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administration  
of justice

# JUDICIAL CONDUCT REPORTER

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## The American Bar Association Model Code of Judicial Conduct *by Cynthia Gray*

**A**lthough the Model Code of Judicial Conduct adopted by the American Bar Association is not binding on judges unless it has been adopted in their jurisdictions, 49 states, the District of Columbia, and the United States Judicial Conference (for federal judges) have adopted codes of judicial conduct based on, although not identical to, either the 1972 or 1990 model codes. (Montana has conduct rules, but they are based on the ABA's 1924 canons of judicial ethics.)

First adopted in 1972, the model code was revised by the ABA in 1990. The 1990 model code retained most of the basic principles of the 1972 model code, but made several significant substantive changes and adopted many differences in details. The language of the code was revised in 1990 to be gender neutral and to distinguish between binding obligations (by using "shall" or "shall not," or "may") and hortatory language (by using "should," "should not," or "may"). In addition, the 1990 model made the

following major changes.

- The provision discouraging membership in organizations that practice invidious discrimination (first adopted in 1984) was made mandatory (Canon 2C).
- Although discriminatory language and conduct was already impliedly covered by the requirement that a judge treat all persons with patience, dignity, and courtesy, the 1990 model emphasized

*(continued on page 6)*

## Canons 1 and 2 *by Cynthia Gray*

**I**n most states, the conduct commissions and state supreme courts have the authority pursuant to constitution, statute, or court rule to discipline judges for willful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The code of judicial conduct is used to give more specific content to those standards.

In the majority of judicial disci-

pline cases, a judge is charged with violating a specific canon in the code such as the prohibition on ex parte communications or the requirement that a judge treat all persons with patience, dignity, and courtesy. However, it is not possible to predict all the ways a judge may act contrary to ethical standards nor is it "practicable to list all prohibited acts" (commentary to Canon 2A). Therefore, Canons 1

and 2 establish general standards. Canon 1 provides: "A judge shall uphold the integrity and independence of the judiciary." Canon 2 provides: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 2A provides: "A judge shall respect and comply with the law and shall act at all

*(continued on page 4)*

# Ex Parte Communications

The prohibition on ex parte communications is a core provision of the code of judicial conduct, protecting the integrity of the adversary process by ensuring that one party does not have greater access to the judge and that the judge's rulings are based only on information and arguments in the record. The variations that states have adopted to the model provision generally are designed to clarify the restriction, particularly the exceptions to the rule.

One exception in the model code allows a judge to consult ex parte with other judges and with court personnel who assist the judge in performing adjudicative responsibilities. However, the Massachusetts code emphasizes:

A judge shall take all reasonable steps to avoid receiving from court personnel or other judges factual information concerning a case that is not part of the case record. If court personnel or another judge nevertheless bring non-record information about a case to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and a reasonable opportunity to respond.

The Utah code provides that a judge may consult with other judges and court personnel only if "the judge does not abrogate the responsibility to personally decide the case pending be-

fore the court." The Massachusetts code has a similar provision.

The Alaska code states that it would be "improper for a judge to consult another judge, a law clerk, or anyone else who the judge knows has a disqualifying interest in the proceeding." Similarly, the Massachusetts code explains the exception does not allow a judge to consult with another judge "when the judge initiating the consultation knows the other judge has a financial, personal or other interest which would preclude the other judge from hearing the case," and that a consulted judge shall not "engage in such a consultation when the judge knows he or she has such an interest." The Massachusetts and Alaska codes indicate that a judge may not consult about a case with a judge who might review the case on appeal.

When a judge is disqualified and a case is transferred to another judge, the Alaska code allows the disqualified judge to "engage in limited, purely administrative communication with the successor judge," such as "the dates already scheduled for court proceedings, the identities of the attorneys, etc," but prohibits communications "about the merits of any pending issues, the merits of any previously decided issues, or the substance of any proceedings already

held in the case," which must "be gleaned from the court file or from the attorneys."

## Communications with court personnel

What court personnel fall within the exception has been the subject of several advisory opinions and cases. *See, e.g., Arizona Advisory Opinion 95-14* (a judge may engage in ex parte communications with a special master but may not engage in ex parte communications with an attorney appointed for the children in a domestic relations case); *Virginia Advisory Opinion 00-4* (a judge may not have an ex parte communication with a probation officer preparing a pre-sentence report for a case being tried by the judge); *Washington Advisory Opinion 97-7* (a judge may receive a written ex parte communication from a probation officer to determine if exigent circumstances exist to issue a bench warrant; a judge may not speak ex parte to a probation officer about additional information that should be covered in the probation officer's recommendation regarding deferred prosecution of a charge); *In re Interest of Chad S.*, 639 N.W.2d 84 (Nebraska 2002) (ex

(continued on page 7)

# Commenting on Pending Cases

Judges should clearly and comprehensively explain their decisions to the parties on the record and ensure that the public and media have access to the court and its rulings. By refraining from additional commentary, judges reassure the public that the judiciary is trying cases, not in the press, but in the public forum devoted to that purpose, and the code of judi-

cial conduct advances public confidence by enforcing that principle.

Thus, the 1972 model code stated: "A judge should abstain from public comment about a pending or impending proceeding in any court." In revising the code in 1990, the ABA noted that "judges in their extra-judicial teaching and writing often refer to pending or impending cases in other jurisdictions

without diminishing the fairness of those cases or the appearance of judicial impartiality." Milord, *The Development of the ABA Judicial Code* at 21 (1992). Although no judge had ever been disciplined for referring to pending cases in extra-judicial teaching, the ABA expressed concern that the language was

(continued on page 9)

# Charitable Fund-raising

The prestige of judicial office may not be used for fund-raising for private organizations, however laudable the cause, but must be preserved for carrying out the business of the courts. The limitation on judicial participation in fund-raising also addresses the concern that people either may feel pressured to make contributions when it is a judge who asks or may expect future favors from the judge in return for the donation.

The 1972 model code distinguished between organizations devoted to the improvement of the law, the legal system, or the administration of justice (quasi-judicial organizations) and educational, religious, charitable, fraternal, or civic organizations (extra-judicial organizations). Although personal solicitation of funds was prohibited for all organizations, there were more restrictions on other involvement in fund-raising for extra-judicial organizations; for example, a judge could assist only quasi-judicial organizations in planning fund-raising.

Canon 4C(3) of the 1990 model code eliminated that distinction and treats all non-profit organizations the same although a judge may make recommendations to fund-granting organizations only for projects and programs concerning the law, the legal system, or the administration of justice. For all non-profit organizations, a judge is prohibited by the 1990 model code from personally participating in the solicitation of funds or in other fund-raising activities, including being a speaker or guest of honor at a fund-raising event, and from allowing the prestige of the judicial office to be used for fund-raising. See *In re Brown*, 662 N.W.2d 733 (Michigan 2003) (failing to ensure that name was not used improperly in materials related to fund-raising event for non-profit organization); *In the Matter of Castellano*, 889 P.2d 175 (New Mexico 1995) (allowed his wife to use his name, title, and photograph in a brochure used to solicit funds for a charitable organization).

The 1990 model code does allow a judge to take part in charitable fund-raising in other ways. For all organizations, a judge may, for example, assist in planning fund-raising, attend a fund-raising event, and participate in the management and investment of funds. Further, the 1990 model code added an exception that allows a judge to personally solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority and personally participate in membership solicitation if the solicitation would not reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Moreover, commentary added to Canon 4C clarified that an organization may send a general membership solicitation over the judge's signature if the judge is an officer, and a judge may allow his or her name to appear on letterhead for solicitation if the letterhead lists the judge's judicial designation only if comparable design-

(continued on page 8)

# Disciplinary Responsibilities

Public confidence in the justice system depends in part on judges responding to misconduct by other judges and by lawyers. Commentary to the Massachusetts code explains:

The rule is necessary because judges make up a significant group that may have information about colleagues' misconduct. For this reason, judges have an opportunity and a special duty to protect the public from the consequences of serious misconduct and the potential harmful results of other violations of the Code.

The 1972 model code provided that "a judge should take or initiate appropriate disciplinary measures against a

judge or lawyer for unprofessional conduct of which the judge may become aware." The "weakness of the language" and "a perceived deterioration in the professional conduct of lawyers and judges," (Milord, *The Development of the ABA Judicial Code* at 25 (1992)) led the ABA to try "to articulate the reporting standards more clearly and more comprehensively." Thus, Canon 3D of the 1990 model code provides:

A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this

Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

The rule for responding to attorney misconduct is analogous.

By providing only that a judge "should" take appropriate action, the model provision allows judges to ignore minor misconduct by other judges, even though minor misconduct, uncorrected, may be repeated and become part of a pattern of substantial misconduct. Thus, many states (for example, Alaska, Florida,

(continued on page 10)

## Canons 1 and 2 (continued from page 1)

times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

There are cases of “pure” Canon 1 and Canon 2 violations in which judges have been sanctioned for conduct that clearly violates any reasonable definition of the high ethical standards to which judges are held but is not specifically addressed in the code. *See, e.g., In re Ferrara*, 582 N.W.2d 817 (Michigan 1998) (misrepresentations at press conference, attempt to introduce fraudulent letter into evidence in commission hearing, and inappropriate, unprofessional, and disrespectful conduct at

commission proceedings); *Inquiry Concerning Couwenberg*, Decision and Order (California Commission on Judicial Performance August 15, 2001) (cjp.ca.gov) (misrepresented educational background, legal experience, and affiliations on judicial data questionnaire; misrepresented to attorneys that he had been in Vietnam, had shrapnel in his groin received in military combat, and had a master’s degree in psychology; falsely told a newspaper reporter that he had been in Vietnam; and made false statements about his education and military experience in letters and testimony to the commission); *In the Matter of Mazzei*, 618 N.E.2d 123 (New York 1993) (twice signed dead mother’s name to credit card application and repeatedly misled bank investigators); *In the Matter of Collazo*, 691 N.E.2d 1021 (New York 1998) (gave patently false statements to the commission and lied to the governor’s judicial screening committee and counsel for the senate judiciary committee); *In re Kroger*, 702 A.2d 64 (Vermont 1997) (false, misleading, and deceptive statements

at a hearing held by the state judges association); *In re Ritchie*, 870 P.2d 967 (Washington 1994) (filed travel vouchers that contained false and misleading statements); *In the Matter of Hall* (South Carolina Supreme Court October 27, 2003) (made untruthful statements at his own trial for failing to use turn signals during lane changes; held in contempt for gestures and behavior during prosecution’s

late the judge’s court hours); *In the Matter of Blackman*, 591 A.2d 1339 (New Jersey 1991) (attended widely publicized picnic hosted by convicted felon); *In re O’Bier*, 833 A.2d 950 (Delaware 2003) (displayed a weapon in a fashion that made two court clerks feel that their personal safety was threatened and persistently carried his weapon while at work in a way that it was clearly visible to the public and employees).

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### The test for appearance of impropriety is that of a reasonable person, a standard familiar to judges.

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closing argument); *In the Matter of Gerard*, 631 N.W.2d 271 (Iowa 2001) (intimate relationship with assistant county attorney who regularly appeared before him, including intimate encounters in the courthouse); *In re Harris*, 713 So. 2d 1138 (Louisiana 1998) (extra-marital affair with a felon while he was on parole from a prison sentence the judge had imposed); *Commission on Judicial Performance v. Milling*, 657 So. 2d 531 (Mississippi 1995) (openly lived with fugitive charged with drug-related felonies, allowed the fugitive to drive her car with a suspended license, actively participated in the felony case, and married felon after he was convicted); *In the Matter of Tessmann*, 638 N.W.2d 883 (North Dakota 2002) (presided while smelling of alcoholic beverage); *In the Matter of Crawford*, 629 N.W.2d 1 (Wisconsin 2001) (threatened to make public allegations against county’s chief judge, chief judge’s daughter (an attorney in the county district attorney’s office), and district court administrator unless the chief judge dropped attempts to regu-

#### Appearance of impropriety

Avoiding the appearance of impropriety, as mandated by Canon 2, “is as important to developing public confidence in the judiciary

as avoiding impropriety itself.” *In re Dean*, 717 A.2d 176 (Connecticut 1998).

The responsibility of the judge extends not only to the business of the courts in its technical sense, such as the disposition of cases, but also to the business of the judge in an institutional sense, such as the avoidance of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system from the actions of a judge.

“To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle.” *In the Matter of Spector*, 392 N.E.2d 552 (New York 1979).

The test for appearance of impropriety is that of a reasonable person, a standard familiar to judges. The “reasonable person” has been defined in the judicial discipline context as a reasonably intelligent and informed member of the public (*In the Matter of Johnstone*, 2 P.3d 1226 (Alaska 2000)); an objective observer (*Adams*

v. *Commission on Judicial Performance*, 897 P.2d 544 (California 1995)); the average person encountered in society (*Inquiry Concerning a Judge*, 822 P.2d 1333 (Alaska 1991)); and the thinking public (*In re Flanagan*, 690 A.2d 865 (Connecticut 1997)). The reasonable person is neither a “highly sophisticated observer of public affairs” nor a “cynic skeptical of the government and the courts” (*Inquiry Concerning a Judge*, 822 P.2d 1333 (Alaska 1991)), and neither “excessively indulgent, nor excessively jaundiced.” *In the Matter of Larsen*, 616 A.2d 529 (Pennsylvania 1992).

### A duty to take reasonable precautions

There are various formulations of the test. For example, commentary to Canon 2 of the 1990 model code explains that “the test for appearance of impropriety is 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.” Many courts have focused on whether the judge could have taken reasonable precautions to, for example, “avoid having a negative effect on the confidence of the thinking public in the administration of justice.” *In re Flanagan*, 690 A.2d 865 (Connecticut 1997). Under the case

law, to avoid creating an appearance of impropriety, a judge has a duty to take reasonable precautions to prevent a reasonable person from believing that an impropriety is afoot (*Inquiry Concerning a Judge*, 822 P.2d 1333 (Alaska 1991)); suspecting that the judge violated the code (*In re Chaisson*, 549 So.2d 259 (Louisiana 1989)); or having an undisputed suspicion of actual impropriety. *In the Matter of Johnstone*, 2 P.3d 1226 (Alaska 2000).

A couple of cases illustrate the effectiveness of the standard. A judge who had taken a straw poll of the courtroom audience regarding the guilt of a defendant on a charge of battery – asking “If you think I ought to find him not guilty, will you stand up?” – argued that his conduct was not sanctionable because, in fact, his verdict was not based on the audience vote but on the evidence presented at trial. However, the Louisiana Supreme Court held:

Whether or not Judge Best actually based his verdict on the audience’s vote does not determine whether or not his conduct is sanctionable. The mere fact that he asked the courtroom audience to vote on the guilt of the defendant gave the impression that Judge Best based his verdict on something other than the evidence presented at trial. This type of behavior destroys the credibility of the judiciary and undermines public confidence in the judicial process.

*In re Best*, 719 So. 2d 432 (Louisiana 1998).

Similarly, a judge who had an intimate relationship with an assistant county attorney who regularly appeared before him argued that no misconduct was proven because no one had been able to find any evidence that he acted partially toward the state. The Iowa Supreme Court held:

It is immaterial that the judge’s association may not have had a detrimental impact on defendants appearing before him. The key concern of this canon is the appearance of impropriety. In this situation, once the public learned of the judge’s relationship with the State’s attorney who appeared before him daily, the appearance of bias was very real.

*In the Matter of Gerard*, 631 N.W.2d 271 (Iowa 2001). See also, e.g., *Kennick v. Commission on Judicial Performance*, 787 P.2d 591 (California 1990) (creating appearance of ex parte communication by practice of meeting alone in chambers with an attorney representing one side of a case pending before); *In the Matter of D’Auria*, 334 A.2d 332 (New Jersey 1975) (creating appearance of preferential treatment by being a luncheon guest, on numerous occasions in public restaurants, of attorneys or representatives of insurance companies in pending matters); *In re Chaisson*, 549 So.2d 259 (Louisiana 1989) (creating appearance of use of influence by making inquiries on behalf of a litigant regarding the settlement of a case); *In the Matter of Johnstone*, 2 P.3d 1226 (Alaska 2000) (creating appearance of favoritism in the hiring of a coroner by going outside the merit selection process to appoint an individual whose name was suggested by the chief justice, whom the judge knew to be a friend of the chief justice, on the basis of criteria that were not part of the position’s stated qualifications, and on terms that were different from those advertised). 

## Judicial Conduct Reporter

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## The ABA Model Code of Judicial Conduct *(continued from page 1)*

the inappropriateness of such conduct by adopting text expressly prohibiting a judge from manifesting bias during the performance of judicial duties (Canon 3B(5)).

- The 1990 model code added a rule that imposes on judges the obligation to require lawyers “in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, against parties, witnesses, counsel or others” (Canon 3B(6)).
- Specific exceptions were adopted to the prohibition on ex parte communications for scheduling, administrative purposes, or emergencies (under certain circumstances), consulting with court personnel and other judges, and settlement (Canon 3B(7)). *See* article on page 2.
- The size of the financial interest that triggers disqualification was increased from “however small” to more than “de minimis,” in other words, more than an insignificant interest that could not raise a reasonable question about a judge’s impartiality (Canon 3E(1)(c)).
- The 1990 model code allows a judge to ask the parties and their lawyers to consider waiving the judge’s disqualification, which was not allowed under the 1972 model (Canon 3F).
- The 1972 model prohibited all public comment on pending cases (with a few exceptions); the 1990 model code prohibits only public comment “that might reasonably be expected to affect its outcome or impair its fairness”

(Canon 3B(9)). *See* article on page 2.

- The requirement in the 1972 code that a judge “take appropriate disciplinary measures” for unprofessional conduct by a lawyer or other judge was revised to require reporting to the disciplinary authority when the judge knows of a violation evidencing the unfitness of a judge or a lawyer and to give judges discretion to act in response to other violations of the code about which the judge receives information (Canon 3D). *See* article on page 3.
- With respect to fund-raising and other participation in charitable organizations, the 1990 model code eliminated the 1972 code’s distinction between extra-judicial and quasi-judicial organizations (Canon 4C). *See* article on page 3.
- An exception was created that allows a judge to participate in a family business (Canon 4D(3)).
- The prohibition on judicial candidates’ giving their views on disputed legal or political issues was changed to a prohibition on candidates’ committing themselves with respect to cases, controversies, or issues that are likely to come before the court (Canon 5A(3)).

How many jurisdictions have adopted the 1990 model code is not a simple question. Most jurisdictions depart from the model based on their own experience, ideas, and emphasis, although the differences are often more a matter of clarifying the restrictions than adopting a contrary rule. As of November 2003, 30 jurisdictions have adopted most of the major changes made in 1990 model code although all of those jurisdictions have deviated from the model

code in part. The jurisdictions are **Alaska, Arizona, Arkansas, California, Florida, Georgia, Hawaii, Indiana, Kansas, Kentucky, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming,** and the **District of Columbia**. In addition, 16 jurisdictions have adopted new codes since 1990 that have included parts of the 1990 model code but have deviated substantially from the model in other respects or have adopted some of the revisions made in 1990 while retaining their former codes. Those jurisdiction include **Colorado, Delaware, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, Oregon, Texas, Washington,** and the **United States Judicial Conference**.

In October 2003, the ABA established a Joint Commission to Evaluate the Model Code of Judicial Conduct, noting that since 1990, “many changes have occurred affecting the role of judges and the ways in which they execute their responsibilities” and “recent court decisions have had a significant impact on the conduct of campaigns for judicial office.” As the ABA begins its evaluation and the states continue to review their codes, this issue of the *Judicial Conduct Reporter* will consider cases that have arisen under Canons 1 and 2 of the code, which set the general standards for judges, and what revisions states have adopted to the model provisions on ex parte communications, publicly commenting on pending cases, disciplinary responsibilities, and charitable fund-raising. 

## Ex Parte Communications *(continued from page 2)*

parte communication between probation officer and the trial judge was not improper); *In the Matter of Fine*, 13 P.3d 400 (Nevada 2000) (misconduct found in numerous and repeated ex parte communications with experts retained by the parties or appointed by judge in child custody proceedings); *In the Matter of Connor*, Determination (New York State Commission on Judicial Conduct September 22, 2003)

([www.scjc.state.ny.us/Determinations/2003\\_decisions.htm](http://www.scjc.state.ny.us/Determinations/2003_decisions.htm)) (misconduct found in consideration of law guardians' reports without furnishing reports to the parties).

Several states have undertaken to clarify what court personnel are covered by the exception in the code. The Alaska code explains that this exception "is not intended to authorize a judge to engage in ex parte consultation with court staff such as custody investigators and court-employed juvenile intake officers, whose functions is to provide evidence in the proceeding." The Massachusetts code notes that although probation officers are court personnel who assist the judge in performing adjudicative responsibilities, they "often work independently of the judge," and "from their work in the community, probation officers regularly obtain or receive factual information that is not part of a case record but that may have a direct bearing on a particular party in a case." Therefore, the Massachusetts code clarifies that "any consultation between a judge and a probation officer about a party in a specific criminal or juvenile case [must] take place in the presence of the parties (or their

counsel) who have availed themselves of the opportunity to attend, so that there is an opportunity to hear and respond to any information being conveyed by the probation officer." The code does allow a judge to "discuss with a probation officer ex parte the specifics of various available programs as long as there is no discussion about the suitability of the program for a particular party."

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### The variations that states have adopted to the model provision generally are designed to clarify the restriction, particularly the exceptions to the rule.

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Adopting the model code exception for ex parte communications "authorized by law," several states have listed examples. For example, in commentary, the South Carolina code lists "the issuance of a temporary restraining order under certain limited circumstances, the issuance of a writ of supersedeas under exigent circumstances, the determination of fees and expenses for indigent capital defendants, the issuance of temporary orders related to child custody and support where conditions warrant, and the issuance of a seizure order regarding delinquent insurers" (citations omitted). Even when ex parte communications are authorized by law, however, the Rhode Island code emphasizes that a "judge should discourage ex parte applications for injunctions and receiverships where the order may work detriment to absent parties."

A judge should act upon ex parte applications only where the necessity for quick action is clearly shown. A judge should scrupulously cross examine and investigate the facts and the principles of law upon which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. A judge should remember that an injunction is a limitation upon a freedom of action of defendants and should not be granted lightly or inadvisedly.

*See also Indiana Advisory Opinion 1-01* (judges should proceed with meticulous attention to the procedures established in the statute governing temporary restraining orders before granting ex parte emergency custody changes).

Although the model code allows ex parte communications with a disinterested expert on the law, it suggests that inviting the expert to

file a brief amicus curiae is the more appropriate and desirable procedure, and Alaska, Illinois, Kansas, Massachusetts, New Hampshire, and Oregon have omitted that exception.

Finally, with respect to the requirement that a judge "take reasonable steps to promptly notify all parties of any ex parte communication," the Alaska commentary explains that the "continuing development of communications technology will affect what steps are "reasonable."

Telephone communication is now virtually ubiquitous and telefax communication is widespread. In the near future, it may be common to notify lawyers through computer mail or computer bulletin boards. A judge should consider these alternatives when deciding the most expeditious means of communication reasonably available to the court and the parties. 

## Charitable Fund-raising *(continued from page 3)*

nations are listed for other persons.

Arizona, Delaware, Georgia, Kansas, Louisiana, New Jersey, North Dakota, Texas, Washington, West Virginia, and the U.S. codes maintained the distinction between quasi-judicial organizations and extra-judicial organizations in their new codes, and most of those jurisdictions did not adopt some of the new exceptions or clarifications added in 1990.

Several additional states also allow greater participation in fund-raising for law-related organizations. For example, for judges' organizations, the New Hampshire code allows a judge to "solicit funds from sources outside the State . . . for the purposes of judicial education and the improvement of the judicial system." For programs to improve the administration of justice, the state's code allows a judge to "solicit funds from governmental agencies and nonprofit organizations."

The D.C. code allows a judge, on behalf of a quasi-judicial organization, to "participate in solicitations of funds, other than from lawyers and from the general public." Commentary explains that the intention of that exception was "to authorize judges to help such organizations seek funding from private and governmental fund-granting agencies that would ordinarily be receptive to such requests and would not feel overreached or importuned by an approach from a judicial officer." The New York rules allow a judge to be a speaker or guest of honor at a court employee organization, bar association, or law school function.

Moreover, several states clarify the application of the fund-raising restriction to religious organizations. Rhode Island and Wisconsin explain in commentary that "Canon 4 should not be read to prohibit judges from soliciting

memberships for religious purposes, but judges must nevertheless avoid using the prestige of the office for the purpose of such solicitation." The Louisiana code of judicial conduct allows a judge "to privately solicit funds for the judge's local church from a local church member." See, e.g., *Arizona Advisory Opinion 96-13* (a judge may pass a collection basket while serving as an usher during a church service); *Delaware Advisory Opinion 1998-2* (a judge may not be a member of a church committee formed to collect tuition due the school operated by the church where the committee will send letters to and meet with persons who are in arrears); *South Carolina Advisory Opinion 16-1995* (a judge may not write letters to encourage the congregation of the judge's church to pray for the church's stewardship mission); *South Carolina Advisory Opinion 26-2000* (a judge may not participate in a church video that encourages parishioners to become active in the church and its fund-raising activities).

### De minimis activities

Some states have created an exception for "de minimis" fund-raising. For example, both the Rhode Island and Wisconsin codes provide in commentary:

Canon 4 should not be read as proscribing participation in de minimis fund-raising activities so long as a judge is careful to avoid using the prestige of the office in the activity. Thus, e.g., a judge may pass the collection basket during services at church, may ask friends and neighbors to buy tickets to a pancake breakfast for a local neighborhood center and may cook the pancakes at the event, but may not personally ask attorneys and others who are likely to appear before the judge to buy tickets to it.

Commentary to the Alaska code explains that although judges may not di-

rectly solicit funds (including being the speaker or guest of honor at an organization's fund-raising event), "judges may participate as workers at fundraising events such as car washes and carnivals, purchase admission to fundraising social events, and purchase goods and services (e.g., candy bars, commemorative buttons, or a car wash) that are being sold as a fundraising effort." Similarly, commentary to the Indiana code permits judges, as parents, to participate "in their children's educational and organizational fund-raising activities if the procedures employed are not coercive and the sums nominal." See also, e.g., *Arizona Advisory Opinion 00-6* (a judge may wash cars at a fund-raising car wash held by the judge's church but may not stand on the street to encourage drivers to go to the car wash, use his or her name in promoting it, or take a role that places the judge apart from the other participants); *Indiana Advisory Opinion 1-96* (a judge may participate in a fund-raising event for a charitable organization if the judge's participation is anonymous or behind the scenes and would have little to do with a donor's decision to make a contribution).

Unlike the model code, the California, New York, and Wisconsin codes allow a judge to be a guest of honor at a fund-raising event. That permission is conditioned in the California code on the judge not personally soliciting funds. Under the Wisconsin provision, the judge may not be advertised as speaker or guest of honor to encourage people to attend and make contributions and any contributions at the event must be made prior to the judge's speech or presentation as guest of honor. In New York, a judge may accept "an unadvertised award ancillary" to a fund-raising event. 

## Commenting on Pending Cases *(continued from page 2)*

“overbroad and unenforceable” and narrowed that provision in 1990. Thus, Canon 3B(9) of the 1990 model code provides: “A judge shall not, while a proceeding is pending or impending in any court, make any public comment *that might reasonably be expected to affect its outcome or impair its fairness*” (emphasis added).

Although that change may have narrowed the restriction, it introduced an element of vagueness. The “difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar,” according to commentary in the Maine code explaining why the revision was not adopted in that state.

In addition to Maine, codes in California, Delaware, Massachusetts, Minnesota, Missouri, and New York and the code of conduct for federal judges have not adopted the “might reasonably be expected to affect its outcome or impair its fairness” qualification in spite of adopting other provisions in the 1990 model code.

### Scholarly presentations

To address concerns about the breadth of the proscription, however, some of these jurisdictions have directly addressed the issue of discussing pending cases while teaching. The Delaware and U.S. codes, for example, state that the restriction does not extend “to a scholarly presentation made for purposes of legal education.” The Delaware and U.S. codes also add in commentary: “If the public comment involves a case from the judge’s own court, particular care should be taken that the comment

does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A.” The California code adds:

Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge

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**To address concerns about the breadth of the proscription, some of these jurisdictions have directly addressed the issue of discussing pending cases while teaching.**

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has presided or to comments or discussions that might interfere with a fair hearing of the case.

*See, e.g., New York Advisory Opinion 95-105* (a judge who teaches a course in criminal justice may comment in the classroom on actual cases pending in other jurisdictions as long as the judge refrains from making gratuitous and unnecessarily controversial statements and avoids any discussion of cases within the general jurisdictional locale of the judge’s court and the college campus).

Other states have narrowed the proscription by limiting it to cases pending in the jurisdiction. Thus, in North Carolina, the restriction applies only to “a pending or impending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law,” while in Massachusetts, it applies only to a “pending or

impending Massachusetts proceeding in any . . . state or federal court within the United States or its territories.”

Other states have clarified the provision by describing what public comment is allowed despite the restriction. For example, the Connecticut code emphasizes that the provision does not prohibit a judge “from correcting factual misrepresentation in the reporting of a case.” The New Hampshire code adds commentary stating, “This Section recognizes the appropriateness of public comment by judges of an informational and educational nature concerning the administration of justice, and to dispel public misconceptions and misinformation about the operation of the court system.”

Commentary to the Massachusetts code explains that “speaking to a journalist is public comment even where it is agreed that the statements are ‘off the record,’” but additional commentary states:

A judge may, consistent with this section, explain what may be learned from the public record in a case, including pleadings, documentary evidence, and the tape recording or stenographic record of proceedings held in open court. The judge may not discuss the rationale for a decision, however, unless the judge is repeating what was already made part of the public record.

*See also Illinois Advisory Opinion 98-10* (a judge may appear on television or radio to discuss legal issues if the judge does not comment about proceedings that are pending or impending in any court except to explain the administrative procedures of the courts and to repeat comments that appeared in the official transcript, a court order, or a written opinion). 

## Disciplinary Responsibilities *(continued from page 3)*

Louisiana, Massachusetts, Minnesota, Nebraska, and Utah) require that a judge *shall* take appropriate action in response to even minor misconduct. (With the substitution of “shall” for “should,” the Louisiana, Minnesota, and Utah codes are identical to the 1972 model code provision.)

Moreover, the model code requirement that the obligation to report to disciplinary authorities arises only when the violation raises “a substantial question as to the other judge’s fitness for office” means that a great deal of serious misconduct will go unknown by the disciplinary authorities. While a single act

of misconduct may not indicate a judge’s unfitness for office, it may require some sanction, and an isolated violation may be part of a pattern that the disciplinary authority can discover only if each act is reported or as the result of an investigation into one report. Therefore, some states have broadened the reporting requirement to cover violations that raise a question as to the other judge’s “honesty, trustworthiness or fitness” (Arizona and Oregon), “honesty, integrity, trustworthiness, or fitness” (Massachusetts), or any unprofessional conduct (Oklahoma). Moreover, because the reporting obligation is triggered only by personal knowledge, the model provision does not require a judge to report serious misconduct that may be conveyed to the judge by court staff or attorneys who turn to the judge for assistance. Thus, in the Arizona code, the requirement is also imposed by the receipt of “reliable information.”

Some states have described the types of misconduct that may be considered too minor to require reporting but may warrant other action. For ex-

ample, the Alaska commentary states “a judge who learns that another judge has engaged in an improper but de minimis ex parte contact, or who learns that a judge has engaged in a fundraising activity for a charity, may believe that the only action needed is to point out to the other judge that his or her conduct violates the Code.” The Massachusetts commentary states that examples of less serious violations in-

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**“Judges have a special duty to protect the public from the consequences of serious misconduct.”**

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clude but are not limited to:

speaking or being the guest of honor at an organization’s fund-raising event; serving as a director of a family business; serving as the executor of an estate of a relative or person with whom the judge had no close familial relationship; frequently starting court business late or stopping it early; soliciting advice about pending cases from a friend who is a law professor without disclosure; placing or leaving a bumper sticker for a political candidate on a vehicle the judge regularly drives; frequently delaying making decisions in cases.

### **Appropriate action**

The Massachusetts commentary also describes the types of appropriate action that may be taken by a judge who has knowledge of a less serious code violation:

speaking to the other judge directly; asking someone else who may be more appropriate to speak to that judge; reporting to the presiding judge of the court where the violation occurred or where that judge often sits; reporting to the Chief Justice of that judge’s court; and speaking to Judges concerned for Judges or calling the judicial hotline maintained by Lawyers Concerned For Lawyers, Inc.

Alaska commentary notes that “appropriate action will vary with particular situations and with particular individuals. There will generally be a range of reasonable responses available to the judge who learns of misconduct.”

Noting “a momentary lapse of judgment resulting in a minor gaffe or embarrassment can easily be resolved internally,” the Arizona supreme court judicial ethics advisory committee explained:

Reasonable minds might disagree on what constitutes “appropriate action” in a particular situation. For example, while some judges might feel comfortable drawing a colleague’s

attention to a minor problem, e.g., frequent tardiness or acting too friendly with attorneys in the courtroom, others may choose to report such incidents to their presiding judge or to the commission. Depending on the circumstances, including the nature and frequency of the misconduct, either approach might constitute “appropriate action.”

*Arizona Advisory Opinion 03-3.* However, the committee emphasized that even if the violation were minor, a judge “would not be wrong to report the conduct to the commission in the first instance, and that the conduct should not be ignored, especially when it threatens to affect the reputation of the entire judiciary.”

The committee addressed what a judge should do if he or she receives reliable information from court staff that another judge in open court referred to the courtroom where he was hearing arraignments as the bad ass court, apparently in an attempt to impress defendants brought in on warrants of the seriousness of their offenses. The committee advised that the judge “could meet privately with the other judge to discuss the problem.

If the offending judge is receptive to the feedback, then the informal consultation might well resolve the problem. But if the offending judge repeats the conduct, the matter should be reported to the commission.”

The Massachusetts code commentary gives the following non-exhaustive list of examples of conduct that requires reporting to the disciplinary commission:

tampering with or attempting to influence improperly a judicial action of another judge; giving false testimony under oath; tampering with or falsifying court papers to support judicial action; grossly abusing the bail statutes; failing to recuse at a hearing when the judge is engaged in a personal financial venture with lawyers or parties; misusing appointment power to show favoritism; using court employees during regular work hours for private benefit; engaging in inappropriate political activity, such as attending fundraisers, soliciting money for candidates or causes, and lobbying except on matters concerning the law, the legal system, or the administration of justice; engaging in a pattern of any of the following activities: abuse of alcohol in public, indifference to case law or facts, use of injudicious or abusive language on the bench, or failure to devote full-time to judicial work.

The Arizona judicial ethics committee has advised that “overt sexual advances and the use of vulgar language in open court should be reported to the commission,” stating that such conduct affects public perceptions of justice and tarnishes the reputation of the judiciary. *Arizona Advisory Opinion 03-3*.

### Substance abuse

Several states have created a specific provision related to substance abuse. The New Mexico code provides:

The requirements of Subparagraphs (1) and (2) of [Canon 3D] do not apply to any communication concerning alcohol or substance abuse by a judge or attorney that is: (a) intended to be confidential; (b) made for the purport of reporting sub-

stance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and (c) made to, by or among members or representatives of a lawyers support group, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board.

Kansas, Wisconsin, and West Virginia have similar provisions for members of groups to assist impaired judges in those states.

Commentary to the Alaska code explains:

[A] judge who learns that another judge is suffering from alcohol or drug addiction might direct that other judge to counseling or might seek the help of the other judge’s colleagues or friends. On the other hand, if the other judge refuses to admit the problem or submit to ameliorative measures, and if the other judge’s intoxication is interfering with his or her judicial duties (so as to constitute a violation of Canon 1 and Section 3A), then a judge who knows of this problem may be obliged to report it to the Commission on Judicial Conduct.

The West Virginia code notes that a “judge who has knowledge that another judge is incapacitated or impaired, raising a substantial question as to the judge’s fitness for office” must inform the Committee on Assistance and Intervention of the Judiciary.

The Arizona advisory committee addressed a hypothetical in which a judge, with the understanding and cooperation of his or her colleagues, takes an authorized leave of absence for three to six months, or longer, for health-related reasons such as alcohol rehabilitation or cancer treatment. *Arizona Advisory Opinion 03-3*. The committee noted that the question under these circumstances was “difficult and sensitive because it typically arises in a situation where a colleague is grappling with a serious illness or is earnestly trying to reform his or her life and is seeking support and under-

standing.” The committee also noted that other judges may have an “unspoken fear” that by informing on a colleague, “they may set in motion a process that could result in the suspension or removal of an experienced judge and trusting friend.” However, the committee concluded “that an illness, recuperation or rehabilitative period that results in an extended absence from judicial duties must be reported to the Commission on Judicial Conduct.” The committee noted that the commission is sensitive to such problems and has indicated its willingness to “keep the information confidential and monitor the judge’s progress until he or she returns to active service.”

Several states define a judge’s disciplinary responsibilities to include disclosure of information in response to a request from a disciplinary authority or other investigative body. For example, the Oregon code provides that a “judge possessing knowledge or evidence concerning another judge or lawyer shall reveal that knowledge or evidence on request by a tribunal or other authority empowered to investigate or act upon the conduct.” Ohio and Alaska have similar provisions.

The California code contains a self-reporting requirement:

A judge who is charged by prosecutorial complaint, information or indictment or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral turpitude or an infraction under California law, but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol, shall promptly and in writing report that fact to the Commission on Judicial Performance. 



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## JUDICIAL CONDUCT REPORTER

# The 19th National College on Judicial Conduct and Ethics Chicago, Illinois October 21 – 23, 2004

The Center for Judicial Ethics will hold its 19th National College on Judicial Conduct and Ethics on October 21-23, 2003 at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois. Registration for the College will be \$250. The rate for rooms will be \$169 a night (for single occupancy; \$189 a night for double occupancy), plus tax.

The National College provides a forum for judicial conduct commission members and staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Thursday af-

ternoon with registration. Friday through Saturday morning, there will be six sessions with three concurrent workshops offered during each session. Topics under consideration include: revisions to the ABA model code of judicial conduct; ethical issues for new judges; ethical issues for judges and their families; attending seminars; judges as administrators; disqualification; charitable activities; sanctions; issues for new members of conduct commissions; and issues for public members.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter*.