 Rule 3.7(A)(6). This Rule corresponds to the 1990 Code, Canon 4C(3)(a).

37 Reporters' Explanation of Changes to Rule 3.7, at 42 (ABA 2007).

38 Rule 3.7, Comment 4. This Comment corresponds to parts of Canon 4C(3)(b), Comment 2, of the 1990 Code.

39 Reporters' Explanation of Changes to Rule 3.7, at 43 (ABA 2007).

40 Rule 3.7(B).

41 Rule 3.7, Comment 5.

42 Reporters' Explanation of Changes to Rule 3.7, at 42 (ABA 2007).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.8 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.8 Rule 3.8

## § 10.3-3.8(a) The Text of Rule 3.8

The text of Rule 3.8 provides:

**RULE 3.8.** ***Appointments to Fiduciary Positions***

**(A) A judge shall not accept appointment to serve in a fiduciary* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.**

**[* Ed. Note:** "Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. Terminology, ¶7.

**[* Ed. Note:** "Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. Terminology, ¶17.**]**

**(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.**

**(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.**

**(D)** If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than [one year] after becoming a judge.

**COMMENT**

> [1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

## § 10.3-3.8(b) Appointments to Fiduciary Positions

The drafters of the Judicial Code, concerned about the judicial "appearance of impropriety," placed rules and limits on when a judge may act in a fiduciary capacity.

Rule 3.8(A) [1] generally prohibits a judge from serving as a fiduciary, such as an executor, administrator or other personal representative, trustee, guardian, or attorney in fact. The only exception is when the judge serves as a fiduciary for the estate, trust, or person of his family, assuming that this extra work will not interfere with his judicial duties.

A "member of the judge's family" includes a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. [2] It is not necessary that the family member reside in the judge's household.

A judge violated this prohibition when he handled personal checking accounts on behalf of persons who were having difficulty managing their own finances. [3] The judge's motives were not nefarious. Nonetheless, the Court censured him: "The record discloses that this activity was the result of families being referred to him by his church and that he did this work gratuitously out of kindness. The Judge's actions, in this respect, may have been well-intended and commendable in some respects but, nevertheless, they were improper and contrary to the Canons mentioned earlier." [4]

In one unusual case, the judge was handling checking accounts on behalf of an individual, who, at the same time, was a defendant in a suit for the collection of the debts in the Barnes County small claims court over which the judge presided. That created a conflict and interfered with the judge's performance of his official duties as judge of the Barnes County small claims court. [5]

If an individual is serving as a fiduciary and then becomes a judge (by election or appointment), the new judge must comply with Rule 3.8 "as soon as reasonably practical," but in no event after a period of time that the Model Code recommends should be one year. [6] A jurisdiction adopting the ABA Model Judicial Code may, of course, choose another time limit.

Rule 3.8(B) [7] provides that a judge shall not serve as a fiduciary if it is "likely" that the judge, as fiduciary, would be engaged in proceedings that would ordinarily come before him. The judge is also disqualified if the estate, trust, or ward, in fact becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

Rule 3.8(C) [8] provides that a judge, when acting as a fiduciary, is subject to the same restrictions on financial activities that apply to a judge acting in her personal capacity. That may cause conflicts. For example, Rule 3.8(A) allows a judge to serve as a fiduciary for a family member. However, under Rule 2.11, a judge has an economic interest in shares of stock held by a trust if the amount of stock held is more than *de minimis*. That stock ownership (held in a fiduciary capacity) might require frequent disqualification of a judge. In such cases, the judge would have to resign as fiduciary, because her duties as a judge violate her duties as a fiduciary. [9]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.8(A) corresponds to the 1990 Code, Canon 4E(1), with a few stylistic changes.

2 Terminology, ¶17.

3 Matter of Cieminski, 270 N.W.2d 321 (N.D.1978) (judge censured for this violation and for other violations of the Judicial Code).

4 270 N.W.2d 321, 331.

5 270 N.W.2d 321, 325.

6 Rule 3.8(D). This Rule corresponds to the 1990 Code, Canon 4E, Comment 1.

7 2007 Code, Rule 3.8(B) corresponds to the 1990 Code, Canon 4E(2), with minor revisions.

8 2007 Code, Rule 3.8(C) corresponds to the 1990 Code, Canon 4E(3).

9 Rule 3.8, Comment 1 corresponds to the 1990 Code, Canon 4E, Comment 2.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.9 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

# § 10.3-3.9 Rule 3.9

## § 10.3-3.9(a) The Text of Rule 3.9

The text of Rule 3.9 provides:

**RULE 3.9. *Service as Arbitrator or Mediator***

**A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.***

**[*Ed. Note:** "law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology, ¶15**]**

**COMMENT**

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

## § 10.3-3.9(b) Judge as Arbitrator or Mediator

Rule 3.9 [1] provides that a judge may not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties, unless expressly authorized by law. It is irrelevant whether the judge secures economic gain from his arbitration activities. [2] The judge, under this section, could provide dispute resolution services for another government entity.

Various reasons justify this ban. The arbitration proceeding could come before the court on which the judge sits, even though arbitration proceedings are usually final. Because arbitration can cover issues that are not normally in court, the judge acting as an arbitrator could draw the court into social and political controversies.

Allowing the judge to participate in private, "rent a judge" activities for private gain would allow judges to exploit and abuse the prestige of their judicial office for private economic gain. Even if the judge engaged in *pro bono* mediation, that would divert the judge from his judicial duties. Such activities might also confuse the public about the role of the judiciary as an independent branch of government. [3]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.9, corresponds to the 1990 Code, Canon 4F.

2 Rule 3.9, Comment 1.

3 *See* The Reporter's Notes to the 1972 Code of Judicial Conduct at 89. Reporters' Explanation of Changes to Rule 3.9, at 45 (ABA 2007).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.10 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.10 Rule 3.10

## § 10.3-3.10(a) The Text of Rule 3.10

The text of Rule 3.10 provides:

**RULE 3.10. *Practice of Law***

**A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,* but is prohibited from serving as the family member's lawyer in any forum.**

**[* Ed. Note:** "Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. Terminology, ¶17.**]**

**COMMENT**

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

## § 10.3-3.10(b) Practicing Law

In order to avoid the appearance of impropriety and conflicts of interest, Rule 3.10 [1] prohibits a judge from practicing law. The drafters left the definition of "practice of law" to the law of each jurisdiction.

This prohibition against the practice of law is quite natural. One who is a full time judge in name should also be a full time judge in fact. Thus, a probate judge cannot continue to draft deeds, wills, contracts, and other legal instruments, or act as an attorney for executors, administrators, or guardians, even for members of his own family. [2]

A judge can, however, continue to practice law if his election to the judgeship is being contested, so long as he has not actually assumed his office by taking the prescribed oath. [3] But once a judge actually assumes his office, he may not continue to practice law, even on matters he had started before becoming a judge. [4]

The prohibition against the practice of law does not apply to the judge who is acting *pro se*. The judge can always represent himself, just as any other litigant can appear *pro se*. However, the judge should be careful not to abuse the prestige of his office, particularly when appearing before governmental bodies. [5]

In addition, a judge may give uncompensated legal advice and even draft documents for members of the judge's family. But he may not represent family members in any forum.

However, the ABA Joint Commission to Evaluate the Model Rules of Judicial Conduct took a different view in some informal settings. Consider a dispute a neighborhood association or a purely private and minor commercial dispute. In those cases, the Commission concluded, "a judge may serve as an 'advocate' for a family member without becoming his or her lawyer and thus practicing law in violation of Rule 3.10." [6] Still, the judge in such circumstances must be careful not to use the prestige of his judicial office to advance his personal or family interests. [7]

### § 10.3-3.10(c) Fee Sharing in Cases That Began Before the Judge Assumed the Bench

If a judge cannot practice law, a question arises about the extent to which a judge may receive fees from cases where the judge worked on the case prior to becoming a judge, but has not yet received payment for that work. After assuming the bench, the judge may receive payment from his former law firm or from the other lawyer, but the payments (although received while he is on the bench) should be for work completed *prior* to his becoming a judge.

For example, one Judicial Ethics Opinion advises that a newly-selected judge must return to the client any fees paid but not earned. For example, if the client has paid his lawyer a yearly retainer, but that lawyer cannot provide the full year of service because she has become a judge, she must return to the client the portion of the retainer that she has not earned. The judge, says this Opinion, "may not practice law or receive compensation for law related or extrajudicial activities while a judge [internal citations omitted]," but can receive legal fees earned as a lawyer "prior to becoming a judge." [8]

The judge may even receive these payments stretched out over a number of years. However, it should be clear that he is not sharing in profits of the firm earned *after* the judge's departure. In contrast, the judge may share in an amount representing the "fair value of the judge's interest in the firm including the fair value of the judge's interest in fees to be collected in the future for work done *before* leaving the firm." [9]

### § 10.3-3.10(d) Referral Fees

A question related to fee sharing involves referral fees. Assume that the judge, while still in private practice, has not worked on the matter but has referred it (often a tort case) to another lawyer prior to assuming the judicial office. Fee-sharing agreements involving sitting judges are relatively unique because the sitting judge is not legally able either to perform any legal work on the tort case or to provide any legal supervision of the matter. Rule 1.5(e) of the ABA Model Rules of Professional Conduct allows fee sharing "between lawyers" not in the same firm if the division is in proportion to the services performed by each lawyer or "each lawyer assumes joint responsibility." [10] Typically, the referring lawyer shares malpractice ability, which is a form of "joint responsibility."

Traditionally, the law has not allowed a judge to receive referral fees if she referred the case immediately after receiving it and then assumed the bench, because she could not perform any work or exercise any responsibility over the case (even in theory) once she had become a judge, because judges cannot practice law. [11] The shared fee would not be "between *lawyers*."

Under this rationale, if the lawyer (before she became a judge) performed services on the case, could she properly receive a share of the contingent fee, with that share corresponding to the work that she actually did? [12] If a lawyer simply received a tort case and then referred it to another lawyer before assuming the bench, the judge would only be entitled to *quantum meruit* recovery. That amount that would be trivial because the judge did virtually no work on this case, did not supervise the other lawyer (because she had become a judge) and merely referred the case to another lawyer. [13]

Even if one engaged in a very broad reading of ABA Model Rule 1.5(e)(1), and if one assumes that supervision is unnecessary, a sitting judge would have to assume malpractice liability in order to share legal fees on a personal injury case that she referred to a practicing lawyer prior to assuming the bench.

Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.10, corresponds to the 1990 Code, Canon 4G.

2 ABA Informal Opinion 1294 (June 17, 1974).

3 Reed v. Sloan, 475 Pa. 570, 381 A.2d 421 (1977).

4 In re Ryman, 394 Mich. 637, 232 N.W.2d 178 (1975); In re Piper, 271 Or. 726, 534 P.2d 159 (1975).

5 Rule 3.10 & Comment 1.

6 Reporters' Explanation of Changes to Rule 3.10, at 46 (ABA 2007).

7 Rule 3.10, Comment 1.

8 Illinois Judges Association Opinion No. 94-12 (May 16, 1994).

9 Candice Goldstein, *Becoming a Judge: New Judge Must Cut Ties to Former Firm*, 6 No.4 JUDICIAL CONDUCT REPORTER 1, 4 (Winter 1985) (emphasis added).

10 Model Rule 1.5(e)(1). In addition, the client must agree "to the arrangement, including the share each lawyer will receive," the agreement must be confirmed in writing, and the total fee must be reasonable. Rule 1.5(e)(2),(3).

11 Justice v. Lairy, 19 Ind.App. 272, 49 N.E. 459, 462 (1898): "The only basis upon which his [the judge's] right to a portion of the after-earned fee could rest would be that he still retained some interest in the firm, and that the statute does not permit." This topic is discussed in more detail in, Ronald D. Rotunda, *Judges as Ambulance Chasers*, 8 THEPROFESSIONAL LAWYER 14 (A.B.A., No. 8, 1997).

An unusual case allowing the referral paid to the sitting judge who only referred the case prior to becoming a judge, based on an interpretation of Illinois law, is Elane v. St. Bernard Hospital, 284 Ill.App.3d 865, 220 Ill.Dec. 3, 672 N.E.2d 820 (1996). The court said that the sitting judge "supervised" the lawyer to whom she referred the case, but that such supervision was not "practicing law." 284 Ill.App.3d at 869, 220 Ill.Dec. 3, 6, 672 N.E.2d 820, 824. If "supervising a lawyer" is not practicing law, many senior partners must be wondering why they are paying bar dues to remain authorized to practice law.

12 ABA Informal Opinion 1215 (May 18, 1972).

13 *See* JEFFREY M. SHAMAN, STEVEN LUBET, & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS at § 7.22, pp. 235–36 (Michie Pub. 2d ed., 1995):

> [J]udges may make financial arrangements with successor counsel to ensure that payment is made for work performed prior to taking the bench. [In contingent fee cases, even] though the judge is entitled to compensation for work performed, it may be difficult to determine the appropriate percentage before the case is actually completed. Two approaches are possible. The judge may estimate a percentage at the time that the judge takes the bench and enters into an agreement with successor counsel on that basis, or the judge may allow the new attorney to make the pro rata determination at the conclusion of the matter. In either case, the entire fee must be reasonable and the judge's portion must be determined on the basis of actual work actually performed *prior to taking the bench*. (emphasis added)(footnotes omitted).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.11 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.11 Rule 3.11

## § 10.3-3.11(a) The Text of Rule 3.11

The text of Rule 3.11 provides:

**RULE 3.11.** ***Financial, Business, or Remunerative Activities***

**(A) A judge may hold and manage investments of the judge and members of the judge's family.***
**[*Ed. Note:** "Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. Terminology, ¶17**]**
**(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:**
**(1) a business closely held by the judge or members of the judge's family; or**
**(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.**
**(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:**
**(1) interfere with the proper performance of judicial duties;**
**(2) lead to frequent disqualification of the judge;**
**(3) 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; or**
**(4) result in violation of other provisions of this Code.**

**COMMENT**

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

## § 10.3-3.11(b) Holding and Managing Investments

Rule 3.11(A), [1] in general, permits a judge to hold and manage investments of the judge and the judge's family. For example, judges may manage real estate for themselves and members of their family. [2] The judge may also hold passive investments in mutual funds.

However, other Rules or other law may restrict what the judge may do. For example, Rule 3.11(B) forbids the remunerative activity of being a director or employee of a for-profit business entity, unless the judge or the judge's family closely holds the business. [3]

### § 10.3-3.11(c) Serving as an Officer, Director, Manager, or Employee of Any Business Entity

Rule 3.11(B) [4] prohibits a judge from serving as an officer, director, manager, general partner, advisor, or an employee of "any business entity," subject to two exceptions. First, the judge may be involved in a closely held family business (assuming, of course, that this participation violates no other provision of the Judicial Code). Second, the judge may be involved in a business entity "primarily engaged in investment of the financial resources of the judge or members of the judge's family." [5]

These two exceptions are subject to the catch-all requirement that a judge "must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office." [6] For example, the judge cannot appear in judicial robes in business advertising. [7]

Thus, the Rules prohibit a judge from being even an "honorary" director of a bank, a position that allows the judge to attend meetings and to express his opinion concerning bank matters, but does not give him a vote. [8] This arrangement might appear to exploit his judicial office.

### § 10.3-3.11(d) Overarching Restrictions on Judges Financial, Business, or Remunerative Activities

Rule 3.11(C) [9] imposes several overarching restrictions on the judge's financial activities that Rules 3.11(A) and 3.11(B) otherwise allow.

First, the judge must not allow his financial activities to interfere with the proper performance of his judicial duties. [10] Judges should never foster the appearance that patronizing a judge's business will benefit a litigant, or that failure to patronize will work to the litigant's disadvantage. [11]

The judge must manage his investments and other financial interests to minimize the number of cases in which he must disqualify himself. [12] If some investment or financial interest requires the judge to disqualify himself frequently, then he should divest herself of that investment as soon as he can do so "without serious financial detriment." [13]

The judge should not engage in financial activities that involve the judge in continuing business relationships or frequent transactions with lawyers or others likely to come before her court. [14]

The judge must not engage in business activities that involve violations of other provisions of the Judicial Code. [15] Thus, a judge may not use confidential information learned while a judge for private gain. [16] And the judge "should discourage" family members from engaging in dealings that "would reasonably appear to exploit the judge's judicial position." [17]

A judge who was involved in transactions with persons before him exploited his judicial position where the judge charged parties more for legal notices required in probate matters than the expenses he had incurred in securing the notices. The Court established a practice of charging publication fees at $18.00 per edition, which was the newspaper's normal rate. However, the newspaper allowed the Court a discount of 12%, so the real cost was $15.84 per edition. The Court used a portion of the discounts for operating expenses and the judge received the balance as a commission for him *personally*. This was improper. [18]

Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.11(A), corresponds to the 1990 Code, Canon 4D(2), with the last two clauses deleted.

2 Rule 3.11, Comment 1.

3 Reporters' Explanation of Changes to Rule 3.11, at 47 (ABA 2007).

4 2007 Code, Rule 3.11(B), corresponds to the 1990 Code, Canon 4D(3).

5 Rule 3.11(B)(2).

6 1990 Code, Canon 4D(3), Comment 2. *See also* 2007 Code, Rule 3.11, Comment 1.

7 2007 Code, Rule 3.11, Comment 1.

8 ABA Informal Opinion No. 1385 (Feb. 17, 1977).

9 2007 Code, Rule 3.11(C) corresponds, somewhat, to Canon 4D(1) and Canon 4d(4).

10 Rule 3.11(C)(1) & Comment 1; Rule 2.1

11 Rule 1.3.

12 2007 Code, Rule 3.11(C)(2); 1990 Code, Canon 4D(4).

13 2007 Code, Rule 3.11, Comment 2. 1990 Code, Canon 4D(4).

14 2007 Code, Rule 3.11(C)(3).

15 2007 Code, Rule 3.11(C)(3).

16 2007 Code, Rule 3.5. & Comment 1. 1990 Code, Canon 4D(1), Comment 2.

17 1990 Code, Canon 4D(1), Comment 2.

18 In re Douglas, 135 Vt. 585, 382 A.2d 215 (1977) (per curiam). The Court relied on what is Canon 4D(1) of the 1990 Code and Canons 1 & 2 of the 1990 Code.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.12 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.12 Rule 3.12

## § 10.3-3.12(a) The Text of Rule 3.12

The text of Rule 3.12 provides:

**RULE 3.12. *Compensation for Extrajudicial Activities***

**(A) A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law* unless such acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.***

**[*Ed. Note:** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology, ¶15.

**[*Ed. Note:** "Independence" means a judge's freedom from influence or controls other than those established by law. Terminology, ¶11

**[*Ed. Note:** "Integrity" means probity, fairness, honesty, uprightness, and soundness of character. Terminology, ¶12.

**[*Ed. Note:** "Impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. Terminology, ¶8.**]**

**COMMENT**

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

## § 10.3-3.12(b) Compensation for Extrajudicial Activities

Rule 3.12 [1] provides that a judge may receive reasonable compensation for extra-judicial activities that the Judicial Code or other law permits, if the source of the payments does not give the appearance of improperly influencing the judge in performing judicial duties—*i.e.*, would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. These three terms, "independence," integrity," and "impartiality," are all terms of art that the Terminology section defines. [2]

Once the judge receives this compensation, Rule 3.15 governs her duty to report it.

How does one measure what is "reasonable compensation?" The 1990 Code provided that compensation "shall not exceed … what a person who is not a judge would receive for the same activity." [3] In its place, the 2007 Code replaced the phrase with the vaguer test: "would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." [4]

The drafters argued that testing the reasonableness of compensation by what a non-judge would receive was "unsound: if a judge were to be compensated for teaching a law school course on judicial ethics, or giving a lecture on evidentiary rulings, for example, the judge's services would in fact likely be more valuable than those of a non-judge." On the other hand, it also recognized that "significant overcompensation could be a mask for an improper gift or an attempt to influence the judge's conduct in office." [5]

Hence, a judge may accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities. [6] The compensation must be "reasonable," and it must be "commensurate with the task performed." [7] Needless to say, judicial duties must take precedence over these other activities. [8]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.12, corresponds to the 1990 Code, Canon 4H(1), but only as it relates to compensation. For the Rule regarding reimbursement of expenses of extrajudicial activities, see Rule 3.14 of the 2007 Code, and Canon 4H(1) of the 1990 Code.

2 Terminology, ¶¶11, 12, & 8.

3 1990 Code, Canon 4H(1)(a).

4 2007 Code, Rule 3.12.

5 Reporters' Explanation of Changes to Rule 3.12, at 48 (ABA 2007).

6 Rule 3.12, Comment 1.

7 Rule 3.12, Comment 1.

8 Rule 2.1.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.13 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

# § 10.3-3.13 Rule 3.13

## § 10.3-3.13(a) The Text of Rule 3.13

The text of Rule 3.15 provides:

**RULE 3.13.** ***Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value***

**(A) 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.***

**[*Ed. Note:** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology, ¶15.

**[*Ed. Note:** "Independence" means a judge's freedom from influence or controls other than those established by law. Terminology, ¶11

**[*Ed. Note:** "Integrity" means probity, fairness, honesty, uprightness, and soundness of character. Terminology, ¶12.

**[*Ed. Note:** "Impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. Terminology, ¶8.**]**

**(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:**

**(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;**

**(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending* or impending* before the judge would in any event require disqualification of the judge under Rule 2.11;**

**[*Ed. Note:** "Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. Terminology, ¶20

**[*Ed. Note:** "Impending matter" is a matter that is imminent or expected to occur in the near future. Terminology, ¶9.

**(3) ordinary social hospitality;**

**(4) 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 made available on the same terms to similarly situated persons who are not judges;**

**(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;**

**(6) 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;**

**(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or**

**(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,* or other family member of a judge residing in the judge's household,* but that incidentally benefit the judge.**

**[*Ed. Note:** "Domestic partner" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. Terminology, ¶5.

**[*Ed. Note:**"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. Terminology, ¶18.**]**

**(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:**

**(1) gifts incident to a public testimonial;**

**(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:**

**(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or**

**(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and**

**(3) 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.**

**COMMENT**

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items need not be publicly reported. As the value of the benefit or the likelihood that the source of the benefit will appear before the judge increases, the judge is either prohibited under paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report it.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances, and does not require public reporting.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member

> of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, 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.
>
> [5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other Rules of this Code, including Rules 4.3 and 4.4.

### § 10.3-3.13(b) Accepting and Reporting Gifts, Loans, and Other Things of Value

Rule 3.13 [1] governs the judge's duties regarding the acceptance and reporting of gifts and other things of value. Rule 3.13 does *not* govern the judge's receipt of campaign contributions. Rules 4.3 and 4.4 govern that. [2]

Like ancient Gaul, Rule 3.13 divides this topic into three different areas.

FIRST, Rule 3.13(A) absolutely prohibits a judge from accepting anything of value—a gift, loan, bequest, benefit—if other law prohibits the acceptance. The judge must also not accept anything of value if acceptance would appear to a reasonable person to undermine the judge's "independence," "integrity," or "impartiality,"—all terms of art that the Terminology section defines. [3]

A case applying the general propriety standard of Rule 3.13(A) is *Matter of Bonin*, [4] which held that a judge's activities violated what is now the general impropriety standard of Rule 3.3(A). When the judge was an Assistant Attorney General, he had performed legal services for an insurance agency and obtained jobs for relatives of the company's president. The company paid for the judge's reception when he was sworn in. It also paid the judge's rental payments for a leased automobile. The judge had filed a report disclosing these gifts and thus had not violated what is now Rule 3.15. [5] In addition, there was no indication that the insurance company or its affiliate or officers had any cases pending in the court where the judge sat. However, the judge's acceptance of the leased automobile as a gift created the appearance of impropriety because the judge had appointed relatives of the company's president to staff positions while he had been an Assistant Attorney General.

SECOND, Rule 3.13(B) allows acceptance of some things *if* Rule 3.13(A) does not impose a prohibition. These things are, in general, minor, which is why Rule 3.13(B) does *not* require the judge to file a public report of his acceptance. [6]

THIRD, Rule 3.13(C) also allows the judge to accept other things, *if* Rule 3.13(A) does not impose a prohibition. However, in the case of items under Rule 3.13(C), the judge must report his acceptance under Rule 3.15.

Now, let us turn to specific items that the judge does not have to report.

### § 10.3-3.13(c) Accepting Gifts and Other Items of Value without Publicly Reporting the Acceptance

Rule 3.13(B) allows acceptance of some things *if* Rule 3.13(A) does not impose a prohibition. These things are, in general, minor and there is a very small risk that the judge's acceptance would undermine public confidence in the judge's impartiality. That is why Rule 3.13(B) does *not* require the judge to file a public report of his acceptance. [7] Rule 3.15, which governs public reporting, does *not* apply to this class of items.

**FIRST**, the judge may accept items of little intrinsic value, such as plagues, certificates, trophies, and greeting cards. [8]

**SECOND**, the judge may accept gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would already require the judge's disqualification under Rule 2.11. [9] The judge's acceptance of such a gift from such a person does not create any

possibility that the judge might be exploiting the judicial office. The acceptance is a moot point, for the judge will have to disqualify herself anyway.

**THIRD**, the judge may accept "ordinary social hospitality." [10] Judges may accept this ordinary social hospitality "even from lawyers who practice before them." [11]

Going as far back as the 1972 Code, the drafters had difficulty determining what social hospitality to permit. [12] They decided to adopt an "ordinary social hospitality" standard, in order to permit the standard to vary from place to place according to local customs.

There is the question of *wedding gifts*. The 1990 Code allowed the judge to accept a gift from a relative or friend for a special occasion, such as a wedding or birthday. However, the gift must be "commensurate with the occasion and the relationship." The gift must not be "excessive in value. …" [13]

The 2007 Code does not have a specific section dealing with wedding gifts. The general test of Rule 3.13(A) should apply. The judge may simply accept all wedding gifts. There may be circumstances where doing so might appear to exploit the judicial office. For example, if the judge was getting married while in office and invited many lawyers practicing before the judge to the wedding (even though these lawyers were not his close, personal friends), the lawyers might feel coerced into offering gifts, and the judge's acceptance would undermine his integrity.

Any gift must be commensurate not only with the occasion but also with the relationship. The Judicial Code implies that wedding invitations must be *bona fide*, and non-bona fide invitations really exploit the judge's judicial position. [14]

**FOURTH**, the judge may accept commercial or financial opportunities and benefits, and loans from lending institutions in their regular course of business, if the same the business entities make the opportunities and benefits or loans available on the same terms to similarly situated persons who are not judges. The judge may even accept special pricing and discounts, if the businesses make the same opportunities and benefits or loans available on the same terms to similarly situated persons who are not judges. [15]

*In re McDonough*, [16] addressed the problem of a judge receiving a loan from a financial institution. In that case, the judge received preferential treatment from a bank in the form of an unsecured loan of over $20,000 and a large number of uncharged overdrafts on his wife's checking account. The judge used the loan to pay family and medical expenses beyond the judge's control.

The court held that the judge did not violate what is now Rule 3.13(B)(4) of the 2007 Code or Canon 4D(5)(f) of the 1990 Code, because there was no evidence that the bank's treatment of the judge was motivated by the fact he was a judge. In other words, other persons who were (like the judge) good credit risks could receive similar treatment. It was common knowledge that financial institutions take community reputation and professional stature into consideration when extending credit or assessing fees. [17] A judge has a steady job and an employer who is not likely to go bankrupt. It is proper for the bank to offer preferential loan treatment for people with steady jobs, including judges who are good credit risks.

**FIFTH**, the judge may accept rewards and prizes given to competitors or participants in random drawings. [18] There is no danger to judicial impartiality or integrity if the judge buys a winning lottery ticket or wins second place in the marathon. The benefits of a prize given to a competitor or the winner of a random drawing are equally available to all similarly situated persons who are not judges. Thus, there should be no legitimate fear that anyone is extending a benefit to influence the judge's decision-making or to curry favor with the judge.

**SIXTH**, the judge may accept scholarships, fellowships, and similar awards and benefits "if they are available to similarly situated persons who are not judges, based upon the same terms and criteria." [19] The judge can receive the Pulitzer Prize for writing a book, and have no qualms about accepting this award. Because the prize is equally available to all similarly situated

persons who are not judges, there should be no legitimate fear that anyone can influence the judge's decision-making or to curry favor with the judge.

**SEVENTH**, the judge may accept books, magazines, journals, audiovisual materials, and other resource materials that publishers supply on a complimentary basis for the judge's official use. A publisher, for example, may give a copy of this book to a judge, although we would much prefer that the judge buy it.

**EIGHTH**, the rule deals with the issue of gifts to spouses and members of the judge's family, and the problem of laundering gifts. As a Comment warns, Rule 3.13 applies only to the judge's acceptance of gifts or other things of value. However, if someone gives a gift or another benefit to the judge's spouse (or domestic partner, or member of the judge's family residing in the judge's household), that may be an attempt to evade Rule 3.13 and influence the judge indirectly. Then, that evasion would violate Rule 3.13(A). [20]

There is lessened concern if the donor is giving the gift or benefit primarily to the other person (the spouse, the domestic partner, a family member residing in the judge's household), and the judge is merely an incidental beneficiary. A "judge should, however, 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." [21]

Thus, Rule 3.13(B)(8) does not prohibit gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member of a judge residing in the judge's household, even though that gift incidentally benefits the judge. For example, if the judge's spouse is a travel agent and—in connection with his job—receives a free trip to Mexico for him and his spouse, the judge may accompany her spouse on the trip.

### § 10.3-3.13(d) Accepting Gifts and Other Items of Value that the Judge Must Report

The judge may accept some other gifts or items of value, if they do not violate the general prohibition of Rule 3.13(A). The framers of this Rule determined that the Rule should not ban items in this group, the third tier of items that the Rule covers. But, because the items in tier three may be worth more than the items in Rule 3.13(B), this subsection requires the judge to report the gift pursuant to Rule 3.15.

**FIRST**, the judge may accept (and must report) a gift incident to a public testimonial. [22] The public testimonial gift should not come from a donor organization whose members comprise (or frequently represent) the same side in litigation, [23] for then acceptance could raise a question of impartiality, and thus Rule 3.13(A) would come into play and impose its absolute ban.

**SECOND**, the judge may accept (and must report) invitations for the judge and her guest to attend, free of charge—

> (1) Bar-related functions or other activities related to the law, the legal system, and the administration of justice, [24] or
>
> (2) An event associated with any of the judge's educational, religious, charitable, fraternal or civic activities, if the organization in question issues the same invitation to nonjudges who are similarly engaged as is the judge. [25]

For example, the judge must report the gift of a free ticket to attend a law-related event. Then, others are able to assess whether a particular judge had a particularly close association with a particular bar association or organization. "On the other hand, if a judge is invited to attend, free of charge, an event sponsored by a non-law-related organization, the judge cannot accept *at all* unless the additional condition of equal treatment is met. If that condition is met, however, then public reporting should be sufficient to allay concerns about possible lack of impartiality. (This distinction between events and organizations that are or are not law-related is another theme that occurs throughout Canon 3.)" [26]

**THIRD**, the judge may accept (and must report) gifts, loans, etc. from a party or other person, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge. This "other person" can include 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. [27]

The 1990 Code forbade a judge from accepting any gift or favor from a lawyer or party who has come or is likely to come before the judge. [28] The 2007 Code reverses this Rule.

This reversal is amazing. The drafters explain that their view is more "discriminating." [29] The 2007 Code allows the gift and then relies on the other party to object:

> Under Rule 3.13(C)(3), the proposed rule provides that such gifts *may be accepted as long as they are reported*—which will give another party in litigation an opportunity to consider whether disqualification of the judge is required. More important, placement of this item in paragraph (C) assumes that the size of a particular gift or other circumstances will not cause a reasonable person to fear that the judge's impartiality will be impaired. If a reasonable person would take that view, then the gift is wholly impermissible to accept, because it will have failed the test of Rule 3.13(A). [30]

So, the judge may not accept gifts from litigants that are too generous, for that will violate Rule 3.13(A). But, judges may accept gifts from current litigants as long as they report the gifts. The drafters of this 2007 Rule do not explain what public policy favors this new rule. Why should the law allow a judge to accept any gift from a litigant who appears before the judge?

Why should the Rule put the burden on the other litigant to move for disqualification? If the other litigant moves to disqualify, what standard should the judge use to rule on that motion? The judge must have already decided that his receipt of the gift does *not* violate Rule 3.13(A), that is, a reasonable person would not view the gift as undermining the judge's independence, integrity, or impartiality. Otherwise, he should not have accepted it. So, why should the judge disqualify himself? Is the fact that a litigant has complained be a sufficient reason? Or, should the other litigant give the judge a similar-sized gift?



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.13, corresponds to the 1990 Code, Canon 4D(5)(a)–(h), and related commentary. The 2007 Code completely reorganizes this material.

2 Rule 3.13, Comment 5.

3 2007 Code, Terminology, ¶¶11, 12, & 8.

4 Matter of Bonin, 375 Mass. 680, 378 N.E.2d 669 (1978).

5 2007 Code, Rule 3.15 corresponds, in part, to the 1990 Code, Canon 4H.

6 Rule 3.15, which governs public reporting, does *not* apply to this class of items.

7 Reporters' Explanation of Changes to Rule 3.13, at 50 (ABA 2007).

8 Rule 3.13(B)(1).

9 Rule 3.13(B)(2).

10 Rule 3.13(B)(3).

11 JEFFREY SHAMAN, STEVEN LUBET, & JAMES ALFINI, JUDICIAL CONDUCT AND ETHICS § 7.28 at 201 n.226 (Michie Pub. 2d ed., 1990).

12 Reporter's Notes [1972] at 84.

13 1990 Code, Canon 4D(5)(d), & Comment 1.

14 1990 Code, Canon 4D(1)(a). In the 2007 Code, the prohibition against abusing the prestige of judicial office is in Rule 1.3.

15 Rule 3.13(4).

16 In re McDonough, 296 N.W.2d 648, 693 (Minn.1979).

17 For other reasons, the Court censured Judge McDonough for the violations of the Code of Judicial Conduct and ordered him to forfeit 3 months' salary as a fine.
18 Rule 3.13(B)(5).
19 Rule 3.13(B)(6).
20 Rule 3.13, Comment 3.
21 Rule 3.13, Comment 3.
22 Rule 3.13(C)(1).
23 1990 Code, Canon 4D(5)(a), Comment 2.
24 Rule 3.13(C)(2)(a).
25 Rule 3.13(C)(2)(b).
26 Reporters' Explanation of Changes to Rule 3.13, at 50 (ABA 2007)(emphasis in original).
27 Rule 3.13(C)(3).
28 1990 Code, Canon 4D(5)(h).
29 Reporters' Explanation of Changes to Rule 3.13, at 50 (ABA 2007).
30 Reporters' Explanation of Changes to Rule 3.13, at 50 (ABA 2007) (emphasis added).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.14 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

§ 10.3-3.14 Rule 3.14

## § 10.3-3.14(a) The Text of Rule 3.14

The text of Rule 3.14 provides:

**RULE 3.14.** ***Reimbursement of Expenses and Waivers of Fees or Charges***

**(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.**

**[*Ed. Note:** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology, ¶15**]**

**(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner,* or guest.**

**[*Ed. Note:** "Domestic partner" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. Terminology, ¶5**]**

**(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.**

**COMMENT**

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors that a

judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

### § 10.3-3.14(b) Reimbursement of Expenses and Waiver of Fees or Charges

Rule 3.14 [1] applies only to reimbursement of expenses and waivers of fees or charges. Provisions dealing with compensation are in Rule 3.12.

Rule 3.14(A) provides that an entity other than the judge's "employing entity" (the Government) may reimburse the judge for necessary and reasonable expenses for travel, food, lodging, and incidental expenses. The judge may also receive a waiver or partial waiver of fees or charges for registration, tuition, and similar items.

In order for this reimbursement to be proper, two conditions must exist. First, the reimbursement must not violate Rule 3.1 (which limits the judge's extrajudicial activities) or Rule 3.13(A) (which prohibits the judge from accepting any thing of value if a reasonable person would view it as undermining the judge's independence, integrity, or impartiality). The reimbursement also must not violate any other law. Second, the expenses or charges must be associated with extrajudicial activities that the Judicial Code permits. [2]

Rule 3.14(B) [3] limits expense reimbursement to the "actual cost" of travel, food, and lodging. Furthermore, these expenses must be "reasonably incurred" by the judge. An organization may also reimburse the judge for the expenses of the judge's "spouse or guest" if that person's presence is "appropriate to the occasion." Any amount reimbursed over those expenses reasonably incurred is in essence compensation. [4]

Rule 3.14(C) [5] requires the judge to report his reimbursement. The judge will report pursuant to Rule 3.15, which is the section that deals with the time, place, and manner of reporting.

### § 10.3-3.14(c) Judges' Participation at Judicial Seminars

For years, it has been common for some foundations, law schools, civic, religious, fraternal, and charitable organizations to invite judges to attend educational seminars at no cost to the judge.[6] The host institution typically provides free food and lodging and reimburses, in whole or in part, the judges' travel expenses.[7] Sometimes the meetings are located at resort locations. Sometimes a corporation is a sponsor, but it does not control the content of the programs. At other times, a school, foundation, or religious organization may be the sponsor.[8] The attendees may not even be able to determine the source of the funds.[9] Topics discussed often relate to law, history, economics, science, the environment, and philosophy.[10]

The 2007 Judicial Code concluded that it should "encourage" judges to attend these educational programs, both as teachers and as participants.[11] Before the judge decides to attend, she must assure "herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."[12]

The judge should look at factors such as:[13]

- whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;
- whether information concerning the activity and its funding sources is available upon inquiry;
- whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11; and,
- whether the seminar presents differing viewpoints.[14]

It is often the case that these non-profit institutions are not involved in any litigation before the judge. Law schools are not "special interest groups" that lobby judges. The money used to pay the judges to preside over moot court or attend law school educational programs or engage in similar activities comes from people who younger people may derisively call, "dead white males." Other deceased benefactors are typically the source of the funds. The deceased have no interest in any litigation that can come before the federal courts. The deceased, after all, are deceased and have more important matters on their minds. In addition to this old money, the sources of additional funds are myriad. "Dozens of entities—including foundations, corporations, and law firms—contribute to these institutions' judicial education programs."[15] No one group controls what it said.

Criticism of judicial attendance is sometimes shrill. For example, one editorial proclaimed that judges should "limit their travel to such places as Detroit or Jersey City in the middle of the winter."[16] One wonders why a change in the locale of the seminar has any relationship to the integrity of federal judges. If it is ethical for a federal judge to hear Nobel Laureate Professor Paul Samuelson give a lecture on the market economy in Petersburg, Alaska, why would it be unethical if the location were St. Petersburg, Florida? If judges can attend a seminar in Jersey City in the winter, could they attend the same seminar in Salt Lake City in the winter? Or, would attendance be limited to judges who did not care to ski?

### § 10.3-3.14(d) Recusal Motions Based on Judge's Participation at Seminars

Some litigants have sought to force judges who attend these seminars from hearing cases that might relate to legal issues discussed at these seminars, but mere attendance is not a grounds for recusal.[17] As the Second Circuit has warned: "No reasonable person would believe that expense-paid attendance at such events would cause a judge to be partial, or to appear so, in litigation involving a minor donor—whether a party or counsel to a party—to a bar association, law school, or program administering a particular seminar. Were we to take a different view, judges would (as a practical matter) either have to recuse themselves in a vast number of matters or decline invitations to numerous events of an entirely innocent nature that are of importance to the judiciary, the profession, and legal education."[18]

Those who object to these seminars are concerned that the speakers will improperly influence or brainwash the judges, as if these judges are babes in the woods. Jack Weinstein, Senior Judge for the Eastern District of New York attended the George Mason Law & Economics Center for Judges and later sat on its Judicial Advisory Board. No one who has ever appeared before Judge Weinstein would ever think that any course could reprogram him. Ditto for Justice Ruth Bader Ginsburg, who wrote that the judicial seminars advanced "both learning and collegial relationships among federal judges." [19] Another judge said, "I don't understand how I functioned before I had statistics and basic economics." [20]

The judges who attend these seminars, after all, tend to be distinguished practitioners who now are federal judges in the last third of their career. They give up the precious gift of time when they choose to attend these seminars voluntarily. It should not be "corrupting" to listen to luminaries like Nobel laureates Paul Samuelson and Milton Friedman, who are some of the past speakers featured at these programs. [21]

It should not be surprising that judges, living in a market economy, take courses in market economics. Law students take classes in economic analysis of law and similar courses. Lawyers take continuing legal education courses in these same subject areas. Judges would like to learn what the lawyers and their law clerks already have learned. Judges should make sure that attendance at seminars does not undermine the judge's independence, integrity, or impartiality, while fulfilling their "duty to remain competent in the law." [22]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.14, derives from the reimbursement provisions of 1990 Code, Canon 4H(1).

2 Rule 3.14(A).

3 2007 Code, Rule 3.14(B) is substantially the same as Canon 4H(1)(b) of the 1990 Code.

4 This distinction was important for the 1990 Code because compensation for non-judicial duties must be publicly reported under Canon 4H(2) of the 1990 Code, while reimbursement for expenses need not be. But the 2007 Code requires reporting reimbursements. Rule 3.14(C).

5 2007 Code, Rule 3.14(C) is similar to Canon 4H(2) of the 1990 Code.

6 *See* Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How Many Judges Learn?*, 36 ARIZ. L.REV. 539 (1994); Jack B. Weinstein, *Learning, Speaking, and Acting: What Are the Limits for Judges?*, 77 JUDICATURE 322 (1994); Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1 (1994); Ronald D. Rotunda, *A Few Modest Proposals to Reform the Law Governing Federal Judicial Salaries*, 12 THE PROFESSIONAL LAWYER 1, 7–9 (A.B.A., Fall 2000); Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URBAN L.J. 941 (2002).

7 Rule 3.14, Comment 2.

8 Rule 3.14, Comment 1.

9 Judge Ralph Guy, Jr., quoted in, *Congress Dumbs Down Judges*, WALL ST. J., Oct. 24, 2000, at A26 as saying: "I can't be influenced by something I don't know."

10 In re Aguinda, 241 F.3d 194, 203 (2d Cir.2001).

11 Rule 3.14, Comment 1.

12 Rule 3.14, Comment 3. *See also* Rule 3.14, Comment 2: "The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code."

13 Rule 3.14, Comment 3, lists (a) through (h). This section simply lists a few of the factors the judge should consider.

14 The Second Circuit refused to disqualify a judge for attending a seminar that it stipulated was unbalanced. The Court warned that judges cannot regulate the content of a seminar to determine if it is "balanced."

> "[W]e accept for purposes of the present analysis the allegation that the FREE seminar attended by Judge Rakoff was 'unbalanced.' Indeed, we have little choice. A determination that a presentation on policy issues is unbalanced must be based on establishing a set of parameters defining 'balance' that in turn requires a weighing of the intellectual significance of differing positions on controversial issues. This weighing involves judgments resembling content regulation that are not appropriate for courts. A determination that a presentation is balanced depends so heavily on each individual's view as to whether his or her position on the issue is prominently featured that a search for a consensus as to what is a balanced presentation of a particular issue is almost chimerical. If the subject is controversial, some will inevitably say that a presentation on it is unbalanced. A court addressing a recusal motion should, therefore, accept a claim of lack of balance at least for purposes of determining whether an appearance of impropriety has been created."

In re Aguinda, 241 F.3d 194, 203–04 (2d Cir. 2001).

15 Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URBAN L.J. 941, 941–42 (2002) (footnote omitted).

16 Editorial, *The Pay and Perks of Federal Judges*, TAMPA TRIBUNE, Oct. 3, 2000, at 6. *See also, e.g.*, Editorial, *A Blot on Judicial Ethics*, WASH. POST, July 28, 2000, at A24; Editorial, *A Threat to Judicial Ethics*, N.Y. TIMES, Sept. 15, 2000, at A34; Statement of Senator Pat Roberts, chairman of the Senate Ethics panel, quoted in, THE RECORD (Bergen County, NJ), Oct. 4, 2000 (AP wire services); *Just Say No to Judge Junkets*, USA TODAY, May 1, 2001, at 14A.

17 *E.g.*, In re Aguinda, 241 F.3d 194, 198 (2d Cir. 2001), which said:

> "The issue now before us arises from Judge Rakoff's attendance at an expense-paid seminar on environmental issues during the period between his dismissal of the case and our remand. Petitioners argue that because Texaco contributed general funding to the organization that sponsored the seminar and a former Texaco chief executive officer was a speaker at the seminar, an appearance of partiality warranting disqualification was created. Judge Rakoff denied petitioners' motion essentially on the grounds that Texaco provided only minor general funding to the seminar's sponsor, nonprofit foundations funded the seminar itself, and neither the former Texaco CEO nor any other presenter at the seminar discussed any issues material to the merits of the underlying case. We hold that Judge Rakoff did not abuse his discretion in denying petitioners' motion. Given Texaco's indirect and minor funding role and the lack of a showing that any aspect of the seminar touched upon an issue material to the disposition of a claim or defense in the present litigation, we deny the petition." (internal citations omitted).

*See also* Advisory Opinion No. 67 (1980), *reprinted in*, Administrative Office of U.S. Courts, *Codes of Conduct for Judges and Judicial Employees*, *in* GUIDE TO JUDICIARY POLICIES AND PROCEDURES, IV-151 (1999), which states:

> "Payment of tuition and expenses involved in attendance at non-government sponsored seminars constitutes a gift. … The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them. It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation."

In order to secure disqualification under this standard, the test is: would "an objective, disinterested observer fully informed of the underlying facts [to] entertain significant doubt that justice would be done absent recusal." United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir.1992).

See also, discussion of unpublished cases coming to the same conclusion in, Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URBAN L.J. 941, 943 n.16 (2002).

18 In re Aguinda, 241 F.3d 194, 203 (2d Cir. 2001)

19 Quoted in, *Congress Dumbs Down Judges*, WALL ST. J., Oct. 24, 2000, at A26.

20 Quoted in, Ronald D. Rotunda, *A Few Modest Proposals to Reform the Law Governing Federal Judicial Salaries*, 12 THE PROFESSIONAL LAWYER 1, 8 & n.46 (A.B.A., Fall 2000).

21 Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URBAN L.J. 941 (2002).

22 Rule 3.14, Comments 3 & 1.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.3-3.15 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.3. Canon 3 Conduct in the Courtroom

# § 10.3-3.15 Rule 3.15

## § 10.3-3.15(a) The Text of Rule 3.15

Rule 3.15 provides:

**RULE 3.15. *Reporting Requirements***

**(A) A judge shall publicly report the amount or value of:**
**(1) compensation received for extrajudicial activities as permitted by Rule 3.12;**
**(2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items, alone or in the aggregate with other items received from the same source in the same calendar year, does not exceed $[insert amount]; and**
**(3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A), unless the amount of reimbursement or waiver, alone or in the aggregate with other reimbursements or waivers received from the same source in the same calendar year, does not exceed $[insert amount].**
**(B) When public reporting is required by paragraph (A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation; the description of any gift, loan, bequest, benefit, or other thing of value accepted; and the source of reimbursement of expenses or waiver or partial waiver of fees or charges.**
**(C) The public report required by paragraph (A) shall be made at least annually, except that for reimbursement of expenses and waiver or partial waiver of fees or charges, the report shall be made within thirty days following the conclusion of the event or program.**
**(D) Reports made in compliance with this Rule shall be filed as public documents in the office of the clerk of the court on which the judge serves or other office designated by law,* and, when technically feasible, posted by the court or office personnel on the court's website.**
**[*Ed. Note:** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. Terminology, ¶15**]**

## § 10.3-3.15(b) Public Reporting

Rule 3.15 [1] gathers in one place all the rules dealing with the judge's public reporting requirements. It governs the judge's reporting of compensation for extrajudicial activities (Rule 3.12), reporting of gifts and other things of value (Rule 3.13), and reporting of reimbursements of expenses and waivers or partial waiver of fees and charges (Rule 3.14). This Rule creates a very transparent system to govern judicial reporting.

The judge must report, first, annually, the amount or value of all compensation he receives for extrajudicial activities pursuant to Rule 3.12. [2]

Second, the judge must annually report gifts and other things of value that Rule 3.13(C) permits, unless the value of the items (either alone or aggregated with other items from the same source) does not exceed a set amount. Each jurisdiction should insert the actual dollar amount. [3]

Third, the judge must annually report reimbursement of expenses and waiver of fees or charges that Rule 3.14(A) permits (either alone or aggregated with other items from the same source) does not exceed a set amount. Each jurisdiction should insert the actual dollar amount. [4]

With respect to a fee waiver, the judge may not always know the amount that is waived. The drafters advise that the judge "should be able to obtain a statement of what the fees or charges would have been for a person who was not being offered a waiver. As this requirement becomes better known, it is likely that the sponsoring entity granting the waiver will develop this information and provide the requisite statement as a matter of course." [5]

The judge's public report must include the date, place, and nature of the activity for which the judge received any compensation. He must also describe any gift, loan, bequest, benefit, or any other thing of value that he accepted. And, he must disclose the source of the reimbursement of expenses or the waiver of fees. [6]

The judge must file his public report at least annually. However, in cases where the judge benefitted from waiver of fees or reimbursement of expenses, the judge must make his report within 30 days after the program or event concludes. [7] In other words, the judge's obligation to report in connection with reimbursements and waivers of fees or charges, is within thirty days of the underlying event, not on a calendar-based schedule.

When the judge files his report, it must be public in fact as well as in name. The clerk of the court must file these reports as public documents. When technically feasible, the court should post it on the court's website. [8]

These Public Reports should be very helpful in building public confidence in the integrity of the court. Sunlight it the best disinfectant. [9]

The Judicial Code reflects a concern that lost privacy for judges is a cost, and therefore it requires financial disclosure only to the extent it determines that the burdens of this loss of privacy do not outweigh the benefits of disclosure. We often say that more is better than less. Granted, sunshine is the best disinfectant, but too much sunshine can cause skin cancer. More is better than less at zero cost. Once the cost is greater than zero, more may not be better than less. This Rule draws a careful balance between the judge's desire for privacy, particularly in financial matters, and the need of the public to know what is going on.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.
a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 3.15, derives from Canon 4H(2), with various modifications.
2 Rule 3.15(A)(1).
3 Rule 3.15(A)(2).
4 Rule 3.15(A)(3).
5 Reporters' Explanation of Changes to Rule 3.15, at 55 (ABA 2007).
6 Rule 3.15(B).
7 Rule 3.15(C).
8 Rule 3.15(D).
9 See discussion in, Ronald D. Rotunda, *The Courts Need This Watchdog*, WASHINGTON POST, Dec. 21, 2006, at A29.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.4-4.0 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.4. Canon 4 Extra-Judicial Activities

§ 10.4-4.0 Canon 4

## § 10.4-4.0(a) The Text of Canon 4

Canon 4 provides:

**CANON 4. A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.**

## § 10.4-4.0(b) Judges and Candidates for Judicial Office

Rule 4.1 applies to all judges, whether or not they are also judicial candidates. This Rule also applies to all judicial candidates, whether or not they are also sitting judges. Rule 4.2 applies only to judicial candidates who are running in elections. These elections may be partisan, nonpartisan, or retention elections. Rule 4.3 applies to any judicial candidate seeking an appointive judicial office. Rule 4.4 applies to campaign committees. And, Rule 4.5 applies to judges who become candidates for nonjudicial office.

Canon 4 of the 2007 Code derives from Canon 5 of the 1990 Code. Canon 4, like its predecessor, regulates both judges who are, or are not, judicial candidates, and nonjudges who become judicial candidates. This Canon also deals with candidates running in public elections. Those elections might be partisan elections, nonpartisan elections, or retention elections (where the judge does not run against any candidate but runs against her record).

This Canon also deals with candidates seeking appointment to a judicial office rather than election to a judicial office.

Canon 4 of the 2007 Code made three major changes in the language, as compared to the 1990 Code. First, it replaced "shall refrain from" with "shall not engage in." The change is more in style than in substance. The drafters noted that the new language is "less passive and fits more comfortably with the language of the other three Canons." [1]

Second, the new Canon 4 replaces "political activity" with "political or campaign activity." The framers believed that this new phrase "more accurately reflects the actual content of Canon 4. Canon 5 of the 1990 Code also dealt with more than just 'political' activity so the new Canon 4 title" reflects that. [2]

Third, Canon 4 of the 2007 Code replaces "inappropriate activity" with "activity that is inconsistent with the independence, integrity, or impartiality of the judiciary." The framers believed that the undefined term, "inappropriate," was not sufficiently precise. The phrase that it substitutes—"independence, integrity, or impartiality" of the judiciary and candidates for the judiciary may be compromised or undermined—hardly has the precision of Euclidian Geometry, but it is the phrase that appears throughout the 2007 Model Judicial Code.

Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 Reporters' Explanation of Changes to Canon 4, at 56 (ABA 2007). It is true enough that the new language is less passive, but the Code still loves using the passive voice. Or, shall we say, the passive voice is loved by the Code?

2 Reporters' Explanation of Changes to Canon 4, at 56 (ABA 2007).

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.4-4.1 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.4. Canon 4 Extra-Judicial Activities

# § 10.4-4.1 Rule 4.1: Political and Campaign Activities

## § 10.4-4.1(a) The Text of Rule 4.1

The text of Rule 4.1 provides:

**RULE 4.1.** ***Political and Campaign Activities of Judges and Judicial Candidates in General***

**(A) Except as permitted by law,* or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate* shall not:**

**[*Ed. Note:** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law.

**[*Ed. Note:** "Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.**]**

**(1) act as a leader in, or hold an office in, a political organization;***

**[*Ed. Note:** "Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by Rule 4.4. Terminology, ¶22**]**

**(2) make speeches on behalf of a political organization;**

**(3) publicly endorse or oppose a candidate for any public office;**

**(4) solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office;**

**[*Ed. Note:** "Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. Terminology, ¶3**]**

**(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;**

**(6) publicly identify himself or herself as a candidate of a political organization;**

**(7) seek, accept, or use endorsements from a political organization;**

**(8) personally solicit* or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;**

**[*Ed. Note:** "Personally solicit" means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication. Terminology, ¶21.**]**

**(9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;**

**(10) use court staff, facilities, or other court resources in a campaign for judicial office;**

**(11) knowingly,* or with reckless disregard for the truth, make any false or misleading statement;**

**[*Ed. Note:** "knowingly" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. Terminology, ¶14**]**

**(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; or**

**[*Ed. Note:** "Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. Terminology, ¶20

**[*Ed. Note:** "Impending matter" is a matter that is imminent or expected to occur in the near future. Terminology, ¶9**]**

**(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.**

**[*Ed. Note:** "Impartial" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. Terminology, ¶8**]**

**(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).**

**Comment**

**GENERAL CONSIDERATIONS**

[1] Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.

[2] When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.

**PARTICIPATION IN POLITICAL ACTIVITIES**

[3] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations.

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These Rules do not prohibit candidates from campaigning on their own behalf, or from endorsing or opposing candidates for the same judicial office for which they are running. See Rules 4.2(B)(2) and 4.2(B)(3).

[5] 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 in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. For purposes of this Canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate, and is not prohibited by paragraphs (A)(2) or (A)(3).

**STATEMENTS AND COMMENTS MADE DURING A CAMPAIGN FOR JUDICIAL OFFICE**

[7] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees. Paragraph (A)(11) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[8] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In addition, when an independent third party has made unwarranted attacks on a candidate's opponent, the candidate may disavow the attacks, and request the third party to cease and desist.

[9] Subject to paragraph (A)(12), a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case.

[10] Paragraph (A)(12) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

**PLEDGES, PROMISES, OR COMMITMENTS INCONSISTENT WITH IMPARTIAL PERFORMANCE OF THE ADJUDICATIVE DUTIES OF JUDICIAL OFFICE**

[11] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

[12] Paragraph (A)(13) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[13] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

[14] A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse.

[15] Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(13) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.11.

## § 10.4-4.1(b) Holding Office in a Political Organization, Making Speeches on its Behalf, and Endorsing Other Candidates

### § 10.4-4.1(b)(1) General Principles

Rule 4.1(A)(1) through Rule 4.1(A)(10) deal, in general, with restrictions on the ability of the judge or judicial candidate to participate in political activities.

**Rule 4.1** places broad restrictions on the political activity of a judge or a candidate for election to judicial office, subject to various exceptions found mainly in that Rule and in Rule 4.2. The purpose of this section is to limit the active participation of a judge (or candidate for judicial office) in the election process of any other political candidate.

Rule 4.1 applies to judges and to nonjudges who are judicial candidates. [1] At first blush, one might think that there are practical problems in enforcing the Judicial Code against those who are not judges. However, *if* the candidate is successful in becoming a judge, he or she would then be subject to appropriate sanctions for any misdeeds as a candidate. [2] In addition, if the candidate is a lawyer, the Model Rules of Professional Conduct, governing lawyers, require the lawyer to follow these provisions of the Judicial Code. [3] So, the successful candidate is subject to judicial discipline because he or she is a judge, and the unsuccessful candidate is subject to lawyer discipline if he or she is a lawyer.

A “candidate,” in general, is anyone seeking selection or election to judicial office. The term has the same meaning whether applied to *elected or appointed* judges. [4] Thus, unless a provision states otherwise, [5] the ABA intends that the rules in the Judicial Code governing judicial “candidates” apply to both elected and appointed judges.

Federal judges are all appointed, but the ABA proposed code does not govern them. There are separate federal rules that apply to federal judges. These drafters of federal rules derived them from the ABA Model Judicial Code, but they did not adopt a verbatim copy of the ABA Model Judicial Code. [6]

**Rule 4.1(B)** [7] provides that the judge or judicial candidate must take reasonable measures to make sure that other persons do not do, on behalf of the judge or judicial candidate, that which the judge or judicial candidate cannot do directly herself.

**Rule 4.1(A)(1)** [8] prohibits a judge *or candidate* from acting as a "leader" of, or holding any office in, a political organization.

A "political organization" is a political party or another group affiliated with a political party or candidate. The principal purpose of this entity is to further the election or appointment of candidates for political office. This term does not include a judicial candidate's campaign committee created and authorized by Rule 4.4. [9] For example, a candidate who is a county prosecutor does not hold an office in a "political organization." [10]

**Rule 4.1(A)(2)** [11] prohibits the judge or judicial candidate from making speeches for a political organization or candidate.

**Rule 4.1(A)(3)** [12] prohibits the judge or judicial candidate from publicly endorsing (or publicly opposing) another candidate for public office. [13] The judge, for example, may not say, "I endorse John Smith, for President." However, a candidate for elective judicial office may publicly endorse or oppose candidates for the same judicial office for which he or she is running. [14]

These restrictions exist to assure the public that judges and judicial candidates are free, and appear to be free, from political pressure and influence. [15]

These restrictions apply to anyone who becomes a judicial candidate. [16] A "judicial candidate" includes not only any person who is seeking selection for judicial office by election but also those who seek a judicial *appointment*. A person becomes a candidate appointment when she is "nominated for election or appointment to office." [17]

The Judicial Code does not specifically define "endorse." As one court frankly acknowledged, the relevant provisions of the state judicial code (which is similar to the ABA Model Judicial Code) "quite candidly, lack definitive meaning." [18]

We do know that a public endorsement requires more than mere public association. A candidate for judicial office does not publicly endorse another candidate for public office merely by having the candidate's name on the same ticket. [19] For purposes of Rule 4.1, the judge's participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate. [20]

Judges and judicial candidates may certainly vote. Yes indeed, in case there were any doubts, Comment 1 to Canon 5A(1) explicitly states that the judge or candidate retains the right to participate as a voter. Oddly enough, the second Justice Harlan stopped voting when he joined the U.S. Supreme Court because he thought that voting was a partisan act. [21]

Harlan was a great justice but his view on this issue is jejune. Although a judge should not think of himself or herself as a Republican or Democrat and decide a case that way, that does not stop one from casting a ballot in the voting booth. Many people who vote are independents and do not think of themselves as Republicans or Democrats, yet they vote. They may vote in a Democratic Party Primary one year and in a Republican Party Primary the next. Judges may vote for candidates but they do not "vote" on cases; they decide cases. Refusing to vote in an election does not make you nonpartisan: some people never vote but they still have strong partisan views. The goal for the judge is to be sure that the judge does not import her partisan views in deciding cases.

Judges may also register to vote, even when they register as a member of a political party, and thus make known their partisan affiliations. They may participate in party caucuses. That type of public participation does not constitute public support for or endorsement of a political organization or candidate. [22] But, judges and judicial candidates may not assume leadership roles in the party organization. [23]

Rule 4.1(A)(3) has a "family exception." Judges and candidates may not endorse family members who are running for office, or become involved in, or publicly associated with, a family member's political activity or campaign. "To avoid public

misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity." [24]

Case law tells us that before a judge can violate Rule 4.1(A)(3) [25] —the prohibition endorsing another candidate for any public office—, the judge must give permission for others to publicly use the judge's name in endorsements of the candidate. A judge's statements about a nominee—that a Texas Supreme Court Justice thinks a Presidential nominee to the U.S. Supreme Court would be a great judge— do not amount to endorsing her. [26]

**Rule 4.1(A)(4)** [27] prohibits the judge or judicial candidate from soliciting funds for a political organization or political candidate, or from paying an assessment to (or contributing to) a political organization or political candidate. The judge or candidate should establish a committee to solicit campaign funds. [28]

**Rule 4.1(A)(5)** [29] makes clear that the judge or candidate cannot purchase tickets for political events that a political organization or other candidate sponsors. However, Rule 4.2(B)(4) allows the judicial *candidate* to attend and purchase tickets for political events when the events are close to the election. [30] So, the general rule is that judges may not purchase such tickets, but when it is close to their own election, they may do so.

**Rule 4.1(A)(6)** [31] provides that the judge or candidate shall not "publicly identify himself or herself as a candidate of a political organization." This seems like a strange rule, though, because a judicial candidate in a partisan election would not want to keep it a secret that she is a candidate running as a Democrat or Republican. Judicial candidates should not be alarmed. Rule 4.2(C)(1) provides that a "judicial candidate in a partisan public election may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general election: identify himself or herself as a candidate of a political organization."

**Rule 4.1(A)(7)** [32] provides that the judge or judicial candidate may not "seek, accept, or use endorsements from a political organization." That also, at first, appears a bit strange. The judge running in a partisan election would welcome the endorsement of his own political party. He surely would not want to shun it. Well, Rule 4.2(C)(2) provides that a "judicial candidate in a partisan public election may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general election: seek, accept, and use endorsements of a political organization."

When we compare Rule 4.1(A)(6) with Rule 4.2(C)(1), we know that a candidate running in a *partisan* public election for judicial office may communicate to voters the fact that a particular political organization or party nominated him or her. "Thus, because an exception to Rule 4.1(A)(6) appears only in Rule 4.2(C)(1), a candidate running in another type of judicial election is still subject to Rule 4.1(A)(6)." [33] In other types of elections (nonpartisan, or retention), the Rules seal the judge's lips.

Some courts have invalidated such restrictions on First Amendment grounds. These counts hold that they violate the rights of association of judges and judicial candidates. For example, *Republican Party of Minnesota v. White* [34] struck down the partisan-activities clause of Minnesota's canons of judicial conduct. That clause prevented judicial candidates from identifying themselves as members of a political organization, attending political gatherings, and accepting political endorsements. These restrictions were not the least restrictive means of addressing Minnesota's compelling state interest in protecting litigants from biased judges. [35] It was, for example, underinclusive, because it did not restrict association with interest groups. [36]

*Siefert v. Alexander* [37] is another case that explores these issues. Plaintiffs challenged the Wisconsin Code of Judicial Conduct rules prohibiting judges and judicial candidates from (1) asserting their membership in a political party, (2) endorsing partisan candidates for office, and (3) personally soliciting campaign contributions. The plaintiff, an active Democrat before becoming a judge, wanted to join the party again and endorse President Obama. The district court held that the rules prohibiting this conduct were unconstitutional. The Seventh Circuit agreed that the ban on joining a political party was unconstitutional, citing *Republican Party v. White*. The policy behind such a ban was to avoid indicating the judge's possible views on policy issues,

but that is the purported compelling state interest that *White* "squarely rejected." If party membership were somehow relevant to issues in a particular case, the judge could recuse himself.

The court held that endorsement of political candidates, on the other hand, was subject to a balancing analysis, not strict scrutiny. An endorsement does not simply announce a judge's views on an issue, nor is it a shorthand expression for that view. The court, quoting the American Bar Association Model Code provision from which Wisconsin derived its rules, justified the restriction on endorsement "based on the danger of 'abusing the prestige of judicial office to advance the interests of others.'" [38] This restriction is an attempt to preserve the appearance of impartiality in the judiciary.

Political actors may exchange endorsements on a quid pro quo basis. A judge might trade his or her endorsement of political figures for reciprocal support by the officials. People the judge endorsed may later appear in the judge's court. Further, because the prohibition against endorsements does not "inform the electorate of [the judge's] qualifications and beliefs," the prohibition on endorsement on *partisan* elections is permissible. [39]

As for *endorsements in nonpartisan* election, the court was less charitable. In dictum, it said that the Wisconsin rule allows endorsements in these nonpartisan elections. "Were we to consider this provision under strict scrutiny, this underinclusiveness could be fatal to the rule's constitutionality." [40]

Finally, the court upheld the ban on the judge personally soliciting or accepting campaign funds. This rule prevented corruption and preserved impartiality without impairing more speech than was necessary. This rule (1) made sure that no person felt directly or indirectly coerced by the judges' presence to contribute funds to his judicial campaign; (2) helped eliminate any potential bias or appearance of bias that could accompany a lawyer who frequently appeared before a judge from being personally solicited for campaign contributions, and (3) reduced quid pro quo impropriety suggested by face-to-face solicitation.

**Rule 4.1(A)(8)** [41] prohibits the judge from "personally" soliciting or accepting campaign funds other than through the judge's campaign committee, as authorized by Rule 4.4. To "personally solicit" means "a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication." [42]

The ABA Joint Commission that drafted this Rule acknowledged, "several courts have struck down provisions forbidding 'personal solicitation' of campaign funds—often in broad language. Ultimately, the Commission adopted the broader prohibition on the theory that the solicitation of campaign funds in the judicial election context could justify restrictions greater than are permitted for lawyer advertising." [43]

Lower federal courts have, indeed, violated the "personal solicitation" provision. [44] For example, in *Republican Party of Minnesota v. White* [45] the plaintiffs challenged only the fact that they could not solicit contributions from large groups and could not, through their campaign committees, transmit solicitation messages above their personal signatures. They did not challenge the campaign committee system that provides that judicial candidates may establish committees that may solicit campaign funds on behalf of the candidate. [46]

The Court found unpersuasive Minnesota's efforts to bar this rather impersonal type of solicitation—the very type that Rule 4.1(A)(8) also prohibits:

> It seems unlikely, however, that a judicial candidate, if elected, would be a "judge [who] has a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a litigant in a case]," based on whether that litigant had contributed to the judge's campaign. That is because Canon 5 [of the Minnesota Judicial Code] provides specifically that all contributions are to be made to the candidate's committee, and the committee "shall not" disclose to the candidate those who either contributed or rebuffed a solicitation. [47]

*Weaver v. Bonner* [48] held unconstitutional Georgia's version of the judicial ethics restricting the judge's involvement in endorsements and contributions:

> [E]ven if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support. Canon [5C(2); Rule 4.1(A)(8) & Terminology 21] thus fails strict scrutiny because it completely chills a candidate's speech on these topics while hardly advancing the state's interest in judicial impartiality at all. [49]

Pennsylvania publicly reprimanded and placed on probation a judge who personally solicited and collected funds for his campaign. [50] A Judge collected $285 by passing around a basket and reported it on his Campaign Financial Report. Judge Singletary said to a small group wearing the colors of a motorcycle club:

> "There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. I got some stuff that I got to do, but if you all can give me twenty ($20) dollars you 're going to need me in Traffic Court, am I right about that?" And,
>
> > "Now you all want me to get there, you 're all going to need my hook-up, right?" And,
>
> It costs money. I have to raise $15,000 by Friday, I just hope you have it, because I have to raise $15,000 dollars by Friday. [51]

**Rule 4.1(A)(9)** [52] prohibits the judge or candidate from using campaign contributions for private benefit. The judge may not use the funds to benefit himself, other candidates, or anyone else. He can only use campaign funds for proper campaign purposes.

**Rule 4.1(A)(10)** [53] prohibits the judge from using court staff, court facilities, or any other court resources "in a campaign for judicial offices." One might think that this section, by negative pregnant, would allow the judge to use court staff, court facilities, or any other court resources in a campaign for a non-judicial office, such as State Attorney General. However, Rule 1.3 (and Canon 2B of the 1990 Code) forbids the judge from using the prestige of judicial office to advance the personal interests of the judge or anyone else. Using the prestige of judicial office includes using the trappings of judicial office.

### § 10.4-4.1(b)(2) Judges "Endorsing" Themselves

Recall that Rule 4.1 applies to *all* judicial candidates. A "judicial candidate" includes not simply any person who is seeking selection for judicial office by election but also those who seek a judicial *appointment*. A person becomes a candidate for appointment when she is "nominated for election or appointment to office." [54] The Rules only prohibit endorsing another candidate for public office. The 1990 Code made it clear in its reference to "another candidate." [55] The 2007 Rules do not use that phrase in the black letter of Rule 4.1(A)(3), but the Comments make it clear that the "Rules do not prohibit candidates from campaigning on their own behalf, or from endorsing or opposing candidates for the same judicial office for which they are running" [56] In addition, other Rules make that clear. [57]

A judge and those seeking election or appointment to a judgeship may endorse himself or herself. It is now quite common for the nominee to testify at his or her own hearings, although that was not always the case. [58] A judicial candidate in an election or a judicial nominee, implicitly and explicitly may testify in his or her own behalf. This principle may appear obvious today, but the practice of the nominee testifying at the nominee's confirmation hearing is relatively recent in the history of confirmation hearings. [59]

### § 10.4-4.1(b)(3) Judges Testifying at Nomination Hearings about Another Judge

A judge may testify at the Senate Judiciary Committee hearings about another judge's nomination and express his approval or disapproval of the nominee. Historical practice confirms that judges do not consider the Judicial Canons to bar such testimony. [60] For example, at the Supreme Court nomination hearing of then-Judge Samuel Alito, two current judges and five

retired judges testified in person or via videotape. [61] All the judges favored his nomination. If the testimony had been to the contrary—if a judge had said that the nominee occasionally lost his temper and got angry during judicial conferences, or made sexist remarks—that surely would be useful information that the Senators should know before the confirmation vote.

Nonetheless, some commentators (perhaps unfamiliar with the historical precedent) have raised a question about the appearance of impropriety, wondering if the Third Circuit judges were acting unethically by testifying at the Alito confirmation hearing. At the time, some people even argued that Judge Alito should recuse himself in cases where he would review their decisions as a Supreme Court Justice, because the lower court judges might appear to be currying favor through their testimony. [62]

Would it raise at least the "appearance" of impropriety if Justice Alito decided a case by affirming a lower court judge who had testified in his behalf? That is an argument that one can always make, but its logic is a bit strained. First, it assumes that judges treat reversal and affirmance rates the way a baseball player treats his batting average, as something personal to himself. But judges, unlike the litigants, have no personal interest in the case. If they did, they could not be judges. Judges even disagree with themselves. For example, disagreement occurs when Judges decide to reverse a precedent that they originally joined [63] or vote as a judge in a way contrary to their view as an author [64] or as an executive branch official. [65]

Second, if we assume that a judge should recuse himself from reviewing cases decided by other judges because those judges said nice things about him, then surely he should recuse himself from hearing any cases about lawyers who said nice things about him. Lawyers really do have an interest in their cases. Their won-lost record is important. Not so for judges. They really have, and should have, no personal interest in their cases.

And, if lawyers who say nice things can cause a judge's recusal, then lawyers who say bad things about a judge should definitely cause his recusal. Yet, if that were the rule, any lawyer could create a permanent preemptory challenge against a judge simply by testifying against him at the confirmation hearing (or saying nasty things about him during an election campaign). The lawyer who decides to create this right to recuse a judge whom he does not like will also create a niche practice, for other lawyers can hire this lawyer when they decide that they want to prevent this particular judge from being on the panel.

Hence, historical practice confirms that a judge may properly testify at hearings about another judge without providing an unethical "endorsement" of that judge.

### § 10.4-4.1(b)(4) Judges Informing Reporters and Others about their Views Concerning a Nominee for Judicial Office

*In re Hecht* [66] involved a Texas Supreme Court Justice who spoke favorably about President Bush's nomination of Harriet Miers to the U.S. Supreme Court. Ms. Miers faced opposition and she eventually withdrew her name, but prior to that, her friend, Justice Nathan Hecht told reporters and friends that he supported her nomination to the U.S. Supreme Court. At the time, Texas Supreme Court Justice Hecht was running for reelection, while Ms. Miers was subject to a confirmation vote in the U.S. Senate Judiciary Committee.

The issue in this case was whether a judge may tell reporters and friends that he thinks another person would make a "great" judge. The Court held yes; those statements do not amount to an "endorsement" because they "did not urge the public to 'get behind' the nominee, particularly because the situation involved a nomination to the federal bench, not a candidate running in a contested election." [67] Urging the public to vote for a particular candidate would amount to "endorsement," but giving one's opinion of a candidate rather than urging the public to vote (an easy assumption if the nominee is seeking an appointed position) is not an endorsement.

Justice Hecht appeared on various television news programs, and many newspaper and Internet news articles quoted him as saying that Ms. Miers would be a great Justice. His comments mainly provided factual information, but he also discussed his personal relationship with Miers, her professional background and accomplishments, her conservative political philosophy, her attendance and participation at an evangelical Christian church, and her pro-life and anti-abortion views. [68]

The Texas Supreme Court, in reviewing an ethics charge against Justice Hecht, concluded that, under these facts, there was no prohibited "endorsement."

The political processes offer a unique twist. The state judge is up for re-election and is in a political campaign. The state judge speaks of his friend, the nominee, whose nomination is pending before the Senate Judicial Committee of the United States Congress. In this federal process, the public expects a thorough examination of the background, qualifications, and experience of the nominee in public, and most assuredly, at the Senate committee hearings. The Senate committee fully intended to call the state judge as a witness during the confirmation hearings, and the state judge fully intended to testify to the same statements before the committee which are at issue here. No one claims such statements would have violated the Texas Code of Judicial Conduct. Had the confirmation proceeded as scheduled and the state judge testified, it is highly doubtful that we would be considering any of these matters, anonymous complaint or not. [69]

The Texas Court was mindful that "[d]ebate on the qualifications of candidates for public office is at the core of our electoral process and of First Amendment freedoms." [70] Because of these free speech interests, the Court held that it must "strictly construe" the "endorse" provision of the Judicial Canons. Hence, "'endorsing' under the circumstances of this case [must] mean more than support, that is, more than spoken praise." [71]

To constitute "endorsing," statements must constitute a request or appeal for others to support her nomination. [72] Justice Hecht did not "urge the public to 'get behind' the nominee, particularly because the situation involved a nomination to the federal bench, not a candidate running in a contested election." [73] Justice Hecht did not violate the "endorse" provision when he told the press and others that Harriet Miers "would make a good justice," has a "sterling character," and her nomination was "good" and "solid." Such statements, including "his perception of her personal views on various subjects, and his favorable opinions about Miers' nomination to the bench," are not "endorsement."

### § 10.4-4.1(c) Statements and Comments Made During the Judicial Campaign

Rule 4.1(A)(11), Rule 4.1(A)(12), and Rule 4.1(A)(13) deal, in general, with restrictions on the ability of the judge or judicial candidate to make statements during a campaign for judicial office.

Rule 4.1(A)(11) [74] prohibits the judge or judicial candidate from "knowingly, or with reckless disregard for the truth, make any false or misleading statement." Presumably, these statements relate to political campaigns. However, the Rule is drafted very broadly: it seems to prohibit any lie, even one that is not material and has no functional relationship to being a judge.

Rule 4.1(A)(11) derives from Canon 5A(3)(d)(ii) of the 1990 Code. Canon 5A(3)(d)(ii) was drafted more carefully. It forbade the judge or candidate from knowingly misrepresenting "the identity, qualifications, present position or other fact concerning the candidate or other opponent."

The drafters of the 2007 Code noted the difference and explained that their purpose was to broaden the prohibition: "Although the 1990 Code language was specific, its precise reach was unclear. The new language used in the proposed Code is established in the law of libel and slander." [75] Note that this pithy statement makes two statements, both of which are dubious. First, the precise reach of Canon 5A(3)(d)(ii) was clear. It applies to charges a candidate makes about an opponent in an election.

Secondly, the ABA, in its new language in Rule 4.1(A)(11), admits that it is incorporating the law of libel and slander into political campaigns. The problem is that when a sitting judge or candidate makes a statement about his political opponent, he is making a political statement in the course of a political campaign. That is the heart of First Amendment speech. [76] The state has made the decision to select judges by political campaigns, not merit selection. Once it decides to use political campaigns, it is hard for the state to take the politics out of politics—which is what it would do if it adopted this provision of the ABA Model Judicial Code as a law governing judges.

The Comments accompanying this section are even less sympathetic to the requirements of the First Amendment. The ABA warns that Rule 4.1(A)(11) obligates a judicial candidate and its campaign committee "to refrain from making statements that are false or misleading, *or that omit facts necessary to make the communication considered as a whole not materially misleading*." [77] Now, the ABA is incorporating in political discourse the restrictions of Rule 10b-5 of the Securities laws. [78] Voting for a candidate is different than deciding whether to buy the stock of Microsoft. The Court has made clear that political speech is different than speech involving commercial transactions. When the purchaser is buying stock or toothpaste, the government has more power to regulate. [79] This ABA Comment rejects all that and argues that a judicial disciplinary commission may discipline a judge if the commission decides that a campaign slogan was too pithy and should have included "*facts necessary to make the communication considered as a whole not materially misleading*." [80]

Many states limit the content of what a judge may say in the campaign, even though the state has chosen political elections as the method to select its judges. To regulate the content of a campaign is like trying to take the politics out of politics. Once the state makes the decision to conduct an election for an office, even a judicial office, the First Amendment comes into play to protect speech that is at the core of free speech rights. [81]

Rule 4.1(A)(12) [82] provides that the judge or judicial candidate may not make any statement that a reasonable person would expect to affect the outcome or impair the fairness of a matter pending or impending in any court. The Rules also obligate the judge to require similar abstention on the part of court personnel subject to his direction and control. [83] Rule 4.1(A)(12) repeats the prohibition of Rule 2.10(A), but this repetition is not redundant because Rule 2.10(A) only applies to sitting judges, not candidates.

Once again, the Comments add significantly to the scope of Rule 4.1(A)(12). First, they tell us that judges (as long as they do not violate this Rule) may "respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case." [84] The judicial candidate's response must be "factually accurate." Here, the Comment does not add the requirement that this "factually accurate" statement must not "omits facts necessary to make the communication considered as a whole not materially misleading." [85] And, this statement must not otherwise violate Rule 4.11(A)(11), (12), & (13).

The Comment does not explain why it is preferable for the judge to have someone else speak on his behalf if the attacks relate to a pending case. Elsewhere, Rule 4.1(B) [86] provides that the judge must take reasonable measures to make sure that other persons do not, on behalf of the judge or judicial candidate, do that which the judge or judicial candidate cannot do directly herself. If she cannot make the statement herself, it would be wrong to sue a surrogate. If the judge can make this statement herself, why should she use a surrogate?

The Comment also does not explain why the judge (either directly or through someone else) should speak outside of the record. If the case is pending in the trial court, the judge could respond in court, on the record, to any charges that anyone might make. If the case is on appeal, and someone attacks the judge's opinion, one wonders why the judge did not anticipate and answer the arguments in his opinion. Nonetheless, this Comment clearly authorizes the judge to reply outside the record and defend his reputation.

Another Comment clears up a confusion that exists in the black letter of Rule 4.1(A)(12). Rule 4.1(A)(12) prohibits judicial candidates from making comments "that might impair the fairness of pending or impending judicial proceedings." [87] The Comment makes clear that this restriction does not apply to "arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter." [88]

Hence, a lawyer who is running against a judge may criticize the judge's handling of a case, even though the case is still pending. For example, the candidate may say, "The intermediate appellate court just reversed Judge Smith again, because of his racist

comments during sentencing." Although the case is still pending—the state Supreme Court has yet to rule on it, or the case may be remanded for resentencing—the lawyer can make this comment on a pending case and not violate Rule 4.1(A)(12).

### § 10.4-4.1(d) Pledges, Promises, or Commitments Inconsistent with the Judge's Adjudicative Duties

#### § 10.4-4.1(d)(1) Introduction

Rule 4.1(A)(13) [89] states that, in connection with cases, controversies, or issues that are likely to come before the court, the judge or judicial candidate may not make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office. This prohibition raises significant First Amendment problems, which led to the ABA redrafting it in response to litigation. Let us first review the litigation that has led up to the 2007 version of Rule 4.1(A)(13)

#### § 10.4-4.1(d)(2) Judicial Political Speech, Free Speech, and the Road to *Republican Party of Minnesota v. White*

The predecessor to Rule 4.1(A)(13) was Canon 5A(3)(d)(i). For many years, Canon 5 of the 1990 Model Judicial Code, like its predecessor, Canon 7 of the 1972 Model Judicial Code, imposed restrictions on judicial candidates' speech. In particular, Canon 5A(3)(d)(i) of the 1990 Code forbade candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." [90]

Minnesota had a similar Canon with two parts. One rule prohibited a judicial candidate or judge from making "pledges or promises" on how he will rule in a particular case. A second rule of judicial ethics prohibited a candidate for judicial office from "*announcing*" a view on any "disputed legal or political" issue if the issue might come before a court. This second clause prohibited a candidate's "mere statement," even if he did not bind himself to maintain that position after election. The Supreme Court invalidated that second clause on free speech grounds, in 2002, in *Republican Party of Minnesota v. White*. [91] The case did not challenge the first clause. The next section discusses that case.

A harbinger of things to come was the Seventh Circuit, in *Buckley v. Illinois Judicial Inquiry Board*. [92] This case invalidated, on free speech grounds, an Illinois Rule based on an earlier version of Canon 5A(3)(d)(1). The Court held that a state rule prohibiting judicial candidates from making pledges or promises of conduct in office and from announcing views on disputed legal or political issues violated the First Amendment.

Although the state had a legitimate interest in preserving the impartiality of those elected to judicial office, the rule reached far beyond the speech that one could reasonably interpret as committing the candidate in a way that would compromise impartiality if he or she succeeded in the election. The clause dealing with "disputed legal or political issues" was too broad and unconstitutionally vague. In the particular facts of this case, one of the litigants (a sitting judge) had distributed campaign literature *truthfully* claiming that he had never reversed a rape conviction.

#### § 10.4-4.1(d)(3) *Republican Party of Minnesota v. White*

*Buckley* was the precursor to *Republican Party of Minnesota v. White*. [93] Minnesota, like more than 75 percent of the states, chooses judges through popular elections. Rules of judicial conduct limit the candidates' speech. One rule (which this case did not challenge) prohibited a judicial candidate or judge from making "pledges or promises" on how he will rule in a particular case. A second rule of judicial ethics prohibited a candidate for judicial office from "announcing" a view on any "disputed legal or political" issue if the issue might come before a court. This clause prohibits a candidate's "mere statement" even if he "does not bind himself to maintain that position after election." In this case, Justice Scalia, writing for five members of the Court, held that this second prohibition on judicial candidates violates the First Amendment.

Once the state chooses to select its judges by election, can it then decide to restrict what the candidates say, if the candidates are speaking truthfully? Can the state determine that the voters must decide among the candidates but that the candidates may not tell the voters why they should cast their votes for them? The United States Supreme Court answered these questions in *Republican Party of Minnesota v. White*, and rejected Minnesota's restrictions.

In that case, a candidate for judicial office, as well as various political groups, including the Republican Party of Minnesota, sued state boards and offices who were responsible for establishing and enforcing judicial ethics. They alleged that the portions of Minnesota Supreme Court's Canon of Judicial Conduct that prohibited candidates for judicial election from "announcing" their views on disputed legal or political issues violated the First Amendment. The U.S. Supreme Court agreed.

*White* is important not merely because it decided the question before the Court, but also because it embraced a judicial methodology that favors a more active review of state regulations of judicial campaign speech. The Court's opinion and the questions during oral argument also suggest that several of the justices view restrictions on campaign speech as a form of incumbent protection legislation. Both (1) the Court's use of strict scrutiny for this type of speech, and (2) the belief of some of the justices that incumbents devise campaign restrictions as a form of job security portend a difficult future for rules regulating campaign speech. [94]

Campaign speech is well within the essence of the First Amendment, but judicial elections are different in that judges are supposed to decide cases on merit, not because of interest groups, pressure politics, and polling data. [95] On the other hand, if a state requires that its judges win popular elections, to some degree, the judicial candidates must assume the burden of political campaigns. Like ham and eggs, or eggs and cholesterol, elections and campaign speech go together. Even if the state ameliorates the effects of political campaigns by requiring only nonpartisan elections for judges, there will still be elections and that means campaign speeches. [96]

*Republican Party of Minnesota v. White* [97] considered constitutional challenges to the Minnesota Code of Judicial Conduct. That Code, like the ABA Model Code of Judicial Conduct, places various limits on the candidates' speech when the state selects its judges by election. Historically, these restrictions on judicial campaign speech are of relatively recent origin. [98]

At that time, the ABA Model Judicial Code did not have the "announce" provision, but the Minnesota state Supreme Court said that its "announce" provision was intended to be similar to another provision of the pre-2003 ABA Model Judicial Code. That provision prohibited judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." [99]

Minnesota claimed that its "announce clause" was really the same as the ABA "commit or appear to commit" clause. Thus, the Minnesota Supreme Court placed limitations upon the scope of the announce clause that, in the words of the U.S. Supreme Court, "are not (to put it politely) immediately apparent from its text." [100] The Court accepted this remarkable piece of plastic surgery and still proceeded to invalidate this clause, even with the newly-discovered limitations on its breadth. Hence the Court decided the case as if it were deciding the "commit or appears to commit" provision.

In *Republican Party of Minnesota v. White*, [101] Justice Scalia, writing for five members of the Court, held that this second prohibition on judicial candidates violates the First Amendment. In order for the announce clause to survive strict scrutiny, it must be narrowly tailored to serve a compelling state interest. And, in order to be narrowly tailored, it must not "'unnecessarily circumscrib[e] protected expression.'" [102] The Minnesota rule did not meet this rigorous test.

The announce clause was not narrowly tailored to promote "impartiality," in the sense of no bias for or against any party to the proceeding, because it did not restrict speech for or against particular parties, but rather speech for or against particular issues. If the state meant to promote "impartiality" in the sense of no preconception for or against a particular legal view, that is not a compelling state interest, the Court said, because it is both "virtually impossible," and also not desirable, to find a judge who does not have preconceptions about the law. [103] Indeed, the Minnesota Constitution specifically requires judges to be "learned in the law." [104]

Nor did the Minnesota announce clause promote impartiality in the sense of "open-mindedness," as it was very underinclusive for that purpose. [105] For example, the rule allowed a judge to confront a legal issue on which he had already expressed an

extra-judicial opinion while on the bench. The Minnesota Code of Judicial Conduct, in fact, encourages judges to speak out on disputed legal issues outside the context of adjudication, such as in classes that they conduct, in books, and in speeches. [106]

The Minnesota rule prohibited a judicial candidate from saying, "I think it is constitutional for the legislature to prohibit same-sex marriage." Yet she could say the very same thing up until the very day before she declares herself a candidate. If she was already a judge and running for reelection, she could make that statement repeatedly (until litigation is pending). The Court concluded that the announce clause is so underinclusive that to believe its purpose is to promote open-mindedness is "a challenge to the credulous." [107]

Justice Kennedy's concurrence effectively summarizes principles that this case embraced. It says that what Minnesota may not do is "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State." [108]

Justice Stevens filed a dissenting opinion in which Justices, Souter, Ginsburg, and Breyer joined. Justice Ginsburg also filed a dissenting opinion, in which Justices Stevens, Souter, and Breyer joined. It is interesting that Justice Breyer joined both opinions that would have upheld the Minnesota restrictions, given that Justice Breyer himself has made "promises" about how he would rule! In a speech to the American Bar Association, Justice Breyer explicitly "*promised*" that the Court (or, at least, he personally) never will treat foreign law as binding, even if he might cites it from time to time:

> "[I]n some of these countries, they're just trying to create these independent judicial systems to protect human rights and contracts and all these other things. And if we cite them sometimes, *not as binding, I promise, not as binding*, well, that gives them a little boost sometimes with their legislators, I might say. As I say, the Supreme Court of the United States, which you've heard of as citing us and we cite them sometimes, doesn't bind, but nonetheless it sort of gives them a little leg-up for rule of law and freedom, I say." [109]

### § 10.4-4.1(d)(3) Strict Scrutiny

What is important about *Republican Party of Minnesota v. White*, [110] is not only the conclusion that *White* reached but also the test that it applied in getting there. *White* explicitly adopted the strict scrutiny test with vigor, holding that those who seek to justify content-based restriction of speech by candidates for public office have the burden to prove that any restriction must be (1) narrowly tailored, to serve (2) a compelling state interest. The strict scrutiny test represents very active judicial review, which is why the Court often invalidates laws when it evaluates them using strict scrutiny. Hence, the Court's application of the strict scrutiny test is significant.

Oddly enough, the West headnotes on this point argue that there was only a plurality on this issue. One who would rely on these headnotes would think that a majority of the Court had rejected strict scrutiny:

Under the strict-scrutiny test, party challenging content-based restriction of speech by candidates for public office has the burden to prove that the restriction is (1) narrowly tailored, to serve (2) a compelling state interest. (Per Justice Scalia, with three justices concurring and one concurring in the result). [111]

These headnotes are, frankly, inaccurate. If one turns to the actual decision instead of the Cliff Notes version, it is clear that a majority of the Court holds that the proper test is strict scrutiny. The Court opinion says that it is a majority opinion and lists the names of the five justices who joined it. There were two concurring opinions, both labeled "concurring."

Neither of these Justices labeled their opinion as "concurring in part" or "concurring in the result." For example, Justice O'Connor, in her concurring opinion, makes her position unambiguous as she says simply: "I join the opinion of the Court. …" [112] Justice Kennedy, the only other concurring opinion, also makes it quite plain that he embraces the strict scrutiny test. First, he acknowledges that prior case law constitutes "authority for the Court to apply strict scrutiny analysis to resolve some First Amendment cases," [113] and that "the Court explains in clear and forceful terms why the Minnesota regulatory scheme

fails that test." That sentence is follows by the succinct statement: "So I join its opinion." [114] In other words, he is joining the majority because it uses "that test," i.e., strict scrutiny. It is hard to read that statement as really meaning, "I join in the result but not in the opinion."

One could read Kennedy's opinion as saying that he agrees that the opinion of the Court has followed the strict scrutiny test in a proper way, and that he joins that opinion in invalidating the law. But, if he had his druthers, he would apply an even stricter test than strict scrutiny: he would adopt a *per se* rule invalidating such campaign restrictions. In the sentence following the one just quoted, Justice Kennedy says: "I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests." [115] At a minimum, we still have a majority of the Court adopting strict scrutiny, but one of these Justices would prefer an even stricter standard that would simply ban state efforts to regulate the content of campaign speech. As Kennedy instructs us: "The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose." [116]

The Court's test of strict scrutiny may not be as strict as Kennedy's suggested alternative formulation, but it is strict nonetheless. Strict scrutiny will make it much harder for states to justify restrictions on judicial campaign speech, or any campaign speech for that matter.

The *White* decision, its method of analysis, and its invocation of the strict scrutiny test all point to the same conclusion—that the Court will be wary of campaign reform legislation that in practice is really incumbent protection legislation. To an extent, campaigning and electioneering is becoming a regulated industry, but one where and the regulators are the incumbents. The Court is aware of the self-interest, whether conscious or unconscious, of those who do the regulating, and *White* may be signaling that the Court will not grant the deference to these regulators that it grants in situations not implicating the First Amendment.

The First Amendment (as applied to the states through the Fourteenth Amendment) does not allow judges to impose restrictive rules that try to take the politics out of political campaign speech. If states choose to elect judges instead of appointing them, that choice limits the subsequent power of the state to regulate the judicial elections. Hence, *White* may lead states to reconsider the election of judges and move more to the federal model of merit selection. But even if the states do that, the long shadow of *White* remains, for the majority opinion adopts a template that uses strict scrutiny to analyze campaign laws that restrict speech—and that template imposes a heavy burden on advancing the restriction.

### § 10.4-4.1(d)(4) Incumbent Protection Legislation

During the course of the oral argument before the Supreme Court in *Republican Party of Minnesota v. White*, [117] the justices revealed their concern that the judicial restrictions appear to be designed less to protect voters and more to protect incumbent judges from criticism from their challengers. The restrictions on what judicial candidates could say in the course of a political campaign were, in practice, one-sided. Incumbent judges when writing their majority opinions, concurrences, or dissents were free to say whatever they wanted in terms of criticizing their colleagues, explaining how they would have ruled, why their view is correct, and so forth. The Minnesota rule restricting judicial campaign speech also did not apply to dictum, even when judges knew that newspapers would likely quote that dictum.

The opinion of the Court does not delve into motives behind the incumbent judges adopting ethics rules that apply to challengers in a different way than they apply to sitting judges. But, in the oral argument, at least one justice was more candid and blunt. That justice said:

> And what we end up with at the end of the day is a system where an incumbent judge can express views in written opinions, and perhaps otherwise, as well, and yet a candidate for that office is somehow restricted from discussing the very same thing in the election campaign. That's kind of an odd system, designed to what? Maintain incumbent judges, or what? [118]

### § 10.4-4.1(d)(5) The Response to the *White* Case: the 2007 Model Code

Following *Republican Party of Minnesota v. White*, [119] the ABA amended Canon 5A(3)(d) at its August 2003 annual meeting so that it then read that the judge "shall not,"—

> "(i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or
>
> "(ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent …." [120]

Although these sections impose some limits, Canon 5A(3)(e) also allowed the candidate to respond to personal attacks or attacks on his record. [121]

The Canons, as revised, and the 2007 Judicial Code, do not specifically address the issue of candidates responding to opinion polls, interviews, or questionnaires. [122] The Canons do not prevent a candidate from promising to improve court administration. And an incumbent judge may make "private statements" to other judges or court personnel in performance of judicial duties. The fact that the drafters believed that they needed to specifically approve of a judge making *private* statements in the performance of their judicial duties is amazing. It suggests that restriction is the general rule, and the rule is so restrictive that it must contain language to allow an exception of private statements.

The revised Canon goes on to say that in any public statement, a candidate "should emphasize" the candidate's duty to uphold the law regardless of one's personal views. [123] The Comment also makes clear that the judicial candidate can make "pledges or promises respecting improvements in court administration."

It is clear that the judicial candidate (whether seeking election or appointment) may not properly state: "Elect me, and I will favor high verdicts in personal injury lawsuits, no matter what the law provides." Of course, that restriction is reasonable. The issue is how far the state may go in restricting.

In 2007, the ABA revamped these sections. The main provision is Rule 4.1(A)(12). The judge or judicial candidate (unless Rules 4.2, 4.3, 4.4, or another law says otherwise), may not:

> in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

The Rule defines "impartial" to mean "the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." [124]

This Canon is substantively identical to Canon 5A(3)(d)(i), after the ABA revised it in response to *Republican Party of Minnesota v. White*. [125] The Reporters' Explanation of Changes to Rule 4.1 advises that a—

> judge or candidate who announces his or her personal views on a matter that is likely to come before the court does not compromise impartiality unless the announcement demonstrates a closed mind on the subject, or includes a pledge or a promise to rule in a particular way if the matter comes before the court. [126]

That test—"demonstrates a closed mind"— indicates that the Rule will impose very few restrictions on judges.

A Comment to the new Rule describes the fundamental difference between a pledge, promise, or commitment, which Rule 4.1(A)(13) prohibited, and "statements or announcements of personal views," which the Rule protects and the ABA acknowledges are constitutionally protected. [127] The distinction does not turn on using any specific words or phrases. The test is

whether a "reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result." [128] Rule 4.1 does not prohibit "statements or announcements of personal views on legal, political, or other issue." [129]

This Comment advises the judge or judicial candidate to issue a caution when he or she makes statements or announcements of personal views: "When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views." [130] It remains to be seen if a disciplinary authority will seek to discipline a judge or candidate who does not accompany her comments with a equivalent of a caveat or warning label.

The Reporters' Explanation of Changes has a more succinct and precise test that Courts should find helpful. Personal statements (which the Rule permits) "*will not interfere with future decision making*," while improper pledges and promises (which the Rule does not permit) "commit a judge or judicial candidate to decide a future case in a particular way. A prohibited pledge or promise concerns future decision making." [131]

The Comments do make clear that the judge may make campaign promises related to judicial organization, administration, and court management. For example, the candidate may promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. "A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse." [132]

The candidate should be able to promise to vote a particular way regarding a court rule (e.g., a rule of evidence making it less difficult for rape victims to testify in court). However, the Comment does not offer that example, although it fits in with the examples that the Comment does give—examples relating to judicial work does not involve deciding a particular case in a preordained way.

After *Republican Party of Minnesota v. White*, [133] Pennsylvania amended its Judicial Code to take out the language "appears to commit." [134] Then, the Pennsylvania Court publicly reprimanded and placed on probation a judge, who campaigned for office by making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," and making "statements that commit the candidate with respect to cases, controversies, or issues that are likely to come before the court …." [135] Judge Singletary said to a small group wearing the colors of a motorcycle club:

> "There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. I got some stuff that I got to do, but if you all can give me twenty ($20) dollars you 're going to need me in Traffic Court, am I right about that?" And,
>
> Now you all want me to get there, you 're all going to need my hook-up, right? [136]

The Court also disciplined the judge for personally soliciting and accepting campaign funds.

### § 10.4-4.1(d)(6) Judicial Questionnaires and Judicial Recusal

In the aftermath of *Republican Party of Minnesota v. White*, [137] voting groups and interest groups have asked candidates for judicial office to respond to questionnaires. Often, these questions go beyond the physical plant and amenities of the courthouse. [138]

Some lower courts and advisory opinions have allowed judges to answer these questionnaires without fear of discipline or future disqualification, [139] but other courts have avoided reaching these issues.

The ABA Model Judicial Code avoids this issue. It recognizes that community organizations and special interest groups request judges to fill out questionnaires or to sit for interviews on disputed or controversial legal or political issues. Rule 4.1(A)(13), it advises, "does not specifically address judicial responses to such inquiries." A particular response might amount to a commitment to perform the adjudicative duties of office other than in an impartial way." Hence, it advises that "candidates

who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected." If a candidate chooses not to respond, she might explain that there is a "danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification." [140]

The Reporters' Explanation adds several important reminders. First, the Code of Judicial Conduct of any state governs judges, not voters. Each voter can decide what will persuade him to vote for or against any candidate. Second, candidates can decide for themselves if they will or will not answer. But the law cannot prevent candidates from answering "as long as their answers take the form of constitutionally protected statements and announcements of personal views, and do not constitute pledges and promises about future decision making." And, third, judicial candidates can refuse to answer, "with or without giving reasons." [141]

### § 10.4-4.1(e) Judicial Surrogates

Rule 4.1(B) [142] simply requires that the judge or candidate undertakes reasonable measures to make sure that "other persons do not undertake, on behalf of the judge or judicial candidate, any activities" that Rule 4.1(A) prohibits.

As applied to employees of the judge or judicial candidate, the judge's duties under Rule 4.1(B) should be easy to implement. The judge (or candidate) should not ask his employees to do that which Rule 4.1(A) forbids him from doing directly. If an employee decides to be a free spirit and volunteer to do that which the judge may not do, then the judge should instruct the employee not to do him any such favors.

The application of this Rule is less clear to members of the judge's family. The judge should not ask family member to do that which the judge may not do under Rule 4.1(A). However, if the family member (or a friend of the family) is truly a volunteer, it is difficult to see how this requirement of undertaking reasonable measures will be subject to any realistic enforcement mechanism. It is not that simple for a judge to control all the members of his or her family, as any parent with teenagers can attest. The judge can merely ask, which is all that Rule 4.1(B) can mandate.

### § 10.4-4.1(f) Constitutional Restrictions on Judges' Speech When (1) They Are Not Speaking in Their Judicial Capacities, and When (2) They Are Speaking on the Bench, in Their Judicial Capacities

#### § 10.4-4.1(f)(1) Restrictions on a Judges' Speech While Off the Bench

The decisions granting First Amendment rights to judges waging political campaigns for office bring us to a more general question, the extent to which the state may restrict the speech of its judges on and off the bench. It is to those questions that we now turn. First, let us examine the extent to which the Constitution limits the state when it is restricting the speech of judges when they are not on the bench.

The American Bar Association's Model Code of Judicial Conduct, and hence the codes of the states that derive their law from the ABA Judicial Code, have various (and often vague) restrictions on the extra-judicial speech and conduct of judges, as discussed above.

An analysis of the state cases and lower federal court cases suggests that some lower court judges do not even attempt to balance societal interests in placing some limits on the speech of judges with societal interests in free speech. [143]

Indeed, in some cases, even a judge subject to discipline does not raise any First Amendment challenge to the restrictions applied to him. Consider, for example, *In re Bonin*. [144] The court there held that a judge violated a Judicial Code when he attended a public meeting that included a lecture by Gore Vidal on "Sex and Politics in Massachusetts." At this meeting, the judge heard comments about a case pending in the superior court. That case was *not* before this judge, but he was chief judge of the superior court. The state had indicted the defendants in the criminal case for alleged sexual acts between men and boys.

The Court said that this judge should have known that the purpose of the public meeting was to raise money for the criminal defendants. In addition, by attending this public meeting, Judge Bonin "not only exposed himself to *ex parte* or one sided statements and argumentation on matters before his court, but further compromised his position by seeming to favor or have particular sympathy with the views of the partisan group which sponsored the affair." [145] The Massachusetts Supreme Judicial Court acknowledged that normally "any judge would be entirely free to attend a public lecture about sex and politics whether or not sponsored by a 'gay' group." [146] Yet that court unanimously held that Judge Bonin's actions were improper and justified his suspension and censure.

However, Judge Bonin had not been assigned to hear the criminal case at issue and would make no ruling regarding it, so the reference to hearing "one sided argumentation" was not particularly relevant. When Judge Bonin was sitting on the bench, he made no comments regarding the case, as it was not before him. And when Judge Bonin was off the bench (at the large public meeting), he made no remarks or comments about the case. "While it is true that his attendance at the meeting might cause some to infer his support for the cause, it is at least equally likely that it would be interpreted as being motivated by curiosity or interest in the remarks of the well-known featured speaker." [147]

In contrast, *In re Gridley* [148] refused to discipline a trial judge who had written letters to the editor and an article in his church newsletter expressing his opposition to capital punishment (though the judge did state that he would follow the law as written). However, it is disquieting to note that while the Supreme Court of Florida refused to discipline the judge, the opinion did have a dissent, and even the majority said that Judge's Gridley's statements on the death penalty were "close to the dividing line." [149]

### § 10.4-4.1(f)(2) Restrictions on a Judge's Speech While On the Bench

The First Amendment offers protection to judges even while they are acting in their capacity as judges. [150] However, the contours of this protection are affected by the fact that judges also have special obligations not assumed by ordinary people who do not assume the station of a judge. For example, if the judge, while acting in his or her capacity as judge, espouses racial bigotry, the judge is exercising no First Amendment privilege that would immunize the judge from discipline. [151]

Some courts, dominated by people with no strong sense of humor, have even disciplined judges for writing memoranda in limerick form. [152] Although these appellate judges do not seem to appreciate the whimsical or droll, other judges, including U.S. Supreme Court Justices, have engaged in puns or other forms of humor, with no one even suggesting that such behavior was improper. [153]



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 The Rules define "judicial candidate" to include "any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office." 2007 Code, Terminology, ¶13.

2 The 2007 Code makes clear that it governs nonjudges who are judicial candidates. *E.g.*, 2007 Code, Preamble, ¶3. The 1990 Code also made the same point, e.g., Canon 5E.

3 ABA Model Rules of Professional Conduct, Rule 8.2(b).

4 2007 Code, Terminology, ¶13. 1990 Code, Terminology, ¶3.

5 2007 Code, Rule 4.3. 1990 Code, Canon 5B, which applies only to "candidates seeking *appointment* to judicial or other governmental office." (emphasis added). And, Canon 5C only applies to "judges and candidates subject to public *election*." (emphasis added).

6 *E.g.*, Code of Conduct for United States Judges, *reprinted in* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf (Effective July 1, 2009) & 28 U.S.C.A. §§ 47.

7 2007 Code, Rule 4.1(B) derives from parts of the 1990 Code, Canon 5A(3)(a) and Canon 5A(3)(b).

8 2007 Code, Rule 4.1(A)(1) is substantially the same as the 1990 Code, Canon 5A(1)(a).

9 2007 Code, Terminology, ¶22.

10 1990 Code, Canon 5A(1), Comment 3.

11 2007 Code, Rule 4.1(A)(2) is identical to the 1990 Code, Canon 5A(1)(c).

12 2007 Code, Rule 4.1(A)(3) is almost identical to the 1990 Code, Canon 5A(1)(b).

13 2007 Code, Rule 4.1(A)(3) is substantially the same as the 1990 Code, Canon 5A(1)(b).

14 2007 Code, Rule 4.1, Comment 4. 2007 Code, Rule 4.2(B)(3).

15 2007 Code, Rule 4.1, Comment 1.

16 2007 Code, Rule 4.1, Comment 2.

17 2007 Code, Terminology, ¶13.

18 In re Hecht, 213 S.W.3d 547, 550 (Tex. Spec. Ct. Rev.2006).

19 1990 Code, Canon 5A(1), Comment 5.

20 Rule 4.1, Comment 6.

21 *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 146 (1992). A Harlan law clerk recalled: "One day, at breakfast, the Justice casually remarked that he had never voted since he became a judge. It was wrong, he thought, for a member of the Supreme Court to think of himself as a Democrat or Republican, even for the minute it took to cast a ballot." Bruce A. Ackerman, [Untitled], in JOHN MARSHALL HARLAN II: REMEMBRANCES BY HIS LAW CLERKS (Norman Dorsen & Amelia Ames Newcomb, eds., 2001) (not paginated), *cited in*, Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore*, 16 GEORGETOWN J. LEGAL ETHICS 375, 442 (2003).

22 2007 Code, Rule 4.1, Comment 6.

23 2007 Code, Rule 4.1, Comment 3.

24 2007 Code, Rule 4.1, Comment 5.

25 The corresponding provision of the 1990 Code is Canon 5(A)(1)(b).

26 In re Hecht, 213 S.W.3d 547, 550 (Tex. Spec. Ct. Rev.2006).

27 2007 Code, Rule 4.1(A)(4) is almost identical to the 1990 Code, first clause of Canon 5A(1)(e).

28 Rule 4.4(A).

29 2007 Code, Rule 4.1(A)(5) is similar to the 1990 Code, second clause of Canon 5A(1)(e).

30 Rule 4.2(B) allows candidates for *elective* judicial office, no earlier than [a certain time that each state should insert] to purchase these tickets. Rule 4.2(B)(4) is similar to the 1990 Code, Canon 5C(1)(a)(i).

31 There is no corresponding provision in the 1990 Code to Rule 4.1(A)(6).

32 There is no corresponding provision in the 1990 Code to Rule 4.1(A)(7).

33 Reporters' Explanation of Changes to Rule 4.1, at 59 (ABA 2007).

34 Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005).

35 *Compare* Minnesota State Bar Ass'n v. Divorce Education Associates, 300 Minn. 323, 219 N.W.2d 920, 922 (1974). The state bar association sought an injunction against individuals for unauthorized practice of law. The Court held that in that civil action, membership in the same bar association would not in itself disqualify a judge from hearing the case on a theory he was "impliedly biased."

36 416 F.3d 738, 755–60. *See also* 416 F.3d. at 755:

> "In the case of a political party involved in a redistricting dispute, for example, the fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an 'R' or 'D,' or 'DFL' (denoting Minnesota's Democratic-Farmer-Labor Party) after his or her name."

37 Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).

38 608 F.3d 974, 983-84, quoting ABA Model Code of Judicial Conduct Rule 4.1 Comment 4.

39 608 F.3d 974, 987.

40 608 F.3d 974, 987.

41 Rule 4.1(A)(8) derives from the 1990 Code, first two sentences of Canon 5C(2). The new Rule makes some changes in terminology and applies only to solicitation of campaign contributions, while the former Canon also covered soliciting "publicly stated support."

42 Terminology, ¶5. *See also* Rule 4.4, Comment 1.

43 Reporters' Explanation of Changes to Rule 4.1, at 59 (ABA 2007).

44 *E.g.*, Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002). Carey v. Wolnitzek, 2006 WL 2916814 at *29 (E.D. Ky. Oct. 10, 2006). Kansas Judicial Watch v. Stout, 440 F. Supp.2d 1209, 1237 (D. Kan. 2006).

45 Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005).

46 416 F.3d 738, 765.

47 416 F.3d 738, 764–65 (internal citations omitted).

48 Weaver v. Bonner, 309 F.3d 1312 (11th Cir.2002).

49 309 F.3d at 1322–23.

50 In re Singletary, 967 A.2d 1094, 1097, 2008 WL 5539786, *3 (Pa. Ct. Jud. Disc. 2008).

51 In re Singletary, 967 A.2d 1094, 1096, 2008 WL 5539786, *2 (Pa. Ct. Jud. Disc. 2008). It was a mitigating factor that Singletary was not a lawyer at the time and had not had the opportunity to attend any classes required for magisterial district judges once they are elected. 967 A.2d at 1101–02, 2008 WL 5539786, *7.

52 Rule 4.1(A)(9) is almost the same as the 1990 Code, the last sentence of Canon 5C(2).

53 Rule 4.1(A)(10) is new. It really is encompassed within the principle of the 1990 Code, Canon 2B, which prohibits the judge from using the prestige or trappings of judicial office to advance his own personal interest.

54 2007 Code, Terminology, ¶13.

55 1990 Code, Canon 5(A)(1)(b).

56 Rule 4.1, Comment 4.

57 Rules 4.2(B)(2), 4.2(B)(3).

58 *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.7 (Thomson-West, 4th ed. 2007) (6 volumes).

59 *See* Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 560–61 (1988).

60 In 1987, former Chief Justice Warren Burger testified in favor of Judge Robert Bork during Bork's Supreme Court confirmation. Bob Egelko, *Questions Raised About Having Judges Testify*, SAN FRANCISCO CHRONICLE, Jan. 13, 2006, at A7. Various other federal judges appeared as witnesses for William Rehnquist in 1971, Sandra Day O'Connor in 1981, and Clarence Thomas in 1991. *Id*. While the Senate Judiciary Committee was conducting its hearings on Sam Alito, other judges were testifying at hearings involving state judges. The confirmation hearing for California Supreme Court nominee Carol Corrigan "included supporting testimony from three former judicial colleagues, including a current federal judge, Martin Jenkins, and a state Supreme Court justice, Ming Chin." *Id*. Corrigan had invited all three to testify. The Senate confirmed all of these judicial nominees (except for Robert Bork). *Id*.

61 *See* Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 HOFSTRA L. REV. 1337, 1369–70 (2006).

62 See discussion in Bob Egelko, *Questions Raised About Having Judges Testify*, SAN FRANCISCO CHRONICLE, Jan. 13, 2006, at A7.

63 *E.g.*, Justice Blackmun's opinion in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530, 546–47, 556–557, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), (reversing *National League of Cities v. Usery*, 426 U.S. 833, 856, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)), in which Blackmun had concurred).

*See also* United States v. Gooding, 25 U.S. (12 Wheat.) 460, 478, 6 L.Ed. 693 (1827) (Justice Story explaining his rejection of his own former opinion: "My own error, however, can furnish no ground for its being adopted by this Court, in whose name I speak on the present occasion.").

64 *Compare* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (arguing that convictions should not be reversed when the "worst that can be said is that a policeman placed a bit too much credence on the reliability of an informer"), *with* Williams v. Adams, 436 F.2d 30, 35, 38–39 (2d Cir. 1970) (Friendly, J., dissenting) (arguing that a writ of habeas corpus should have been granted to the defendant when an officer's cause to stop a car was based solely on what an unnamed informer had said).

The Second Circuit vindicated Judge Friendly (the Judge, not the author) when, en banc, it reversed the panel decision, in Williams v. Adams, 441 F.2d 394, 394 (2d Cir. 1971) (per curiam). But the U.S. Supreme Court agreed with Henry Friendly, the author, and not Henry Friendly, the judge, and it reversed the Second Circuit. Adams v. Williams, 407 U.S. 143, 149, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

65 Justice Jackson concurred in McGrath v. Kristensen, 340 U.S. 162, 176, 71 S.Ct. 224, 95 L.Ed. 173 (1950), even though the view he took in that case was contrary to his opinion as Attorney General. Registration of Aliens Under Selective Training and Service Act, 39 OP. ATT'Y GEN. 504, 505 (1940).

66 In re Hecht, 213 S.W.3d 547, 550 (Tex. Spec. Ct. Rev.2006).

67 213 S.W.3d at 573.

68 Justice Hecht "provided reporters and interviewers with factual information about Miers' background and experience, including information about her views on religion and abortion and his own personal relationship with her." In addition, beyond this factual information, Justice Hecht "repeatedly expressed his opinion that the Miers' appointment was 'great,' 'solid,' 'strong,' and that after the American people had been given a chance to review her record, they were 'going to herald this nomination as a good one.' When asked about the opposition to Miers' nomination during an interview reported by the Washington Post, Petitioner replied that he believed that Miers' detractors were 'going to be happy as clams' after they learned more about her. When asked by another interviewer about the need to prove the President's 'case' in favor of the Miers' nomination, Petitioner agreed that a 'case has to be made,' but went on to claim that a 'case has been made in Texas for the last 30–plus years. We think of her as a hero down here already.'" In re Hecht, 213 S.W.3d 547, 557 (Tex. Spec. Ct. Rev.2006). *See also* 213 S.W.3d at 555.

69 213 S.W.3d 547, 550–51.

70 In re Hecht, 213 S.W.3d 547, 572, *citing* Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 223, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989).

71 213 S.W.3d at 573.

72 213 S.W.3d 547, 574.

73 213 S.W.3d at 573.

74 2007 Code, Rule 4.1(A)(11) derives from the 1990 Code, Canon 5A(3)(d)(ii), although there are substantial revisions.

75 Reporters' Explanation of Changes to Rule 4.1, at 60 (ABA 2007).

76 *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.6 (Thomson-West, 4th ed. 2008) (6 volumes).

77 Rule 4.1, Comment 7 (emphasis added).

78 3 Fed. Reg. 8183, Dec. 22, 1948, as amended at 16 Fed. Reg. 7928, Aug. 11, 1951, 17 C.F.R. § 240.10b-5. The SEC promulgated Rule 10b-5 pursuant to § 10(b) of the Securities & Exchange Act of 1934, 15 U.S.C.A. § 78j(b).

79 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 20.26–20.31 (Thomson-West, 4th ed. 2008) (6 volumes).

80 Rule 4.1, Comment 7 (emphasis added).

81 Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224 (7th Cir.1993), invalidated various restrictions imposed on judicial campaign speech. A case rejecting this viewpoint (a case *that* Buckley viewed as being "distinguishable, although precariously"), is Stretton v. Disciplinary Board, 944 F.2d 137 (3d Cir.1991). The Supreme Court sided with *Buckley*. *See* Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), discussed below.

82 2007 Code, Rule 4.1(A)(12) is new. It is very similar to the 1990 Code, the first sentence of Canon 3B(9), but that Canon does not apply to nonjudges who are candidates for a judgeship.

83 Rule 4.1(B).

84 Rule 4.1, Comment 9.

85 Rule 4.1, Comment 7 imposes that requirement on judicial candidates. One might argue that the requirements of Comment 7 are implied. However, Comment 8, when it says that the response must be "factually accurate," explicitly incorporates the requirements of 4.11(A)(11), (12), & (13.) It makes no mention of Comment 7.

86 2007 Code, Rule 4.1(B) derives in parts of the 1990 Code, Canon 5A(3)(a) and Canon 5A(3)(b).

87 Rule 4.1, Comment 10. Note that the actual Rule does not say, "*might* impair." It says, "*would* reasonably be expected to affect the outcome or impair …." (emphasis added).

88 Rule 4.1, Comment 10.

89 2007 Code, Rule 4.1(A)(13) is almost the same as the 1990 Code, Canon 5A(3)(d)(i).

90 The ABA Judicial Code, Canon 5A(3)(d), prior to the August 2003 changes, read as follows. The judge or judicial candidate:

> "(d) shall not:
>
> "(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> "(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

"(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent."

**COMMENTARY**

"[1] Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the ABA Model Rules of Professional Conduct."

91 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

92 Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224 (7th Cir.1993).

93 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

94 *See* Ronald D. Rotunda, *Judicial Campaigns in the Shadow of Republican Party v. White*, 14 THE PROFESSIONAL LAWYER 2 (ABA, No. 1, 2002); Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION LAW JOURNAL 79 (No.1, 2003).

95 *See* Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEORGETOWN J. LEGAL ETHICS 127 (2001).

96 If the arguments for regulating campaign speech fail in the case of judicial campaign speech—where any state interests in regulating political speech should be at their apex—then *Republican Party v. White* casts a long shadow that will extend beyond the rules governing judicial elections. *See* Reid Chambers & Ronald D. Rotunda, *Reform of the Presidential Nominating Conventions*, 56 VA. L. REV. 179 (1970); Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 TEXAS L. REV. 935 (1975).

97 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

98 Throughout the 19th and the first quarter of the 20th century, there appear to have been *no* restrictions on statements by judicial candidates (including judges). Judicial elections were generally partisan during this period. The trend towards nonpartisan judicial elections did not begin until the 1870's. *See* Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176–177 (1980); MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 4, 7 (Quorum, 1987).

99 ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii). The ABA, in the 1972 version of its Model Code, had an "announce clause," but, because of First Amendment concerns, dropped it and replaced it with the "appear to commit" language. *See* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50 (ABA, 1992). Minnesota refused to adopt the ABA's new formulation, but at oral argument contended that its "announce" clause was really the same as the ABA provision it earlier had specifically refused to adopt:

"At oral argument, respondents argued that the limiting constructions placed upon Minnesota's announce clause by the Eighth Circuit, and adopted by the Minnesota Supreme Court, render the scope of the clause no broader than the ABA's 1990 canon. Transcript of Oral Argument 38. This argument is somewhat curious because, based on the same constitutional concerns that had motivated the ABA, the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions, declined. Final Report of the Advisory Committee to Review the ABA Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 5–6 (June 29, 1994), reprinted at App. 367–368. The ABA, however, agrees with respondents' position, Brief for ABA as Amicus Curiae 5. We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question."

536 U.S. at 773 n.5, 122 S.Ct. at 2534 n.5.

100 536 U.S. at 771, 122 S.Ct. at 2532.

101 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

Subsequently, Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005), *cert. denied*, Dimick v. Republican Party of Minnesota, 546 U.S. 1157, 126 S.Ct. 1165, 163 L.Ed.2d 1141 (2006), on remand from the U.S. Supreme Court, the Eight Circuit held, *en banc*, that the partisan-activities and solicitation clauses of Canon 5 of the Minnesota Supreme Court's canons of judicial conduct also violate the First Amendment. The Eight Circuit noted that the Supreme Court's remand required it to consider two issues in light of *White*: "the constitutional viability of the partisan-activities and solicitation clauses of Canon 5." 416 F.3d 738, 744–45. It did so and entered summary judgment in favor of the Republican Party.

Canon 5A(1) and 5B, the partisan-activities clause, stated, in relevant part:

> Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not: (a) identify themselves as members of a political organization, except as necessary to vote in an election; … (d) attend political gatherings; or seek, accept or use endorsements from a political organization.

Canon 5B(1)(a) provided that "[a] judge or a candidate for election to judicial office may … speak to gatherings, other than political organization gatherings, on his or her own behalf."

The solicitation clause stated, Section 5B(2):

> A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

416 F.3d at 745.

102 536 U.S. at 774, 122 S.Ct. at 2535, quoting Brown v. Hartlage, 456 U.S. 45, 54, 102 S.Ct. 1523, 1529, 71 L.Ed.2d 732 (1982).

103 536 U.S. at 776, 122 S.Ct. at 2530.

104 Minn. Const., Art. VI, § 5.

105 536 U.S. at 776, 122 S.Ct. at 2530

106 Minn. Code of Judicial Conduct, Canon 4(B) (2002) stated: "A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law. …" The Comment to Minn. Code of Judicial Conduct, Canon 4(B) adds: "To the extent that time permits, a judge is *encouraged* to do so. …" (emphasis added).

107 536 U.S. at 780, 122 S.Ct. at 2537.

108 536 U.S. at 794, 122 S.Ct. at 22545 (Kennedy, J., concurring), *citing* Brown v. Hartlage, 456 U.S. 45, 60, 102 S.Ct. 1523, 1532, 71 L.Ed.2d 732 (1982). Justice O'Connor also filed a concurring opinion. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Ginsburg, J., filed a dissenting opinion, in which Stevens, Souter, and Breyer, JJ., joined.

Justice Ginsburg's dissent argued: "In view of the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office." 536 U.S. at 807, 122 S.Ct. at 2551 (Ginsburg J., dissenting).

109 Steven Breyer, speech, ABA Annual Meeting, "Is the Independence of the Judiciary at Risk?" Aug. 9, 2005, http://www.abanet.org/media/docs/judiciary debatetrans8905.pdf, at p. 13 (emphasis added).

110 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

111 36 U.S. at 765, 122 S.Ct. at 2528, headnote [2]. West emphasizes this point in its next headnote:

> "In order for party challenging content-based restriction of speech by candidates for public office to show that restriction is narrowly tailored under the strict scrutiny test, party must demonstrate that restriction does not unnecessarily circumscribe protected expression. (Per Justice Scalia, with three justices concurring and one concurring in the result)." 536 U.S. at 765, 122 S.Ct. at 2528, headnote [3].

112 536 U.S. 765, 788, 122 S.Ct. 2528, 2542 (O'Connor, J., concurring).

113 536 U.S. at 792, 122 S.Ct. at 2544 (Kennedy, J., concurring).

114 536 U.S. at 792, 122 S.Ct. at 2544 (Kennedy, J., concurring).

115 536 U.S. at 793, 122 S.Ct. at 2544 (Kennedy, J., concurring).

116 536 U.S. at 793, 122 S.Ct. at 2544 (Kennedy, J., concurring).

117 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

118 Republican Party of Minnesota v. Kelly, 2002 WL 492692, 70 USLW 3612 (2002), U.S. Oral Argument, Mar 26, 2002, transcript at pp. 34–35.

119 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

120 ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(i), (ii). The August 2003 ABA revisions also changed the accompanying Comment so that it now reads:

> "Section 5A(3)(d) prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9) and (10), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the ABA Model Rules of Professional Conduct."

121 Assuming that this response did not violate Canon 5A(3)(d). Similar language is now in Rule 4.1, Comments 8 & 9.

122 2007 Code, Rule 4.1, Comment 15.

123 Canon 5A(3)(d), Comment 1.

124 2007 Code, Terminology, ¶8.

125 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

126 Reporters' Explanation of Changes to Rule 4.1, at 60 (ABA 2007). The introductory language to the Reporters' Explanation of Changes as a whole also warns:

> "The 'Reporters' Explanations of Changes' have not been approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been drafted by the Commission's Reporters, based on the proceedings and record of the Commission, solely to inform the ABA House of Delegates about each of the proposed amendments to the Model Code prior to their being considered at the ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF THE MODEL CODE." (All capitalizations in the original.)

Reporters' Explanation of Changes, at 1 (ABA 2007).

127 Rule 4.1, Comment 13.

128 Rule 4.1, Comment 13.

129 Rule 4.1, Comment 13.

130 Rule 4.1, Comment 13.

131 Reporters' Explanation of Changes to Rule 4.1, at 62 (ABA 2007) (emphasis in original).

132 Rule 4.1, Comment 14.

133 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 69 (2002).

134 On July 22, 2008 the Supreme Court of Pennsylvania amended the Rule by deleting the words "or appear to commit." The Court decided that those words were an unconstitutional impairment of free speech after Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002). *See* 207 Pa. Code Ch. 51, Magisterial Doc. No. 1; No. 246, 38 Pa. B. 4353. The Pennsylvania Supreme Court had earlier (on March 17, 2008) amended Canon 7B(l)(c) of the Pennsylvania Code of Judicial Conduct by deleting the words "or appear to commit" from the Canon. 20 Pa. Code Ch. 33, No. 317 Judicial Administration Doc, No. 1, 38 Pa. B. 1445.

135 In re Singletary, 967 A.2d 1094, 1097, 2008 WL 5539786, *3 (Pa. Ct. Jud. Disc. 2008).

136 In re Singletary, 967 A.2d 1094, 1096, 2008 WL 5539786, *2 (Pa. Ct. Jud. Disc. 2008). It was a mitigating factor that Singletary was not a lawyer at the time and had not had the opportunity to attend any classes required for magisterial district judges once they are elected. 967 A.2d 1101–02, 2008 WL 5539786, *7.

137 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).

138 North Dakota Family Alliance, Inc. v. Bader, 361 F.Supp.2d 1021, 1027–28 (D.N.D.2005). The "voter's guide" questionnaire submitted to North Dakota judicial candidates, including items asking candidate to agree or disagree with statements such as: "I believe that the North Dakota Constitution does not recognize a right to homosexual sexual relationships." Or, "Should the code of Judicial Conduct for judges include protection of people on the basis of sexual orientation?" Or, "I believe that the North Dakota

Constitution does not recognize a right to abortion." The Court held that judicial canons preventing judicial candidates from speaking about issues likely to come before court were unconstitutional. Also, the state constitutional provision and Judicial Canon requiring recusal of a judge where there is conflict of interest were constitutional.

Indiana Right to Life, Inc. v. Shepard, 507 F.3d 545 (7th Cir. 2007). The Court held that an anti-abortion organization lacked standing to challenge, as violating their First Amendment right to listen, the constitutionality of the "pledges" and "commitments" clauses of the Indiana Canons of Judicial Conduct. This clause prohibited judicial candidates from making pledges or promises of conduct in office other than the impartial performance of their judicial duties, and from making statements that commit or appear to commit a candidate with respect to cases or issues likely to come before the court. There were no judicial candidates who were otherwise willing speakers whom the Canons constrained. Two candidates who answered the questionnaire submitted by the organization stated that they had no fear of disciplinary action for doing so. The state did not attempt to enforce the Canons against the candidates who answered the questionnaire. None of the candidates who declined to answer the questionnaire stated that they refused to answer because of the Canons. The Court reversed the decision of the district court, which had held that Canon 5A(3)(d)(i) and (ii) was unconstitutional.

139 *See* Wolfson v. Brammer, 2007 WL 2288024, *1 (D. Ariz. 2007). The court noted that on September 12, 2006, Plaintiff wrote the Arizona Judicial Ethics Advisory Committee requesting a formal advisory opinion and inquiring whether the Code on Judicial Conduct prohibited him from voicing his opinion on Proposition 107 as well as from discussing his views on disputed legal and political issues. The Committee issued its Advisory Opinion 06-05 on October 23, 2006. It provided that "[a] judicial candidate may publicly discuss his or her personal opinion of an initiative measure or other political subject … because a candidate may express views on any disputed issue." The opinion cites to *Republican Party of Minnesota v. White* to support its conclusion. It also withdrew Opinion 96-11, which had prohibited judges from responding to political questionnaires or surveys.

Kansas Judicial Watch v. Stout, 440 F.Supp.2d 1209, 1234 (D.Kan.2006) held that portions of the Kansas Code of Judicial Conduct, generally forbidding judicial candidates from making pledges and promises, and forbidding them from committing as to issues likely to come before court, as applied to prevent candidates from answering political action committee's questionnaire, violated the candidates' speech rights. The Court denied a motion for a stay pending appeal in, Kansas Judicial Watch v. Stout, 455 F.Supp.2d 1258 (D.Kan.2006).

140 Rule 4.1, Comment 15.

141 Reporters' Explanation of Changes to Rule 4.1, at 62 (ABA 2007).

142 2007 Code, Rule 4.1(B) derives from the 1990 Code, Canon 5A(3)(a) and Canon 5A(3)(b).

143 J. Scott Gary, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?*, 57 WASH.L.REV. 119 (1981); STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES (American Judicature Society 1984); Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW.U.L.REV. 983 (1985); Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L.REV. 1181 (1986); Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech and Other Intemperate Conduct*, 1986 ARIZ.ST.L.J. 379 (1986); Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TULANE L.REV. 611 (1987); Steven Lubet, *The Search for Analysis in Judicial Ethics or Easy Cases Don't Make Much Law*, 66 NEB.L.REV. 430 (1987); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 U.C.L.A. L. REV. 207 (1987); William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TULANE L.REV. 109 (1987); Robert F. Copple, *From the Cloister to the Street*, 64 DENVER U.L. REV. 549 (1988); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEORGETOWN J. LEGAL ETHICS 589 (1989); Steven Lubet, *Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment*, 2 GEORGETOWN J. LEGAL ETHICS 665 (1989); JEFFREY SHAMAN, STEVEN LUBET & JAMES ALFINI, JUDICIAL CONDUCT AND ETHICS, §§ 6.01–6.08, 10.30 (Michie Pub. 2d ed.,1990); Abbie Baynes, *Judicial Speech: A First Amendment Analysis*, 6 GEORGETOWN J. LEGAL ETHICS 81 (1992); 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.42(d) (Thomson-West, 4th ed. 2008) (6 volumes).

144 In re Bonin, 375 Mass. 680, 378 N.E.2d 669 (1978).

145 378 N.E.2d at 683.

146 378 N.E.2d at 683.

147 STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 44 (American Judicature Society 1984).

148 In re Gridley, 417 So.2d 950 (Fla.1982).

149 417 So.2d at 954.

150 *See, e.g.*, Stanley Mosk, *Judges Have First Amendment Rights*, 2 CALIF. LAWYER 30 (Oct.1982); Elizabeth I. Kiovsky, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201 (1986); PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS (American Judicature Society 1990); Mark R. Riccardi, *Code of Judicial Conduct Canon 7B(1)(c): An Unconstitutional Restriction on Freedom of Speech*, 7 GEORGETOWN J. LEGAL ETHICS 153 (1993); Daniel J. Burke, *Code of Judicial Conduct Canon 7B(1)(c): Toward the Proper Regulation of Judicial Speech*, 7 GEORGETOWN J. LEGAL ETHICS 181 (1993).

151 Stanley Mosk, *Judges Have First Amendment Rights*, 2 CALIF. LAWYER 30 (Oct.1982); Abbie Baynes, *Judicial Speech: A First Amendment Analysis*, 6 GEORGETOWN J. LEGAL ETHICS 81, 104–16 (1992).

152 In re Rome, 218 Kan. 198, 542 P.2d 676 (1975). *See also* State ex rel. Commission on Judicial Qualifications v. Rome, 229 Kan. 195, 623 P.2d 1307 (1981), *cert. denied*, 454 U.S. 830, 102 S.Ct. 127, 70 L.Ed.2d 108 (1981), *rehearing denied*, 454 U.S. 1094, 102 S.Ct. 662, 70 L.Ed.2d 633 (1981).

153 *E.g.*, Stevens, J., dissenting in Maine v. Taylor, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986), *on remand*, 802 F.2d 441 (1st Cir.1986). This case involved a state prohibition on the importation of live bait fish from out of state. Stevens said, "There is something fishy about this case." 477 U.S. at 152, 106 S.Ct. at 2454.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.4-4.2 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.4. Canon 4 Extra-Judicial Activities

§ 10.4-4.2 Rule 4.2

## § 10.4-4.2(a) The Text of Rule 4.2

The text of Rule 4.2 provides:

**RULE 4.2.** ***Political and Campaign Activities of Judicial Candidates in Public Elections***

**(A) A judicial candidate* in a partisan, nonpartisan, or retention public election* shall:**

**[*Ed. Note:** "Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. Terminology, ¶13.

**[*Ed. Note:** "Public election" includes primary and general elections, partisan elections, nonpartisan elections, and retention elections. Terminology, ¶23.**]**

**(1) act at all times in a manner consistent with the independence,* integrity,* and impartiality* of the judiciary;**

**[*Ed. Note:** "Independence" means that the judge is free "from influence or controls other than those established by law."Terminology, ¶11

**[*Ed. Note:** "Integrity" means "probity, fairness, honesty, uprightness, and soundness of character."Terminology, ¶12

**[*Ed. Note:** "impartially" mean there is the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."Terminology, ¶8.**]**

**(2) comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction;**

**(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and**

**(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1.**

**(B) A candidate for elective judicial office may, unless prohibited by law,* and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general or retention election:**

**[*Ed. Note:** "law" includes "court rules as well as statutes, constitutional provisions, and decisional law."Terminology, ¶15.**]**

**(1) establish a campaign committee pursuant to the provisions of Rule 4.4;**

**(2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;**

**(3) publicly endorse or oppose candidates for the same judicial office for which he or she is running;**

**(4) attend or purchase tickets for dinners or other events sponsored by a political organization* or a candidate for public office;**

**[*Ed. Note:** "Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by Rule 4.4. Terminology, ¶22**]**

**(5) seek, accept, or use endorsements from any person or organization other than a partisan political organization; and**

**(6) contribute to a political organization or candidate for public office, but not more than $[insert amount] to any one organization or candidate.**

**(C) A judicial candidate in a partisan public election may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general election:**

**(1) identify himself or herself as a candidate of a political organization; and**

**(2) seek, accept, and use endorsements of a political organization.**

**Comment**

[1] Paragraphs (B) and (C) permit judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may not engage in these activities earlier than [insert amount of time] before the first applicable electoral event, such as a caucus or a primary election.

[2] Despite paragraphs (B) and (C), judicial candidates for public election remain subject to many of the provisions of Rule 4.1. For example, a candidate continues to be prohibited from soliciting funds for a political organization, knowingly making false or misleading statements during a campaign, or making certain promises, pledges, or commitments related to future adjudicative duties. See Rule 4.1(A), paragraphs (4), (11), and (13).

[3] In partisan public elections for judicial office, a candidate may be nominated by, affiliated with, or otherwise publicly identified or associated with a political organization, including a political party. This relationship may be maintained throughout the period of the public campaign, and may include use of political party or similar designations on campaign literature and on the ballot.

[4] In nonpartisan public elections or retention elections, paragraph (B)(5) prohibits a candidate from seeking, accepting, or using nominations or endorsements from a partisan political organization.

[5] Judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations.

[6] For purposes of paragraph (B)(3), candidates are considered to be running for the same judicial office if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election. In endorsing or opposing another candidate for a position on the same court, a judicial candidate must abide by the same rules governing campaign conduct and speech as apply to the candidate's own campaign.

[7] Although judicial candidates in nonpartisan public elections are prohibited from running on a ticket or slate associated with a political organization, they may group themselves into slates or other alliances to conduct their campaigns more effectively. Candidates who have grouped themselves together are considered to be running for the same judicial office if they satisfy the conditions described in Comment [6].

### § 10.4-4.2(b) Political and Campaign Activities of Judicial Candidates in Public Elections—General Principles

There are three main parts of Rule 4.2.[1] Rule 4.2(A) applies to all judicial candidates in any type of election—partisan, nonpartisan, or retention election. Elections include primary as well as general elections.[2]

It provides, in general, that the judicial candidate must act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary.[3] This admonishment and general catchphrase—the independence, integrity, and impartiality of the judiciary—appears repeatedly in the Model Code.[4]

Secondly, the Model imposes (as a requirement of judicial ethics) that the judicial candidate must comply with all the applicable fund-raising and election laws of the jurisdiction.[5]

Third, the judicial candidate must review and approve the content of all of her campaign statements and any materials that her campaign committee produced, before she or her committee disseminated them.[6] The old saw, ignorance is bliss, cannot apply here because the Rules impose on the candidate the duty to inquiry.

And fourth, the candidate must take "reasonable measures" to make sure that other persons do not undertake, on behalf of the judicial candidate, any activities" that Rule 4.1 prohibits, except to the extent that Rule 4.4 applies. Rule 4.4 requires the judicial candidate to do certain things (solicit and solicit campaign contributions) only through her committee. Rule 4.2(A)(4) corresponds to Rule 4.1(B),[7] which is similar.

As applied to employees of the judge or judicial candidate, the judge's duties under Rule 4.2(A)(4) should be easy to implement. The judge (or candidate) should not ask his employees to do that which Rule 4.2(A)(4) forbids him from doing directly. If an employee decides to be a free spirit and volunteers to do that which the judge may not do, then the judge should instruct the employee not to do him any such favors.

The application of this Rule is less clear to members of the judge's family. The judge should not ask the family member to do that which the judge may not do under Rule 4.2(A)(4). However, if the family member (or a friend of the family) is truly a volunteer, it is difficult to see how this requirement of undertaking reasonable measures will be subject to any realistic enforcement mechanism. As any parent can attest, it is not that simple for a judge to control all the members of his or her family, particularly when they have left the home for their own abode. The judge can merely ask, which is all that Rule 4.2(A)(4) can mandate.

### § 10.4-4.2(c) Political and Campaign Activities of Judicial Candidates in Public Elections—Judicial Candidates for Elective Office

If the candidate is running for an elective judicial office, Rule 4.2(B)[8] authorizes the candidate to engage in certain activities that Rule 4.1(A) would otherwise prohibit. If the candidate is a sitting judge, then that judge comes under the restraints (and powers) of Rule 4.2(A).

First, there is the question of timing. Each jurisdiction picks the time when Rule 4.2(A) applies. Rule 4.2(B) states that candidates cannot engage in these activities earlier than this set time before the first applicable primary election, caucus, general election, or retention election begins.[9] For sake of convenience, let us call this set time (e.g., 6 months, 1 year, etc.), "close to the election."

Once the state sets the time, the candidate counts back from the time of the primary or election to determine what Rule 4.2 allows in this time period or time window. When the candidate is within this time window that is close to the election, Rule 4.2(B) authorizes the candidate to do all of the following.

FIRST, the candidate must establish a campaign committee pursuant to the provisions of Rule 4.4. The candidate needs to do that because, under the Model Judicial Code, the campaign committee is the only entity that can solicit or accept campaign contributions.

SECOND, the candidate can speak on behalf of her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature. [10] If only Rule 4.1(A) governed the candidate, she could not publicly endorse a candidate for any public office, [11] and could not even identify herself as a candidate of a political organization. [12]

THIRD, the candidate may publicly endorse or oppose candidates for the *same judicial office* for which he or she is running. [13] If Rule 4.1(A) governed, the candidate could not publicly endorse or oppose any candidate for any public office. [14]

Candidates are running for the "same judicial office" if they are competing for a single judgeship or if the election will fill several judgeships on the same court. [15] Although this Rule prohibits judicial candidates in nonpartisan public elections from running on a ticket or slate associated with a political organization, "they may group themselves into slates or other alliances to conduct their campaigns more effectively." The Rule considers candidates who group themselves together to be running for the same judicial office. [16]

FOURTH, candidates for an elective judicial office may attend or purchase tickets for dinners or other events that a candidate for public office or a political organization sponsors. [17] Recall that under Rule 4.1, the non-candidate cannot attend or purchase such tickets. [18]

FIFTH, candidates for an elective judicial office may seek, accept, or use endorsements from any person or organization *except* a *partisan* political organization. [19] In other words, in *nonpartisan* elections or retention elections, the candidate may *not* seek, accept, or use nominations and endorsements from partisan political organizations. [20]

In contrast, in *partisan* elections, the candidate may identify herself as a candidate of a political party and may seek, accept, and use endorsements of the political party. [21] For example, if Jane Smith is running as a Democrat for circuit judge in a partisan election, one would expect her to say, "The Democratic Party urges you to vote for Jane Smith, Democrat."

This provision, even given that it allows partisan political organizations to endorse in partisan campaigns, raises free speech issues. If the election is a retention election, the candidate may have originally won a partisan election. Limiting the candidate from accepting, using, or soliciting endorsements from an organization that can legally give the endorsement raises free speech issues.

For example, in *Weaver v. Bonner*, [22] the Court ruled on a Canon of the Georgia Code of Judicial Conduct that prohibits judicial candidates from personally soliciting campaign contributions and from personally soliciting publicly stated support. This Canon allowed the candidate's election committee to engage in these activities. Nonetheless, the Court held that this Canon violated the First Amendment. The state did not narrowly tailor it to serve Georgia's compelling interest in judicial impartiality. If these impartiality concerns exist, they occur because the State decided to elect judges publicly. "The fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected." [23]

*Republican Party of Minnesota v. White*, [24] held that the partisan-activities clause of Minnesota's canon of judicial conduct violated judges' association rights. This clause prevented judicial candidates from identifying themselves as members of political organization, attending political gatherings, and accepting political endorsements. We should expect continued litigation on this issue.

SIXTH, candidates for judicial office may contribute to a political organization or candidate for public office, but not more than a set amount (the State inserts a figure) to any one organization or candidate. [25] If the judge were not a candidate, then Rule 4.1 would prohibit the judge from contributing to any political organization or candidate for judicial office. [26]

### § 10.4-4.2(d) Political and Campaign Activities of Judicial Candidates in Public Elections—Judicial Candidates in Partisan Elections

Rule 4.2(C),[27] like Rule 2.4(B) has a time limit. The state designates a time limit (e.g., 6 months, 1 year, etc.) prior to first applicable primary election, caucus, or general election. Once this clock starts ticking, and unless other law provides to the contrary, the ethics rule provides that the judicial candidate in a *partisan* public election may do two things that the Rule denies to a candidate in a nonpartisan election. First, the candidate may identify himself or herself as a candidate of a political organization. And, second, the candidate may seek, accept, and use endorsements of a political organization.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 4.2, derives from the 1990 Code, Canon 5C. Rule 4.1 and Rule 4.2 adopt mainly stylistic and organizational changes.

2 2007 Code, Terminology, ¶23.

3 Rule 4.2(A)(1).

4 The Reporters' Explanation of Changes explains, "In the Commission's view, independence, integrity, and impartiality are *overarching, fundamental values* that the Rules promote …." Reporters' Explanation of Changes to Canon 1, at 7 (ABA 2007) (emphasis added) "The importance of judicial independence, integrity, and impartiality is underscored by the recurrence of the phrase throughout the Rules." *Id.*

Reporters' Explanation of Changes to Rule 3.1, at 33 (ABA 2007) "a judge's independence, integrity, and impartiality, rather than impartiality alone, is a theme that is prevalent in the Rules."

5 Rule 4.2(A)(2).

6 Rule 4.2(A)(3).

7 2007 Code, Rule 4.1(B) derives from the 1990 Code, Canon 5A(3)(a) and Canon 5A(3)(b).

8 2007 Code, Rule 4.2(B) derives from the 1990 Code, Canon 5C(1).

9 *See also* Rule 4.2, Comment 1.

10 Rule 4.2(B)(2).

11 Rule 4.1(A)(3).

12 Rule 4.1(A)(6).

13 Rule 4.2(B)(3).

14 Rule 4.1(A)(3).

15 Rule 4.2, Comment 6.

16 Rule 4.2, Comment 7.

17 Rule 4.2(B)(4).

18 Rule 4.1(A)(5).

19 Rule 4.2(B)(5).

20 Rule 4.2, Comment 4.

21 Rule 4.2(C).

22 Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

23 309 F.3d 1312, 1322–23 (11th Cir, 2002).

24 Republican Party of Minnesota v. White, 416 F.3d 738, 754 (8th Cir. 2005), *cert. denied, sub nom.* Dimick v. Republican Party of Minnesota, 546 U.S. 1157, 546 U.S. 1157, 126 S.Ct. 1165 (2006).

25 Rule 4.2(B)(6).

26 Rule 4.1(A)(4).

27 2007 Code, Rule 4.2(C) relates to the 1990 Code, Canon 5C(1), but the 2007 Code makes several distinctions discussed in the text.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.4-4.3 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.4. Canon 4 Extra-Judicial Activities

# § 10.4-4.3 Rule 4.3

## § 10.4-4.3(a) The Text of Rule 4.3

The text of Rule 4.3 provides:

**RULE 4.3. *Activities of Candidates for Appointive Judicial Office***

**A candidate for appointment to judicial office may:**
**(A) communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and**
**(B) seek endorsements for the appointment from any person or organization other than a partisan political organization.**

**Comment**

[1] When seeking support or endorsement, or when communicating directly with an appointing or confirming authority, a candidate for appointive judicial office must not make any pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. See Rule 4.1(A)(13).

## § 10.4-4.3(b) Activities of a Candidate Seeking Appointive Judicial Office

### § 10.4-4.3(b)(1) Introduction

With Rule 4.3, [1] the ABA offers rules to govern those who seek appointment to a judicial office.

About 20 to 25 percent of the states provide for merit selection, *i.e.*, appointment to state judgeship. In addition, all federal judgeships are appointed positions. Some states with elected judgeships allow judges to appoint other judges. In that sense, part of the system is an appointed system.

While the ABA Model Code of Judicial Conduct intends to cover these appointed systems, do appreciate the fact that in this area one should bear in mind that states and the federal system have their own rules, although sometimes a jurisdiction will derive its rules from the ABA Model Code.

### § 10.4-4.3(b)(2) Federal Nominees and the Supremacy Clause

It is unclear to what extent Rule 4.3 could govern candidates seeking appointment to the federal judiciary. State law, under the Supremacy Clause, must be subordinate to federal law. [2] Moreover, it is not state law but federal law that governs the procedure to appoint federal judges and discipline of federal judges. If Congress does not approve of this state regulation, and if the state law interferes with federal law, it is invalid under the Supremacy Clause.

### § 10.4-4.3(b)(3) Communicating with the Appointing or Confirming Authority

After the revisions in 2007, this section of the Model Rules imposes very few restrictions on what prospective appointees can do, in contrast to the 1990 Rules. [3]

The 2007 Rules make clear that the candidate for appointment may communicate with the "appointing or confirming authority." [4] The reference to "confirming authority" is to the U.S. Senate or any state body that would confirm nominees that the President, Governor, or other entity would appoint. [5] For example, the President, or the Governor, or state law, may create screen committees to evaluate candidates for a judgeship.

The necessity for this authorization to communicate seems obvious. Hence, it is appropriate for a candidate for the U.S. Supreme Court to talk to the President or his aides who vet or scrutinize the candidate, such as asking him if he has any skeletons in his closet. Similarly, the Senate Judiciary Committee will have hearings on the candidate, who can respond to questions. Nominees may talk to individual Senators as well. [6]

### § 10.4-4.3(b)(4) Seeking Endorsements

Rule 4.3 also allows the candidate for appointment to see endorsements, subject to one restriction. The candidate may "seek endorsements for the appointment from any person or organization other than a partisan political organization." [7] The Reporters' Explanation says that the purpose of this section is to expand the ability of a candidate to seek endorsements. [8]

There is little law interpreting these sections, although they seem to authorize a great deal of contact between, for example, the judicial candidate and the appointing authority or third parties. In the movies, the President of the United States may pick the next Chief Justice out of a universe of all the lawyers in the United States, but it is more likely that some people position themselves so that when lighting strikes, they are more likely to catch the sparks by holding the golf iron.

The Federal Committee on Codes of Conduct of the U.S. Judicial Conference concerning the appointment of magistrate judges suggests that:

> The magistrate judge may not advise attorneys and parties that the comment period is open and that they can make comments on the reappointment. No matter how well intentioned the magistrate judge might be in providing the information to attorneys and parties, there is a significant risk that they might feel pressured to comment favorably on the magistrate judge who is presiding over their case. Under Canon 2, a judge may not take advantage of the judicial office to promote personal interest. Any such action by a magistrate judge would run a significant risk of creating the appearance of impropriety. [9]

This language covers situations where the federal magistrate asks lawyers and parties currently appearing before him to make comments to the panel considering his reappointment. One wonders why the magistrate may "not advise attorneys and parties" what is the simple truth—that they can make comments on his or her reappointment. If the magistrate does not know the content of those conversations, how can there be any appearance of impropriety? The magistrate is simply telling the truth.

This comment does not touch on what is a common practice—-judicial candidates or judges seeking appointment to another government office (such as appointment to a higher judicial office) asking lawyers or parties to communicate their thoughts to the appointing authority. [10] That practice should not raise concerns simply because a judge tells the parties or lawyers appearing before him to communicate their views to another authority. The people can do that without the judge's invitation, and the judge does not need to know what they said.

If lawyers who say nice things can cause a judge's recusal—what the Federal Committee calls "a significant risk of creating the appearance of impropriety"—, then lawyers who say bad things about a judge should definitely cause his recusal. Yet, if that were the rule, any lawyer could create a permanent preemptory challenge against a judge simply by testifying against him during the confirmation process or at the confirmation hearing (or saying nasty things about him during an election campaign). The

lawyer who decides to create this right to recuse a judge whom he does not like will also create a niche practice, for other lawyers can hire this lawyer when they decide that they want to prevent this particular judge from being on the panel. That is not the law.

It is not unusual for judges seeking elevation to a different court to ask his or her supporters to speak to the right officials, or to support or acquiesce in a letter-writing campaign. [11] Similarly, it is not uncommon for an organization such as the ACLU, NAACP, or ABA, to tell a Senator, "Judge X is a great judge and deserves to be elevated." Or, "Lawyer Y is great lawyer and should receive a Presidential appointment as a judge." It hardly can become wrong if the judge tells the ACLU or individuals that he would appreciate their vocal support. [12]

Assume the judge said: "You are appearing before me; tell my home Senator what you think of me as a judge, and your views of my nomination to the Court of Appeals, and be sure to send a copy to me." That might raise a concern under the catch-all language in Rule 1.2 (and in the title of Canon 2) on avoiding the "appearance of impropriety" because of the addition of the phrase, "and be sure to send a copy to me."

It is quite a different matter when the judge merely tells the parties or lawyers the truth: "if you want to tell the Senator that you think I'd be a good appointment, please do so." Another way of looking at the matter is that what should be relevant is whether the judge is *threatening* the person or organization that is doing the communicating.

Rule 4.3(B) imposes a new restriction on the candidate seeking endorsements. A candidate for judicial appointment may seek endorsements from any organization or person "other than a *partisan political organization*." [13] The question is why the 2007 Code imposes this new restriction. Assume that a Democratic President appoints a lawyer to the Court of Appeals. This lawyer is a Democrat but has many friends in the local Republican Party for whom he has performed legal services. Why should it be unethical for the lawyer to solicit support from the local Republican Party? What policy does that restriction serve? We can be sure that if the local Republican Party thought that he was too partisan and ideological to be a judge, it would say so. If the Party has the contrary view, why should it not tell the Senate Judiciary Committee?

### § 10.4-4.3(b)(5) Making Pledges or Promises

Rule 4.3 imposes a second restriction on candidates. They may not "make pledges and promises that are inconsistent with the impartial performance of judicial duties …" [14] That makes sense. A judge running for election could not say, "vote for me and I promise to declare unconstitutional this new tax bill that the legislature has approved." The candidate for an appointed judgeship similarly may not promise the President, Senate Judiciary Committee, the Governor, or State Legislature, or whomever, "vote for me and I promise to declare unconstitutional this new tax bill that the legislature has approved."

Although the Senate may not extract such pledges from the nominee, it certainly can inquire about them to make sure that the nominee has not given such pledges to anyone else, in an effort to secure nomination, or an endorsement, or other support.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 4.3, corresponds, roughly to the 1990 Code, Canon 5B(2). Rule 4.5 deals with judges who become candidates for nonjudicial office, for example, a sitting judge runs for Governor.

2 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 1.64(a), 3.2 (Thomson-West, 4th ed. 2007) (6 volumes).

3 For example, in the 1990 Code, Canon 5B(1) provided that the candidate seeking appointment to a judicial office, or a judge seeking appointment to another government office, should not solicit funds to support his or her candidacy, either "personally or through a committee, or otherwise." The intent seems quite clear—to prohibit judicial candidates or judges seeking another government appointment from engaging in fundraising to secure a government appointment. The 2007 Code deletes this Canon.

4 Rule 4.3(A).

5 Reporters' Explanation of Changes to Rule 4.3, at 67 (ABA 2007).

6 Historically, nominees did not talk to individual Senators. In fact, it is only since World War II that the nominee would routinely appear before the Senate Judiciary Committee. Ronald D. Rotunda, *Innovations Disguised as Traditions: An Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123 (1995); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.7(d)(i) ("Evolution of the Confirmation Process"); § 2.7(d)(ii) ("Personal Appearances before Judiciary Committee"); § 2.7(d)(iv) ("Courtesy Calls on Senators") (Thomson-West, 4th ed. 2007) (6 volumes).

7 Rule 4.3(B).

8 The 1990 Code, Canon 5B(2)(a)(ii), allows the candidate for appointment to judicial office, or a judge seeking appointment to another judicial office, to "*seek support* or endorsement for appointment" from "organizations that *regularly* make recommendations," (e.g., the ABA Committee that examines judicial nominees) or from individuals "to the extent requested. …" (emphasis added). The 2007 Code removes the restriction that the organization must "*regularly* make recommendations."

The 1990 Code, Canon 5B(2)(a)(iii), also allowed the candidate for appointment to judicial office, or a judge seeking appointment to another judicial office, to "provide" information (apparently without being requested) to the individuals or organizations who appoint, nominate, screen, endorse, or support judicial candidates or judges who are candidates for another government office. The 2007 Code deleted this provision.

9 Committee on Codes of Conduct, Advisory Opinion No. 97(1999).

10 Reporters' Explanation to Rule 4.3 concedes "the realities of today's world" are such that "candidates almost universally seek the affirmative support of friends and allies with the appointing authority." Reporters' Explanation of Changes to Rule 4.3, at 68 (ABA 2007).

11 Second Circuit Judge Julius Mayer did that on behalf of then Federal District Judge Learned Hand in 1925. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 275–276 (Harvard University Press, 1994), which describes a letter writing campaign on behalf of Judge Hand's promotion to the Second Circuit. Should it have been the duty of Judge Hand to tell Judge Mayer to stop? If Judge Hand thinks that Judge Mayer would also be a fine appointment, can he engage in a similar letter writing campaign?

12 For an interesting article expressing concerns about using ethics charges to attack nominees, see Richard Painter, *Contracting Around Conflicts in a Family Business: Louis Brandeis and the Warren Trust*, 9 UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE 353 (2001) (discussing purported ethics violations raised at Justice Brandeis's confirmation hearings).

13 Rule 4.3(B) (emphasis added).

14 Rule 4.3, Comment 1.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.4-4.4 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.4. Canon 4 Extra-Judicial Activities

# § 10.4-4.4 Rule 4.4

## § 10.4-4.4(a) The Text of Rule 4.4

The text of Rule 4.4 provides:

**RULE 4.4. *Campaign Committees***

**(A) A judicial candidate* subject to public election* may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.***

**[*Ed. Note:** "Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.

**[*Ed. Note:** "Public election" includes primary and general elections, partisan elections, nonpartisan elections, and retention elections. Terminology, ¶23.

**[*Ed. Note:** "Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law.**]**

**(B) A judicial candidate subject to public election shall direct his or her campaign committee:**

**(1) to solicit and accept only such campaign contributions* as are reasonable, in any event not to exceed, in the aggregate,* $[insert amount] from any individual or $[insert amount] from any entity or organization;**

**[*Ed. Note:** "Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. Terminology, ¶3

**[*Ed. Note:** "Aggregate," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent. Terminology, ¶1**]**

**(2) not to solicit or accept contributions for a candidate's current campaign more than [insert amount of time] before the applicable primary election, caucus, or general or retention election, nor more than [insert number] days after the last election in which the candidate participated; and**

**(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding $[insert amount]. The report must be filed within [insert number] days following an election, or within such other period as is provided by law.**

**Comment**

[1] Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This Rule recognizes that in many jurisdictions, judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions.

[2] Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

[3] At the start of a campaign, the candidate must instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11.

### § 10.4-4.4(b) Creating Campaign Committees

Rule 4.4 [1] governs campaign committees that judicial candidates set up for election purposes. Rule 4.4 says that the judicial candidate "may establish a campaign committee" to manage and conduct the election campaign. But, in practice, this "may" is really means "must." That is because Rule 4.4(A)(8) forbids the judge from personally soliciting campaign contributions or accepting them; instead, the candidate must use the campaign committee. A "contribution" includes financial and in-kind contributions, such as goods, professional or volunteer services, advertising, or anything else that relieves the candidate of a financial expenditure. [2]

The candidate must assure himself or herself that the campaign committee complies with all the provisions of this Judicial Code and other law. [3] The Code recognizes that many jurisdictions have other law, sometimes detailed regulations, that govern campaign finance. Those laws override the requirements of the Judicial Code, including Rule 4.4. [4]

### § 10.4-4.4(c) Contribution Limits

The judicial candidate must instruct his committee only to accept contributions that are "reasonable" in amount, [5] and "appropriate under the circumstances." [6] The Code does not define either term. The Rule allows lawyers and parties who appear before the judge to contribute to the judge's campaign. However, the candidate should "instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office." [7]

In addition, the Committee must not accept contributions that exceed more than a set amount from any individual or entity. The ABA leaves the amount blank so that the jurisdiction can choose an amount. [8] The candidate, in determining the maximum amount that he can receive from any individual or entity, must consider the contributions in the "aggregate." [9]

Typically, states will impose a contribution limit of an amount that is not that high, e.g., $1,000. [10] If a party, a party's lawyer, or the law firm of a party has made a contribution in excess of those limits, the judge "shall disqualify himself or herself" in the proceeding. [11]

In addition to this statutory ground for disqualification, there is a constitutional/due process ground in more extreme cases. First, the judge must recuse himself if he has a "direct, personal, substantial pecuniary interest" in the case. [12]

In addition, the Supreme Court has decided that there is a constitutional dimension to campaign contributions. In *Caperton v. A.T. Massey Coal Co., Inc.* [13] the Court held (five to four) that there was a violation of due process because the Chief Justice of the state supreme court did not disqualify himself when the president and chief executive officer of the corporation appearing before him helped to win his election, by contributing some $3 million to his election campaign following the trial court's entry of a $50 million judgment against the corporation, at time when it was likely that the corporation would be seeking review in the West Virginia's Supreme Court of Appeals. The judge should have recused himself as matter of due process.

The problem with the rule in *Caperton* is that the CEO did *not* make a large *contribution* to the Chief Justice's political campaign. Instead, he made *independent expenditures*, which the Court has held are constitutionally protected. [14] As Chief Justice Roberts noted:

> It is true that Don Blankenship [the CEO] spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent*. [15]

Justice's Kennedy's majority opinion is short on specifics. His opinion offers no litmus test. Instead, he said:

> We conclude that there is a serious risk of actual bias-based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election. [16]

In the actual case, the "personal stake" of Blankenship, the CEO, was hardly significant. Although Blankenship was a principle officer of Massey—he was the Chairman, CEO, and President of Massey—his actual ownership interest was minor. Blankenship's wealth did not depend on his financial interest in Massey. He owned 0.35% of Massey's stock. If we were to pierce the corporate veil and assume that the proportional share of Caperton's damage claim against Massey came out of Blankenship's personal wallet, his share of the judgment in this case that was reversed by the West Virginia Supreme Court would be only $175,000. [17] It does not make any sense for him to engage in independent expenditures of $3 million of his own money in order to save $175,000.

Thus, we know that excessive contributions will require, as a matter of due process, that the judge recuse himself. As to whether this case will lead to other recusal motions, only time will tell. The majority did advise that it saw this case as "extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case." [18]

Courts may decide to revamp their disqualification rules in light of *Caperton*, although it is hard to create a bright-line rule when independent expenditures are so excessive that they require the recusal of the judge who had no control over those expenditures. Yet, expensive judicial campaigns are troublesome and *Caperton* is effort of the Court to limit what many people see as the corrosive effects of judicial campaign financing. [19]

The disqualification issues that *Caperton* raises relate to the Court's decision in *Citizens United v. Federal Election Commission*. [20] *Citizens United* held that *entities* such as corporations or unions have a constitutional right to make *independent* expenditures to favor or oppose candidates for elective office. In light of *Caperton*, must a judge now recuse herself if one of the parties spent money to support or oppose the judge or her opponent?

### § 10.4-4.4(d) Anonymous Contributions and Judicial Disqualification

Recall that the Judicial Code orders the candidate to direct his campaign committee "to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office." [21]

If the judge is not aware of the source of the contribution, it is logical to conclude that the anonymous contribution could not affect the judge in fulfilling her judicial duties, even if the anonymous source appears before the judge. That raises the next question: is the source really anonymous?

The 1972 Code prohibited the campaign committee from revealing the names of the contributors to the candidate unless other law required the candidate to file a list of his campaign contributors. Neither the 1990 Code nor the 2007 Code imposes such a restriction. The drafters made this change for two reasons. First, it is a fact of life that most jurisdictions now require the candidates to disclose the names of the contributors, so a secrecy provision is unrealistic. Second, the drafters thought that the judge should know the names of contributors in order to determine whether recusal is advisable. Even though campaign contributions of which a judge has knowledge are not prohibited, if they are made by lawyers or others who appear before the judge, they "may be relevant to disqualification under Section 3E." [22]

Solicitation of campaign funds raises a problem with no easy solution. Judges who run in elections need money. Unless the state provides the money, candidates must raise it, and the most likely source of funds are those most interested in judicial elections—the lawyers and the major litigants who appear before the courts. Generous financial gifts by the lawyers and litigants undoubtedly raise questions of partiality. In the multi-billion dollar *Pennzoil v. Texaco* case, the Texas state trial court judge received a $10,000 contribution from Pennzoil's chief trial attorney, "[w]ithin days of being assigned the Pennzoil case …." The trial judge described it as a "princely sum." [23] Texaco lost the case.

### § 10.4-4.4(e) Empirical and Anecdotal Evidence of Corruption

Judicial election contests are becoming more and more expensive. In Alabama, for example, the six candidates running for three seats on the state Supreme Court in November 1994 raised at least $3.2 million as of June 2004. [24] In Madison County, Illinois, a venue that many corporations think is too friendly to plaintiffs' law suits, the judges, who are among the most successful in the state in attracting political donations, are getting the biggest chunk of that money from just one side of the courtroom: the plaintiff attorneys. [25]

Critics are concerned that justice is for sale, [26] and polls show that the general public is also troubled. [27]

Intriguingly, the empirical evidence thus far is unable to establish a statistically significant link between litigants' campaign contributions to judges and their success in cases. Take Illinois for example. A study during the 1990s showed that the total amount of money that the contributor-litigants gave to the Illinois Supreme Court, when compared with the total amount of all campaign contributions that non-contributor-litigants gave, was not large: the contributor-litigants as a group gave only 6.6 percent of the money that the candidates raised. The amount that the judges gave themselves dwarfed the amount that the contributor-litigants gave them. In other words, the judicial candidates contributed to their own campaigns two and a half times as much as all of the contributions of the contributor-litigants. This "self-contribution" is significant because there is no risk of corruption when judicial candidates contribute to their own campaigns. The justices are not litigants before their own court, and they do not need to spend money to influence themselves.

In the eight-year period between 1991 and 1999, 34 percent of the cases that the Illinois Supreme Court heard involved a party, lawyer, or organization that made a campaign contribution to a Supreme Court justice in the prior election cycles. However, more than two-thirds of those cases involved public attorneys representing the state. These publicly employed lawyers do not work on contingent fees; they are not billing by the hour; and they do not worry about losing their client. When the state-employed contributors appeared before the court, they were more often on the losing side than the winning side of the case. [28]

If we remove publicly employed lawyers from the list of contributors to Illinois Supreme Court election campaigns, the percentage of cases before that court where a contributor-litigant made a campaign contribution drops to just 10.7 percent. And

when we turn to that 10.7 percent, we find that those contributors were more likely to be on the losing side than the winning side of the case. In other words, to the extent that there is a statistical correlation, it is negative.[29] Empirical studies of Michigan and Wisconsin also fail to establish a statistical correlation.[30]

On the other hand, the anecdotal evidence is different. When one contributor to the campaign funds of various justices of the Illinois Supreme Court learned that the Court was deciding tort cases in a way that he did not support, he was surprised. He said, "Had I known ahead of time that the candidates were going to take two-thirds of the cases and decide them in favor of [the defense], I would have donated the money to a good charity."[31]

Perhaps there may be a link between campaign contributions and the outcome of the decision in a particular case. In addition, the link between contributions and outcome may be different if one looks at trial courts. Empirical studies are, by nature, time-limited, that is, what is true today may not be true next year. And commentators and public remain worried about the appearance of impropriety.

### § 10.4-4.4(f) Time Limits

Politicians often talk about the perpetual or permanent campaign, or the never-ending campaign. It is common for legislators, governors, etc. to set up committees to solicit funds throughout the political career of the politician. Politicians may prepare for the next election as soon as the last one has ended, but the Model Judicial Code does not adopt that view of politics. The Judicial Code places a time limit. The campaign committee cannot solicit or accept campaign contributions until a certain time period shortly before the relevant primary election, caucus, general election, or retention election.

This time window opens a set number of days before the relevant election (the ABA offers no suggested time limit), and the time window closes a certain set number of days after the last election in which the judge participated.[32] Again, the ABA offers no suggested time limit. Each jurisdiction chooses what the time window will be.[33]

One may think that if a judge (who has just been elected to judicial office) solicits campaign funds *after* the election, the solicitation may smell of tribute sought from the lawyers who appear before her. The judge, after all, does not need the money to win the election because she has already been elected. Defeated candidates can also send out letters, but a lawyer would naturally have less incentive to curry favor with a person who has not been elected to a judgeship.

On the other hand, judges realize that soliciting contributions after the election has proven to be a useful means of securing necessary contributions. Thus, this Canon bows to the practically inevitable byproduct of selecting judges by election instead of by the merit system and allows such solicitation, though it requires that the judge's committee (and not the judge personally) solicit the funds. It also prohibits the use of campaign contributions for the private benefit of the candidate or others.[34]

### § 10.4-4.4(g) Independent Expenditures and Judicial Disqualification

The Model Code of Judicial Conduct regulates *contributions* to judicial campaigns,[35] but not *independent expenditures*, i.e., amounts that an individual spends to attack or embrace a candidate for judicial office. In *Caperton v. A.T. Massey Coal Co., Inc.*,[36] the Court (five to four) held that due process in some "extreme" circumstances require a judge to recuse himself if he would have a debt of gratitude to a party (or someone related to a party) who is very interested in a particular case and his support was crucial to the judge winning the campaign.

In *Caperton*, the CEO of A.T. Massey contributed $1,000 to Justice Benjamin's campaign much more in independent expenditures, which mainly criticized Benjamin's opponent, the sitting Justice who lost the race. Justice Kennedy, for the majority, explained what he viewed as the essential facts:

> In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship [CEO of A.T. Massey] donated almost $2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U.S.C. § 527. The § 527 organization opposed McGraw and supported Benjamin. Blankenship's

> donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over $500,000 on *independent expenditures*—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—"'to support … Brent Benjamin.'"
>
> … Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined. Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%). [37]

Under these circumstances, the Court held that due process required Justice Benjamin's recusal. On remand, the West Virginia Court (without Benjamin's participation) once again ruled in favor of A.T. Massey by a four to one vote. [38]

The majority concluded that, under all the circumstances, it agreed with Caperton that Blankenship's "pivotal role in getting Justice Benjamin elected" meant that Justice Benjamin would "feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected." [39]

### § 10.4-4.4(h) Personally Soliciting or Accepting Campaign Funds

Rule 4.4, Comment 1 makes clear, "Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions." In *Siefert v. Alexander*, [40] the state-court judge brought a civil rights claim under 42 U.S.A. § 1983 against the Wisconsin Judicial Commission's executive director and individual members, arguing, among other things, that a provision of the Wisconsin Code of Judicial Conduct that prohibited judges and judicial candidates from personally soliciting campaign contributions was unconstitutional.

The appellate court rejected this challenge and reversed the trial judge. It concluded that this ban on solicitation is constitutional because it is drawn closely enough to the state's interest in preserving impartiality and preventing corruption. It is a fact of life that lawyers largely fund judicial campaigns and many of whom will appear before the candidate who wins. "It would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution. Because the ban on direct solicitation of contributions by judicial candidates prevents corruption and preserves impartiality without impairing more speech than is necessary," [41] the court upheld it.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 2007 Code, Rule 4.4(A), derives from these parts of the 1990 Code, second sentence of Canon 5C(2), part of Canon 5C(4), and some of the commentary following Canon 5C(2). Rule 4.4(B)(1) derives from Canon 5C(3), with an element from Canon 5C(2). Rule 4.4(B)(2) derives from the fifth sentence of Canon 5C(2). Rule 4.4(B)(3) is based on Canon 5C(4), but includes a new reference to divestiture of campaign funds.

2 2007 Code, Terminology, ¶3

3 Rule 4.4(A), & Comments 2, 3.

4 Rule 4.4, Comment 1.

5 Rule 4.4(B)(1).

6 Rule 4.4, Comment 3.

7 Rule 4.4, Comment 3.

8 Rule 4.4(B)(1).

9 The Code defines "aggregate," to mean "not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent." Terminology, ¶1.

10 See, e.g., Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 258 (2010) (discussing limit in West Virginia).

11 ABA Model Code of Judicial Conduct, Rule 2.11(A)(4). See also Rule 4.4(A)(2) & Comment 3.

12 Tumey v. State of Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927):

> it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

13 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

14 See discussion in ROTUNDA AND NOWAK, TREATISE ON CONSTITUTIONAL LAW §§ 20.51(b), 20.51(b)(i), 20.51(b)(v), 20.51(d)(x)(4), 20.51(d)(x)(5) (4th ed.) (Thomson-West 4th ed. 2008) (6 volumes).

15 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2273, 173 L. Ed. 2d 1208 (2009) (Roberts, C.J., dissenting).

16 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2263-64, 173 L. Ed. 2d 1208 (2009).

17 Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 272 (2010).

18 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2265, 173 L. Ed. 2d 1208 (2009).

19 See the thoughtful discussion in, Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 295 (2010).

20 Citizens United v. Federal Election Commission, 558 U.S. 50, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

21 Rule 4.4, Comment 3.

22 Canon 5C(2), Comment 1.

23 Thomas Petzinger, Jr. & Caleb Solomon, *Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, WALL ST. J., Nov. 4, 1987, at 1, 20, col 2. *See also More of the Same*, FORBES, Sept. 7, 1987 at 8 (in the last 3 1/2 years all nine members of the Texas Supreme Court "openly accepted campaign contributions from lawyers with cases pending before them," which was then legal under Texas law).

24 Amy Sieckmann, *Supreme Court Candidates in State Breaking the Bank*, ANNISTON STAR, Sept. 20, 2004; Stan Bailey, *GOP has Funding Edge in Court Races*, BIRMINGHAM NEWS, Sept. 21, 2004.

25 Kevin McDermott, *Plaintiff Bar Gives Top Dollar to Judges' Campaigns*, ST. LOUIS POST DISPATCH, Sept. 20, 2004.

26 Avery v. State Farm, 216 Ill.2d 100, 835 N.E.2d 801 (2005), *cert. rev'd*, 547 U.S. 1003, 126 S.Ct. 1470, 164 L.Ed.2d 248 (2006). The State Supreme Court reversed a large judgment against an insurer. The plaintiff, in the certiorari petition, alleged that this reversal occurred after the defendant gave massive contributions to the campaign of the new justice who cast the deciding vote.

27 J. Barlow Herget, Op-ed, *It's Time for Judicial Reform*, CHARLOTTE (N.C.) OBSERVER, May 31, 2002: 84 per cent; of likely North Carolina voters surveyed were "concerned about how judges raise money for their elections." And, nearly three-quarters of the respondents (74 percent) believed that campaign contributions "influence judicial decisions." Daniel C. Vock, *Voters Leery On Judicial-Race Funding: Survey*, CHICAGO DAILY LAW BULLETIN (Oct. 25, 2000), at p.1: Survey showed that only 7 percent of Illinois voters believe that judicial rulings are "never influenced" by campaign cash. A poll during 2004-2005 revealed that more than 87 percent of Illinois voters believed that campaign contributors influence the judicial decisions in Illinois to at least some degree. Slightly over 50 percent said the term "fair and impartial" described Illinois judges very well or quite well; 55 percent described judges as "honest and trustworthy." Center for State Policy and Leadership at the University of Illinois at Springfield, Illinois Statewide Survey on Judicial Selection Issues 23 (Winter 2004–05), at http://www.ilcampaign.org/analysis/reports/2005.asp.

28 Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION L.J. 79 (No.1, 2003).

29 Ronald D. Rotunda, *Appearances Can Be Deceiving: Should the Law Worry About Campaign Money Looking Dirty When the Facts Show That the System's Clean?*, THE LEGAL TIMES, Sept. 15, 2003, at p. 84.

30 Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, 14 THE PROFESSIONAL LAWYER 16 (ABA, No. 2, 2003).

31 Quoted in, Daniel C. Vock, *Dem Majority Aside, High Court Leans Right*, CHICAGO DAILY LAW BULLETIN (Sept. 3, 2002).

32 Rule 4.4(B)(2).

33 The 1972 Judicial Code had recommended that a judge's campaign committee should solicit campaign funds no more than 90 days before a primary election. 1972 ABA Model Code of Judicial Conduct, Canon 7B(2).

34 2007 Code, Rule 4.4(B)(2), corresponds to the 1990 Code, Canon 5C(2). The 1990 Code suggests 90 days after the last election. The 2007 Code does not recommend a time limit.

35 ABA Model Code of Judicial Conduct, Rule 2.11(A)(4). *See also* Rule 4.4(A)(2) & Comment 3.

36 __U.S. __, 129 S.Ct. 2252, 173 L.Ed. 2d 1208 (2009).

37 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2257, 173 L. Ed. 2d 1208 (2009).

38 Caperton v. A.T. Massey Coal Co., Inc., 2009 WL 3806071, 690 S.E. 2d 322 (W. Va. 2009).

39 __U.S. __, __, 129 S.Ct. 2252, 2262.

40 Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).

41 608 F.3d 974, 990.

**End of Document**

Legal Ethics, Law. Deskbk. Prof. Resp. § 10.4-4.5 (2012-2013 ed.)

Legal Ethics - The Lawyer's Deskbook On Professional Responsibility
Database updated May 2012

Ronald D. Rotunda [a0], John S. Dzienkowski [a1]

X. The Ethical Obligations of a Judge
Chapter 10.4. Canon 4 Extra-Judicial Activities

# § 10.4-4.5 Rule 4.5

## § 10.4-4.5(a) The Text of Rule 4.5

The text of Rule 4.5 provides:

**RULE 4.5.** ***Activities of Judges Who Become Candidates for Nonjudicial Office***

**(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law* to continue to hold judicial office.**

**[*Ed. Note:** "law" includes "court rules as well as statutes, constitutional provisions, and decisional law."Terminology, ¶15.**]**

**(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.**

**COMMENT**

[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.

[2] The "resign to run" rule set forth in paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the "resign to run" rule.

## § 10.4-4.5(b) Judges Who Become Candidates for Nonjudicial Office

Sometimes judges become candidates for a nonjudicial office. For example, in 1979, President Jimmy Carter appointed George Mitchell to the United States District Court for the District of Maine. He left the bench when Maine's Governor appointed him to the U.S. Senate in 1980. [1]

Rule 4.5 [2] requires a judge to resign from judicial office if she becomes a candidate for a nonjudicial elective office. The rational for this "resign to run" requirement is that judge should not be able to use the prestige of judicial office to promote his or her candidacy. The resignation requirement also "prevents post-campaign retaliation from the judge in the event the judge is

defeated in the election." [3] In addition, voters expect a judge running for elective office to make promises and pledges. That is appropriate for nonjudicial elective offices, but not appropriate for a sitting judge. [4]

Note that the Rule only applies to the judge who is seeking a nonjudicial elective office. The Rule does not apply if the judge (state or federal) is seeking an elective *judicial* office. Nor does it exist if the judge is seeking an *appointive* nonjudicial office. The framers of this Rule believed that the dangers in such a situation "are not sufficient to warrant imposing the 'resign to run' rule." [5]

In addition, any sitting judge may become a "candidate" for an appointive non-judicial office merely because the Executive Branch is considering that judge for a position. For example, Justice Goldberg became U.N. Ambassador; Judge Thurgood Marshall became Solicitor General Marshall; Judge Kenneth Starr became Solicitor General Starr. Justice Jackson became the War Crimes Prosecutor at Nuremburg. Judge Griffin Bell left the bench to become Attorney General (Griffin Bell). Judge Chertoff became Secretary of the Department of Homeland Security. Judge Shirley Hufstedler left the bench to become Secretary of the Department of Education. [6]

The fact that the Executive Branch is considering the judge, and that the judge knows it, does not require automatic resignation. First, such a rule would allow the Executive Branch to manipulate the bench by considering the judge. This problem is increased because the Executive Branch may be considering several nominees for the same position. If the Executive Branch does nominate, the confirmation may be both lengthy and uncertain. [7]

The 1990 Code provided that this resign to run rule does not apply to a judge who is serving as a delegate or running as a candidate for delegate to a state constitutional convention (if otherwise permitted by law). [8] The 2007 Code deleted this provision, but did not state if it were reversing the result. The Reporters' Explanation of Changes state that, for Rule 4.5, the revisions are for style and clarity. [9] The only specific reference to a campaign to a state constitutional convention is the statement that the Commission removed this special exemption "because of the rarity with which such a situation occurs." [10] That leads to the conclusion that a judge cannot run as a delegate to a state constitutional convention. The situation is rare, and the 2007 Code removed the exemption, so that this situation moves from rare to nonexistent.



Footnotes

a0 Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law.

a1 Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin.

1 He filled the seat that Senator Edmund Muskie resigned to become Secretary of State. Mitchell then won election in 1982 and 1988. He was Senate Majority Leader from 1989 to 1995.

2 2007 Code, Rule 4.5 derives from the 1990 Code, Canon 5A(2).

3 Rule 4.5, Comment 2.

4 Rule 4.5, Comment 1.

5 Rule 4.5, Comment 2.

6 Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEORGETOWN J. LEGAL ETHICS 1187 (2006).

7 Reporters' Explanation of Changes to Rule 4.5, at 70 (ABA 2007).

8 1990 Code, Canon 5A(2).

9 Reporters' Explanation of Changes to Rule 4.5, at 70 (ABA 2007).

10 Reporters' Explanation of Changes to Rule 4.5, at 70 (ABA 2007).

**End of Document**