

The 2007 ABA model code: taking judicial ethics standards to the next level

by CYNTHIA GRAY



At its February 2007 meeting, the American Bar Association House of Delegates adopted a revised model code of judicial conduct, the first comprehensive revision of the code since 1990. The 2007 model code makes important changes that clarify the ethical obligations of judges, filling in some of the gaps in the former version and reflecting recent developments in case law and court management. Unfortunately, the revised code also makes several unwarranted changes and fails to resolve several important issues. This article discusses the major revisions in the code, emphasizing the important and controversial changes.

The 2007 model code is based on a report of the Joint Commission to Evaluate the Model Code of Judicial Conduct.¹ Created with a grant from the Joyce Foundation, the Joint Commission was appointed in 2003 and operated under the auspices of the Standing Committee on Ethics and Professional Responsibility and Standing Committee on Judicial Independence.

The Joint Commission was comprised of 10 judges and lawyers and one public member and included in its discussion 11 advisors, including a representative of the Ameri-

can Judicature Society. The Joint Commission met in person or by conference call over 50 times and held several public hearings. It posted drafts of portions of the code on a web-site with requests for comments and suggestions.² Thirty-nine entities, including AJS, and 300 individuals filed written comments.³ The ABA's Center for Professional Responsibility Implementation Committee is available to assist states as they consider whether to adopt the changes in the new code.⁴

The revisions reorganize the code, reducing the number of canons from five to four with numbered rules under each canon. The rules have numbered comments that provide aspirational statements and guidance in interpreting the rules. The code also includes a preamble and scope, terminology, and application sections. The report presented

Despite several problems, the new ABA Model Code of Judicial Conduct will help courts in their never-ending quest to be accountable to the public.

1. Available at http://www.abanet.org/judicialethics/house_report.html and http://www.abanet.org/judicialethics/Revised_Report_020607.pdf.

2. Available at <http://www.abanet.org/judicialethics/>.

3. Available at <http://www.abanet.org/judicialethics/resources/comments.html>.

4. See the Committee's web-site at <http://www.abanet.org/cpr/jclr/home.html>.

5. Available at http://www.abanet.org/judicialethics/ABA_MCJC_REMS.pdf.

by the Joint Commission includes reporters' notes that explain the changes but are not part of the code.⁵ A copy of the revised model code, with correlation tables, is available on the Joint Commission's web-site.⁶

Canon 1: Independence, Integrity, Impartiality, and Impropriety

A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety.

Canon 1 and its rules cover most of the subjects included in Canons 1 and 2 in the 1990 Code, including the obligations to comply with the law and to promote public confidence in the judiciary. The revised code adds two new comments to encourage judges to "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" and to "initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice."

Appearance of Impropriety (Rule 1.2). The most controversial issue addressed by the Joint Commission was whether to maintain the requirement, in Canon 2 of the 1990 model code, that a judge shall avoid "the appearance of impropriety in all of the judge's activities." Without any analysis, several commenters asserted that the standard was too vague and pressured the Joint Commission to eliminate it from the model code for judges as it had been eliminated from the model rules for lawyers. In the final report, the Joint Commission placed the standard in a *canon*, not a *rule*, and added a sentence to the scope section stating that "for a judge to be disciplined for violating a Canon, violation of a Rule must be established."

The ABA Ethics Committee, after the final report was submitted to the House of Delegates, persuaded the Joint Commission to amend the scope to further nullify the appearance of impropriety standard by specifying that canons provide only "important guidance in interpreting the Rules." The Conference of Chief Justices then adopted a resolution that opposed any version of the model code that did not make avoiding the appearance of impropriety both "an aspirational goal for judges and . . . a basis for disciplinary enforcement."

In proposed amendments to the final report, AJS reiterated its argument that weakening the appearance of impropriety standard would be seen as a signal that judges are not willing to be held accountable to higher standards than other public officials and the legal profession in general. Moreover, the Society noted, there is no basis for arguing that the standard is unconstitutional; judges apply general standards on the bench every day and have the benefit of case law, court rules, advisory committees, and traditions and established practices in applying the appearance of impropriety standard.

In light of the concerns of the Conference of Chief Justices and AJS, the Commission revised its report to incorporate language proposed by the Society that made avoiding the appearance of impropriety a rule, not just language in a canon. The version of Rule 1.2 adopted by the House of Delegates provides:

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

COMMENT * * *

[5] Actual improprieties include violations of law, court rules or other specific 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.

The Prestige of Office (Rule 1.3). Whereas both the 1972 and 1990 model codes provided that a judge shall not *lend* the prestige of office to advance private interests, Rule 1.3 of the 2007 code provides that 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." The Society opposed that change, arguing that "abuse" was vaguer than "lend" and that this substantial departure from established standards would encourage the use of the prestige of office by suggesting it is presumptively appropriate unless it rises to some undefined, abusive level.

Similarly, a comment in the 2007 model code now allows judges to use judicial letterhead in personal business except "to gain an advantage." The Society argued that keeping an unconditional prohibition on using judicial stationery in personal business is the better, clearer rule for judges. Courts have held that the use of judicial letterhead in personal matters inherently and inevitably creates the appearance of a misuse of the prestige of office and that principle should be reflected in, not contradicted, by the code.

Canon 2: Judicial Duties

A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently.

The rules in Canon 2 of the 2007 model code cover a judge's professional duties, corresponding to Canon 3 in the 1990 model code. Rule 2.2, for example, provides that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially," making explicit the duty to decide cases impartially, which was implicit in numerous provisions in the 1990 model code. Two new comments amplify that duty.

[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

6. http://www.abanet.org/judicialethics/approved_MCJC.html.

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.

Another new comment notes that good faith errors of fact or law do not violate the duty to uphold the law.

Pro se litigants. In its report to the House, the Joint Commission noted that, “throughout the life of the Commission, some witnesses urged the Commission to create special rules enabling judges to assist pro se litigants, while others urged the Commission to disregard calls for such rules.” The Joint Commission proposed, and the House adopted, as a corollary to the requirement of impartiality in Rule 2.2, a comment that permits a judge to “make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”

Several commenters had proposed similar changes. For example, the Society proposed a new comment:

A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge’s impartiality. Reasonable accommodations include liberally construing pleadings, explaining the basis for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendment of pleadings, and explaining general matters such as the burden of proof and what types of evidence may and may not be presented.⁷

Bias and Harassment (Rule 2.3). Rule 2.3 of the revised code reinforces the prohibition on manifestations of bias by judges by moving the prohibition on sexual harassment from a comment to the text and making other changes. The revised rule provides:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affil-

iation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

The rule now expressly covers bias or harassment on the basis of gender, ethnicity, marital status, and political affiliation in the list of prohibited biases. The Joint Commission thought “gender” captured bias, prejudice, or harassment against trans-gendered individuals better than the term “sex.” Ethnicity was “regarded as distinct from national origin; for example, in the case of an Arab-Canadian, discrimination on the basis of Arab ancestry would relate to ethnicity, while discrimination based on Canadian derivation would relate to national origin.” The Joint Commission added marital status after being “made aware of instances in which judges had berated a party for cohabiting or having a child outside of wedlock.”

New comments give examples of improper bias and define harassment.

[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 . . . 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.

The reporters’ notes explain that the term “reasonably” in the last sentence of Comment 2 was used to separate “the merely vulgar from the deeply offensive,” consistent with

Title VII jurisprudence.

The Joint Commission was apparently not persuaded by the Society’s argument that insensitive statements about crimes against women should be included in the list of examples of bias to emphasize the inappropriateness of such statements based on a line of discipline cases involving such conduct. The Society’s proposal had been supported by the National Association of Women Judges and the National Judicial Education Program.

Public Comment (Rule 2.10). The 2007 revisions retain the prohibition on a judge making “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.” The Society had urged that the rule be clarified by prohibiting any public comment on pending cases, noting that the phrase “might reasonably be expected to affect the outcome or impair the fairness of a matter” is too vague a guide in a restriction on speech.

Moreover, the Society objected to a new exception that allows a judge to “respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter” subject to other restrictions. Instead, the Society proposed new text that would state that “a judge shall not discuss the rationale for a decision outside the record unless the judge is repeating what was already made part of the public record.” The Society was concerned that encouraging judges to respond to criticism would result in litigants having to read the paper to find out the judge’s thinking about their case and would distort the administration of justice and undermine confidence in the courts as the public sees judges explaining cases on TV rather than in the court-

7. See also Letter from Chief Justice Karla Gray, Montana Supreme Court, to ABA Joint Commission (September 9, 2005), available at http://www.abanet.org/judicialethics/resources/comm_rules_gray_090905_ddt.pdf; Memorandum from Richard Zorza to ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (July 8, 2004), available at http://www.abanet.org/judicialethics/resources/comm_rules_zorza_070804.pdf.

room. To protect the integrity of the judicial role while allowing for public education about the process, the Society proposed a new comment.

By refraining from public comment, judges reassure the public that cases are being tried, not in the press, but in the public forum devoted to that purpose. This prohibition does not preclude a judge from responding to criticism by reiterating without elaboration what is set forth in the public record in a case, including pleadings, documentary evidence, and the transcript of proceedings held in open court.

Disqualification (Rule 2.11). Like Canon 3E of the 1990 model code, Rule 2.11 of the 2007 model code provides that “a judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned” and then lists specific examples of circumstances that require disqualification. A new comment explains “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.” Noting that the terms “recusal” and “disqualification” have been defined in different and sometimes inconsistent ways to apply where judges act on their own initiative or pursuant to a motion by a party,” the reporters’ notes explain that the comment “is intended to render such distinctions irrelevant” in interpreting the code.

The 2007 revisions add two new specific grounds for disqualification. New Rule 2.11A(6)(b) provides that a judge is disqualified if the judge “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.”

New Rule 2.11A(6)(d) disqualifies a judge who “previously presided as a

judge over the matter in another court.” In addition, the rules regarding disqualification for family relationship or the financial interests of family members now also apply to “domestic partners,” defined as “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.”

The Joint Commission did not propose specific new rules for such common situations as when an attorney in a case is a judge’s former law partner or a partner or associate of a judge’s relative, when a judge has a social relationship with a party or attorney, or when a party is a former client of the judge, although some commenters made suggestions for provisions or at least commentary that would provide additional guidance to judges in those circumstances.⁸ As they consider revisions to their codes, however, states may be able, based on their own case law and advisory opinions, to establish specific rules that will clarify the question of disqualification in these and other situations.

Settlement. One of the big debates within the Joint Commission was whether to require disqualification of a judge who had presided over settlement discussions from further proceedings in the case if settlement talks failed. The Commission concluded that the “issue was better left for rules of practice and procedure than ethics,” but did move to the text the admonition “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.” It also added two new comments to Rule 2.6. One cautions judges about how they conduct settlement discussions.

[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.

The second new comment reminds judges that despite their 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.”

Previous changes. In 1997, the ABA had revised the 1990 model code to provide that a judge is disqualified if “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].” (This formulation allows each state to fill in the specific limits for itself.) No state has adopted this provision, but it was retained in the 2007 revised model code.

In 2003, the ABA revised the 1990 model code to require disqualification if the judge, while a judge or a judicial candidate, “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.” Twelve states have adopted this provision, which remains in the 2007

8. See Suggestions Sent for the Joint Commission’s Consideration by Professor Leslie Abramson (January 14, 2004), available at http://www.abanet.org/judicialethics/resources/comm_code_abramson_011404.pdf.

model code.

Ex parte communications (Rule 2.9). With some fine-tuning, the 2007 model code retains the prohibition on ex parte communications. For example, the exception that allows a judge to consult with court staff and other judges now cautions judges to make “reasonable efforts to avoid receiving factual information that is not part of the record” and not “abrogate the responsibility personally to decide the matter.” The prohibition on independent investigations of facts was strengthened by new language that emphasizes that a judge “shall consider only the evidence presented and any facts that may properly be judicially noticed” and by a new comment that indicates the prohibition “extends to information available in all mediums, including electronic.” The 2007 revisions create a new exception in a comment that allows a judge to “consult ethics advisory committees, outside counsel, or legal experts concerning the judge’s compliance with this Code.”

Problem-solving courts. The reporters’ notes state that the Joint Commission “heard a great deal of testimony about therapeutic or problem-solving courts,” but decided not to create special rules for such courts “because therapeutic courts were too many and varied for the Commission to devise rules of general applicability.” Instead, a new comment explains that the exception for ex parte communications “authorized by law” may permit certain ex parte communications in those courts where “judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.” In addition, the application section includes a new comment:

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 non-traditional 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.

Disciplinary responsibilities (Rules 2.14, 2.15, and 2.16). Filling a gap in the 1990 model code, new Rule 2.16 requires a judge to “cooperate and be candid and honest with judicial and lawyer disciplinary agencies” and prohibits a judge from “retaliat[ing], directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.” This type of misconduct is a frequent basis for discipline but was only covered by the general provisions in the former code.

New Rule 2.14 deals with the “difficult and extremely important issue” of impaired judges.

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.

Comments explain that ‘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,” and, depending upon the circumstances, may include speaking directly to the impaired person, notifying an individual with supervisory responsibility, making a referral to an assistance program, or, if the conduct that has come to the judge’s attention is serious enough, reporting the impaired judge or lawyer to the appropriate disciplinary authority.

Moreover, the disciplinary responsibilities of a judge who receives information indicating a substantial likelihood that another judge has violated the code of judicial conduct were strengthened in Rule 2.15 by changing the hortatory “should take

appropriate action” to the binding “shall take appropriate action” under those circumstances. A parallel change was made for the rule that applies when a judge has information about a lawyer’s violations of the rules of professional responsibility.

Other new comments.

- A new comment emphasizes the responsibility to decide (Rule 2.7):

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.

- A new comment to Rule 2.13(A)(2) defines “nepotism” for purposes of applying the restriction on appointments: “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.”

- A new comment to Rule 2.8 cautions judges who hold discussions with jurors following trial to “be careful not to discuss the merits of the case.”

Canon 3: Personal and Extra-judicial Activities

A Judge Shall Conduct the Judge’s Personal and Extra-judicial Activities to Minimize the Risk of Conflict With the Obligations of Judicial Office.

Canon 3 and its rules address extra-judicial and personal conduct, corresponding to former Canon 4. The revised model code, like previous codes, allows judges to engage in extrajudicial activities that do not interfere with the proper performance of the judge’s judicial duties

and meet other conditions. The 2007 version, however, deletes the reference to activities that “demean the judicial office.”

The 1990 model code prohibited activities that “cast reasonable doubt on the judge’s capacity to act impartially as a judge.” That condition is re-worded in the 2007 revision to prohibit activities that “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

Moreover, the 2007 model code makes explicit several limitations on extra-judicial activities that were

court competition or using a court’s conference room for a meeting of a bar association task force that includes the judge.”

Appearances before Governmental Bodies and Consultation with Government Officials (Rule 3.2). In the revised version of Canon 4C(1), Rule 3.2 provides:

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

posals affecting their real property.” However, the comment reminds judges that “in engaging in such activities . . . judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.”

Character Testimony (Rule 3.3). The 2007 revisions clarify the prohibition on a judge testifying as a character witness. To indicate that the rule “is not limited to civil or criminal trials in courts, but applies whenever testimony is taken on a formal record,” new language specifies that the prohibition applies “in a judicial, administrative, or other adjudicatory proceeding.” Moreover, the rule prohibits not only testifying under oath but any “vouching” for a person’s character. Substituting the phrase “except when duly summoned” for “voluntarily,” Rule 3.3 now reads: “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.”

Organizations that Practice Invidious Discrimination (Rule 3.6). Since 1980, the ABA model code has discouraged membership in organizations that practice invidious discrimination on the basis of race, sex, religion, or national origin, and since 1990, the code has prohibited such membership. Most states and the federal judiciary have adopted some version of this rule.

New comments in 2007 clarify that the rule does not apply to “a judge’s membership in a religious organization” or to national or state military service. Organizations that invidiously discriminate on the basis of gender, ethnicity, and sexual orientation were added to the list of forbidden organizations.

In addition, a new section prohibits a judge from using “the benefits or facilities” of a discriminatory organization, unless “the judge’s attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization’s practices.” As an example, the reporters’ notes explain that a judge

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implied in the former code. Thus, the revised code provides that “when engaging in extrajudicial activities, a judge shall not . . . participate in activities that will lead to frequent disqualification of the judge” or “engage in conduct that would appear to a reasonable person to be coercive.”

New Rule 3.1(E) prohibits a judge from using “court premises, staff, stationery, equipment, or other resources” for personal and extrajudicial activities, “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.” Such a prohibition was implied in the general provisions of the former model, and use of public resources for private purposes has been a frequent ground for judicial discipline. Therefore, making the rule explicit is a significant clarification. The reporters’ notes explain that the incidental use exception applies to “activities, such as opening a real courtroom for use in a moot

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.

The term “voluntarily” was added to indicate that judges who are formally summoned may not refuse to appear before governmental bodies. Compared to Canon 4C(2), the 2007 version eliminates the reference to issues of fact or policy.

The exception for “matters about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties” is new. Moreover, the exception for appearing in a personal matter was clarified by substituting “legal or economic interests or when the judge is acting in a fiduciary capacity for “the judge’s interests.” As a new comment explains, “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 pro-

could not schedule his or her own child's wedding reception at a discriminatory club but could attend the reception of a friend or relative's child. Finally, the 2007 changes eliminate commentary that allowed a judge to remain a member of a discriminatory organization for up to one year if, during that year, the judge took steps to change the organization's policy.

Charitable Fund-raising (Rule 3.7). The revised code adds several new exceptions to the rule that judges shall not solicit contributions for charitable organizations, for example, allowing a judge to solicit contributions from members of the judge's family. Moreover, "a safe harbor" is created for "minor and noncoercive" fund-raising activities in a comment that allows 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." However, the Joint Commission did not decide whether to allow a judge to handle money at fund-raising events or to ban a judge from, for example, acting as a ticket-taker or cashier. "Whether such activities are appropriate," the reporters' notes state, "depends upon analysis of the overall event, and the significance of the judge's participation" to determine if there is any coercion, however "subtle or unstated."

Several of the new fund-raising exceptions apply only to organizations that concern the law, the legal system, or the administration of justice. For those kinds of organizations, a judge may speak or receive an award at, be featured on the program of, and permit his or her title to be used in connection with a fund-raising event. Moreover, a judge may ask others to join such an organization "even though the membership dues or fees generated may be used to support the objectives of the organization or entity."

Finally, new Rule 3.7(B) allows judges to "encourage lawyers to provide pro bono publico legal services," 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." However, judges are cautioned not to "employ coercion, or abuse the prestige of judicial office" in such efforts.

Gifts (Rule 3.13). Rule 3.13 creates a three-tier approach to analyzing whether a judge may accept "gifts, loans, bequests, benefits, or other things of value." The first tier are those gifts a judge cannot accept: anything of value "if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."

The second tier are those gifts a judge may accept and is not required to report, for example, ordinary social hospitality and gifts from individuals whose appearance or interest in a proceeding would require the judge's disqualification. The third category of gifts are those a judge may accept but must report if the value exceeds an amount to be established by each jurisdiction, for example, gifts from "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."

As noted, judges are allowed to accept "ordinary social hospitality" under the 2007 version, a term also used in the 1990 model. The Society had suggested that a definition of ordinary social hospitality be added to the code to help judges apply the rule in a specific situation. The Society's proposed definition was "that type of social event or other gift that is so common among people in the judge's community that no reasonable person would believe that the donor was intending to or would obtain any advantage." Moreover, the Society proposed an additional comment:

Relevant considerations include the cost of the event or gift, whether the benefits conferred are greater in value than that traditionally furnished at similar events sponsored by bar associa-

tions or similar groups, whether the benefits are greater in value than that which the judge customarily provides the judge's own guests, whether the benefits conferred are usually exchanged only between friends or relatives, whether there is a history or expectation of reciprocal social hospitality between the judge and the donor, whether the event is a traditional occasion for social hospitality, and whether the benefits received must be reported to any governmental entity.

In preliminary draft, the Joint Commission had included a definition of "ordinary social hospitality" as hospitality "common among people in the judge's community, extended for a non-business purpose by an individual, not a corporation, and limited to the provision of modest items, such as food and refreshments." However, the final version proposed by the Joint Commission and adopted by the House of Delegates did not include any definition of the term.

Seminars. One of the most controversial issues the Joint Commission considered was judges' attendance at tuition-waived and expense-paid seminars and similar events. The 2007 code treats acceptance of such benefits separately from other gifts and specifically requires public reporting of those benefits.

Thus, Rule 3.14 allows judges to accept reimbursement of the actual "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" as long as the judge assures "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." Comments explain that a judge's decision whether to accept reimbursement "must be based upon an assessment of all the circumstances" following "a reasonable inquiry to obtain the information necessary to make an informed judgment."

The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for atten-

dance 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.

In addition, reimbursements that fall under this rule are required to be reported within 30 days of the event while the reporting requirement for gifts and compensation for extra-judicial activities is required only annually.

Other changes

- Under Rule 3.11, judges are no longer allowed to engage in “remunerative activity,” other than holding and managing investments of the judge and those of members of the judge's family.

- Whereas under the 1990 model code a judge was allowed to provide legal advice and review documents for members of the judge's family but prohibited from acting “as an advocate or negotiator for a member of the judge's family in a legal matter,” under Rule 3.10, a judge is prohibited only from serving as the family member's lawyer “in any forum.”

Canon 4: Political and Campaign Activity

A Judge or Candidate for Judi-

cial Office Shall Not Engage in Political or Campaign Activity That is Inconsistent With the Independence, Integrity, or Impartiality of the Judiciary.

Revised Canon 4 and its rules establish standards for the political and campaign conduct of judges and judicial candidates, like Canon 5 of the 1990 model code. Canon 4 establishes general restrictions on campaign and political activity and then creates exceptions depending on the selection method, differentiating between judicial candidates seeking appointment and those running in elections and, further, between partisan, non-partisan, and retention elections.

The Joint Commission debated extensively what changes, if any, should be made to the restrictions on political and campaign activity in light of the United States Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and subsequent federal decisions. *White* held that the states could not prohibit judicial candidates from announcing their views on disputed legal or political issues during campaigns, and subsequent decisions have held other provisions unconstitutional.

Some groups filing comments exaggerated the effect of *White* and post-*White* cases, urging the elimination of almost all restrictions on political conduct for all judges, not just judicial candidates or judges who are elected. If the Joint Commission had accepted those arguments, the revised model code would have allowed all judges, including appointed state and federal judges, to, for example, serve as political party chairs or actively campaign for candidates for president or governor.

Fortunately, the Joint Commission resisted that pressure, and the revisions adopted by the House of Delegates do not retreat significantly from the principles embodied in the 1990 model code. The reporters' notes explain:

Throughout its deliberations, the Joint Commission has sought to find a balance that accommodates the political

realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality are not undermined by the participation of judges and judicial candidates in political activity.

In Rule 4.1(A)(13), the revised code retains the provision (adopted by the ABA in 2003 following *White*) prohibiting judges as well as judicial candidates from making “in connection with cases, controversies, or issues that are likely to come before the court, . . . pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” A new comment explains:

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.

Moreover, additional comments emphasize that pledges, promises, or commitments are distinguishable from “statements or announcements of personal views on legal, political, or other issues” and that “a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.” Further, a comment describes the types of promises that are appropriate in a judicial campaign.

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 lobbying for more funds to improve the physical plant and amenities of the courthouse.

The Joint Commission deliberated at length about whether to specifically

allow or prohibit judicial candidates from answering the questionnaires that issue advocacy groups send out during campaigns. Although it does not take a “firm stand on the best response to questionnaires of this kind,” the revised code contains a comment to “assist judicial candidates in formulating their positions on judicial campaign speech.”

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.

The revised code adds a new requirement that judicial candidates personally approve the contents of campaign literature and other election materials and a new prohibition on judges using “court staff, facilities, or other court resources in a campaign for judicial office.” The revised code did delete the requirement that judicial candidates maintain “appropriate dignity,” finding the phrase “too subjective a standard for use in a Rule with potential disciplinary consequences.” Further, the prohibition on candidates personally seeking “publicly stated support” was eliminated from the code in the 2007 revisions.

Campaign fund-raising. The revised model retains the prohibition on judicial candidates personally soliciting campaign contributions, despite several federal court decisions striking down that provision. The model also provides time and amount limits for contributions without setting specific figures, which would be established by each state. A new comment emphasizes that, at the start of a campaign, a candidate must instruct his

or her campaign committee “to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law” and “to be especially cautious” in soliciting contributions from lawyers and others who might appear before the candidate if successful so they do not create grounds for disqualification. New Rule 4.4(B)(3) requires a judicial candidate to “divest any unused campaign funds by pro rata refund to campaign contributors not later than six months after any judicial election in which a judge or judicial candidate participated as a contestant” in the absence of a statutory requirement or to “require the candidate’s campaign committee to comply with relevant laws regarding divesting unused campaign funds.”

Other changes

- Without explanation, the revised code eliminates the general provision from former Canon 5D that, in effect, allowed a judge to engage in political activity on behalf of measures to improve the law, the legal system or the administration of justice.

- The 2007 model code contains a new comment clarifying the relationship between a judge’s ethical obligations and family members’ political activity.

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.

- Whereas the 1990 model code allowed a candidate for appointment to judicial office to “seek support or endorsement for the appointment from organizations that regularly

make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required” by the appointing authority, Rule 4.3(B) allows a candidate for appointment to seek endorsements from “any person or organization other than a partisan political organization.”

- The 2007 version of the “resign-to-run” rule (Rule 4.5) indicates the rule applies only when the judge is seeking a non-judicial *elective* office.

- The 1990 model code allowed elected judges to purchase tickets for and attend political gatherings and contribute to a political organization *at any time*. Rule 4.2(B) of the 2007 model code allows those activities only during a period before the first applicable primary election, caucus, or general or retention election (the exact time limit to be chosen by each state), in other words, only while actually a candidate.

Conclusion

Although the ABA model code is not binding on judges unless it has been adopted in their jurisdictions, the state and federal judiciaries have always looked to the model code for inspiration and the national consensus on judicial ethics issues. Currently, all states but one have codes of judicial conduct based on either the 1972 or 1990 model code or some hybrid of the two models with the state’s own fine-tuning and modifications based on their independent evaluation. (Montana has adopted the 1924 ABA code of judicial ethics.) As courts continue the never-ending process of assessing how best to be accountable to the public, the 2007 model code of judicial conduct, with a few exceptions, provides excellent examples of how to take judicial ethics standards to the next level. ☛

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