



NEW YORK STATE BAR ASSOCIATION

Proposed Rules of Judicial Conduct

**Albany, New York
May 1, 2011**

This report was approved by the New York State Bar Association's House of Delegates on April 2, 2011. The rules contained herein are not effective unless and until approved by the Chief Administrative Judge.

NEW YORK STATE BAR ASSOCIATION

SPECIAL COMMITTEE TO REVIEW THE CODE OF JUDICIAL CONDUCT

Introduction

In the nineteenth century, standards grounding the disqualification of judges were well developed. Issues concerning judicial ethics, however, primarily arose when judges were impeached for misconduct. Judicial ethics issues were addressed ad hoc in this context and rules governing the ethical conduct of judges were not consolidated in a single treatment.

On January 29, 1909, the same day it adopted the American Bar Association's ("ABA") Canons of Legal Ethics, the New York State bar Association ("NYSBA") adopted its own Canons of Judicial Ethics. These Canons contained 36 provisions ranging from the "Avoidance of impropriety" in canon 4 to "Personal investments and relations in Canon 26. It is apparent, based on a comparison of the texts, that the NYSBA Canons of Judicial Ethics strongly influenced the ABA's adoption of the ABA Canons of Judicial Ethics in 1924.

The ABA Canons of Judicial Ethics, which reigned for almost half a century, were criticized as lacking firm guidance for the resolution of difficult ethical issues confronting judges. In response to this commentary, the ABA appointed a Special Committee on Standards of Judicial Conduct in 1969 to develop new rules governing judicial ethics. After this Special Committee concluded its work, the ABA Model Code of Judicial Conduct was adopted in 1972 ("1972 ABA Model Code"). The 1972 ABA Model Code contained Canons, black letter Rules, and Commentary.

Effective March 3, 1973, the NYSBA adopted the 1972 ABA Model Code, with some minimal amendments, to replace the 1909 Canons of Judicial Ethics ("1973 NYSBA Code of Judicial Conduct"). In adopting the Code, the NYSBA expressly noted that "if any applicable rules heretofore or hereafter issued by the Administrative Board of the Judicial Conference is inconsistent, the rules of the Board shall prevail."

Later that same year, the Administrative Board of the Judicial Conference adopted the Code of Judicial Conduct approved by the NYSBA ("New York State Code of Judicial Conduct"), which became effective on January 1, 1973. The New York State Code of Judicial Conduct was housed in 22 NYCRR Part 33 and became binding as a court rule. After the Office of Court Administration was established in 1978, the Chief Administrative Judge issued an Administrative Directive that maintained the New York State Code of Judicial Conduct in 22 NYCRR Part 100, where it remains today.

After conducting a survey in 1986, the ABA concluded that a comprehensive review of the 1972 ABA Model Code was appropriate. In 1990, after an extensive review was completed, the ABA House of Delegates adopted the Model Code of Judicial Conduct ("1990 ABA Model Code"). The 1990 Model Code retained the format of the 1972 Model Code, including Canons, black letter Rules, and Commentary, but reduced the number of Canons from seven to five.

An ad hoc NYSBA committee comprised of representatives from the NYSBA Committee on Professional Responsibility, the Judicial Section of the NYSBA, the NYSBA Committee on Judicial Elections, and the NYSBA Committee on Procedures for Judicial Discipline submitted two comment letters to the ABA addressing various drafts of the 1990 ABA Model Code. These comments were largely ignored.

The NYSBA Committee on Professional Ethics subsequently reviewed the 1990 ABA Model Code. In 1993, the NYSBA Committee on Professional Ethics recommended adoption of a new Code of Judicial Conduct, modeled primarily on the 1990 ABA Model Code. The Committee urged for retention of various provisions contained in the 1973 NYSBA Code of Judicial Conduct and the New York State Code of Judicial Conduct that had not been included in the 1990 ABA Model Code. Furthermore, the Committee recommended that, moving forward, New York should retain only one set of standards to replace both the 1973 NYSBA Code of Judicial Conduct and the New York State Code of Judicial Conduct.

Effective January 1, 1996, the New York State Court System revised the Rules of Judicial Conduct. *See* Historical Note, 22 NYCRR Part 100. These rules have, from time to time, been amended by the courts to address various issues.

The NYSBA ultimately adopted The Code of Judicial Conduct (“1996 NYSBA Code of Judicial Conduct”), which became effective on April 13, 1996. The 1996 NYSBA Code of Judicial Conduct was never subsequently amended to conform to the amendments made to the Rules of Judicial Conduct (22 NYCRR Part 100) after 1996.

In 2003, the ABA began an extensive review of the 1990 ABA Model Code. After three and one half years of comprehensive study, those efforts culminated in the adoption of a revised ABA Model Code of Judicial Conduct (“2007 ABA Model Code”). The 2007 ABA Model Code contained important format and substantive changes, and followed a design similar to that in the ABA Model Rules of Professional Conduct, which governs the conduct of lawyers. The 2007 ABA Model Code preserved the Canons from the 1990 ABA Model Code, which contain broad principles of judicial conduct. These are followed by black letter “Rules,” which are mandatory in nature, and “Comments,” which contain guidance in interpreting the Rules and aspirational goals.

As of September, 2010, 16 states have adopted amendments to their code of judicial conduct based on the 2007 ABA Model Code. An additional 22 states are reviewing their codes and considering adoption of the 2007 Model Code.

In 2003, the NYSBA formed the Special Committee to Review the Code of Judicial Conduct (“Special Committee”). The original purpose of the Special Committee was to review the Report of the Chief Judge’s Commission to Promote Public Confidence in Judicial Elections (the Feerick Commission). The Special Committee issued a report in 2004. Judge Joseph P. Sullivan (Ret.) was appointed to chair the committee in 2008 and the committee was asked to review the 2007 ABA Model Code.

In September 2008, the Special Committee conducted a review of the 2007 ABA Model Code and determined that it was desirable to recommend a change from the structure of the New York State Code of Judicial Conduct to that of the 2007 ABA Model Code, as well as an adoption of many of the substantive provisions of the 2007 ABA Model Code. The change is recommended, in part, to bring New York's rules governing the ethical conduct of judges into conformity with the structure and substance of the rules governing judges in other states. The proposed changes will make it easier for judges and others seeking to research judicial ethics issues, who, for example, will be able to perform national searches by reference to a single New York provision that is consistent with a similarly numbered provision in another jurisdiction. Adoption of the format of the ABA Model Code of judicial Conduct will also dovetail with the New York Courts' adoption of the New York Rules of Professional Conduct (Effective April 1, 2009), which mirror the structure of the ABA Model Rules of Professional Conduct.

Initially, given the significant number of states that have already adopted the format in the 2007 Model Code of Judicial Conduct, the Committee determined that it is appropriate to recommend a change in format similar to that in the ABA Model Code. This will better allow judges to locate the relevant rules governing their conduct and facilitate research in determining how other states have interpreted similar provisions.

The Special Committee then formed five subcommittees, each of which was assigned a group of Rules from the 2007 ABA Model Code. The subcommittees prepared reports recommending revisions, deletions and adoption of portions of the Rules in the 2007 ABA Model Code, including a Preamble, Scope and Terminology section. These reports were circulated to the entire Special Committee.

The Special Committee then conducted a series of meetings with detailed agendas to review each subcommittee's report. At these meetings, the Special Committee debated the proposals in the subcommittee reports and voted on Proposed Rules.

After each meeting, the Reporter circulated drafts of the Proposed Rules agreed upon at the meeting to solicit comments and suggested revisions. The Reporter also included Comments and Reporter's Notes for the Special Committee's review. Many of the Proposed Rules, Comments and Reporter's Notes became the subject of debate at future meetings and were further revised.

In this process, the Special Committee attempted to ensure that all important provisions in 22 NYCRR Part 100 were retained in the body of the Proposed Rules. To this end, each Proposed Rule is immediately followed by a reference to the "Parallel Provision[s]" in the Rules of Judicial Conduct. In addition, the Report is accompanied by a comparison chart that compares the provisions in the Proposed Rules with those in the existing New York State Code of Judicial Conduct.

Several members of the Judicial Branch participated in discussions at the Special Committee's meeting. These included the following members of New York's Advisory Committee of Judicial Ethics: Hon. Jerome C. Gorski, Hon. James J. Lack, Hon. George D. Marlow (Chair), Hon. Thomas E. Mercure, and Laura L. Smith, Esq.

The Special Committee initially conducted twelve meetings on the following dates:

September 16, 2008
October 16, 2008
November 25, 2008 (via teleconference)
December 16, 2008
January 23, 2009
February 27, 2009
April 3, 2009
May 5, 2009
June 1, 2009
June 22, 2009
August 3, 2009

On October 20, 2009, the Special Committee circulated Proposed Rules of Judicial Conduct for comments from the bench and bar.

On October 13, 2010, the Special Committee conducted a lengthy meeting to consider the thoughtful comments and suggested revisions submitted by various groups and individuals, including the New York State Bar Association's Judicial Section and Committee on Procedures for Judicial Discipline, the New York County Lawyers' Association, the New York City Bar Association, Court of Claims Judges, Richard B. Long, Esq., Peter V. Coffey, Esq., and Norman Greene, Esq.

At the request of various interested groups, the Special Committee withheld the Proposed Rules of Judicial Conduct from consideration by the NYSBA House of Delegates pending meetings with those groups. These meetings were scheduled to allow the various groups to directly express their concerns regarding the Proposed Rules with members of the Special Committee.

On January 14, 2011, the Chair, various members of the Special Committee, and the Reporter met with Associate Justices Angela M. Mazzarelli and Leland DeGrasse of the Appellate Division, First Department and Justice Eileen Bransten of the Commercial Division, New York County. On January 31, 2011, the Chair, various members of the Special Committee, and the Reporter met with several members of the New York State Bar Association's Judicial Section and Committee on Procedures for Judicial Discipline, the New York County Lawyers' Association and the New York City Bar Association. Several members of these groups are Justices of the Supreme Court and were present at the meeting. After these two lengthy meetings, which the Special Committee found extremely helpful, another meeting of the Special Committee was held on February 9, 2011 to reconsider the suggested revisions to the Proposed Rules in light of the meetings with the various groups. Many of the comments and suggested revisions submitted in writing and aired at the two meetings held in January, 2011 have been incorporated into this Report. The Special Committee would like to thank all of the groups and individuals who submitted so many thoughtful ideas. It is apparent that these submissions have helped to improve the Proposed Rules in a number of areas.

In considering the comments and suggested revisions, the Special Committee attempted, whenever possible, to maintain consistency between the Proposed Rules and the 2007 ABA Model Code. Even if certain provisions in the Proposed Rules could have been drafted with greater clarity and efficiency, as several suggested revisions noted, the Special Committee elected to maintain language in the Proposed Rules that is consistent with the 2007 ABA Model Code if the provision was adequate and clear.

Several comments and suggested revisions proposed carve-outs to many of the Proposed Rules. The Special Committee ultimately determined not to adopt many of these suggestions as they would likely create uncertainty in the application of the Proposed Rules and, in some instances, given the clear wording of the particular Rule, the carve-outs are not required. Furthermore, if certain items were carved out, debate would likely arise as to whether items not carved out were intended to be excluded from a provision.

Several comments suggested that certain items be defined and offered proposed definitions. While the Special Committee shares the desire to provide clear definitions and standards whenever possible, it did not accept many of these proposed definitions because they were incomplete and crafting an appropriate definition proved impossible. In addition, the Special Committee determined that a number of the proposed definitions were not needed.

Submission of Proposed Rules to Courts

In a meeting held on April 2, 2011, the vast majority of the Proposed Rules were approved by the NYSBA House of Delegates. Several amendments to the Proposed Rules were also approved by the NYSBA House of Delegates. Those amendments are referenced in the Reporter's Notes to the applicable Proposed Rules, and include amendments to Proposed Rule 2.10, 2.15, 3.13, 3.14, 3.15, 4.2 and 4.3. The Special Committee thereafter conformed several portions of the Proposed Rules and Comments, including Proposed Rule 5.1.

According to a resolution of the NYSBA House of Delegates dated April 2, 2011, the Proposed Rules are now ready to be forwarded to the Administrative Board of the Courts for consideration.

After the courts make their determinations, the NYSBA will need to revised the Rules and Comments to conform to the final Rules of Judicial Conduct approved by the courts. Any publication issued by the NYSBA after the courts have acted should include a short discussion, similar to that contained at the outset of the New York Rules of Professional Conduct for attorneys, noting whether the Preamble, Scope, Terminology and Comments have been adopted by the courts. In addition, it should note that in the event of a conflict with the Rules of Judicial Conduct (Part 100), the Rules of Judicial Conduct will control. See 1996 NYSBA Code of Judicial Conduct, Application, E ("Relation to Code of Judicial Conduct").

Highlights of Proposed Changes

Terminology Section

The Terminology section has been expanded to include definitions of several new terms, while also expanding definitions for existing terms. Every time any term is used in a Rule in its defined sense, it is followed by an asterisk (*) to alert the reader that the term is defined in the terminology section.

CANON 1

The Proposed Rules contained under Canon 1 combine the previous Canons 1 and 3, emphasizing at the outset of the Proposed Rules the judge's general duties to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. The specific obligations of a judge while on the bench, in the judge's private life, or in the political sphere are addressed in the Proposed Rules in Canons 2, 3 and 4.

The Committee debated whether to remove the reference to "the appearance of impropriety" in Rule 1.2. The Committee acknowledged that there are legitimate grounds to remove the phrase, but ultimately concluded that it should be preserved.

Proposed Rule 1.3, which prohibits a judge from using "the prestige of judicial office to advance the personal or economic interests of the judge or others" adds "or allow others to do so," a key concept that is missing from the New York Code and would cover misconduct by the judge's employees, clerks or friends.

CANON 2

Proposed Rule 2.2, entitled "Impartiality and Fairness," expressly provides that it is not a violation of the Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

Proposed Rule 2.3, entitled "Bias, Prejudice, and Harassment," lists improper bases for discrimination, including ethnicity, marital status, gender, and political affiliation. The Proposed Rule retains the terms "age," "creed," and "color" contained in the current New York Code.

The hortatory instruction that a judge "should cooperate with other judges and court officials in the administration of court business," currently contained in Rule 100.3(C)(1), is made mandatory in Proposed Rule 2.5(B). To obtain efficient and effective administration of justice, the Special Committee believes that cooperation among all judges of the court is required.

Proposed Rule 2.6(B), which addresses a judge's authority to encourage settlement, is new. The inclusion of this provision is important because of the large number of pretrial settlements in our court system and the central role the judge plays in these settlements.

Proposed Rule 2.7, entitled "Responsibility to Decide," is new. It requires a judge to "hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." The Proposed Rule addresses the situation in which a judge sometimes improperly

opts for disqualification to avoid deciding a case that the judge may regard as controversial or likely to reach an unpopular result.

Proposed Rule 2.9, entitled “Ex Parte Communications,” introduces new requirements when a judge seeks to obtain the written advice of a disinterested expert on the law applicable to a proceeding. The parties must receive advance notice of the person to be consulted and the substance of the advice to be solicited, and must be given a reasonable opportunity to object and respond, both to the notice and to the advice received.

Proposed Rule 2.9(C) contains a new provision prohibiting a judge from “investigat[ing] facts in a matter independently.” The Comment to the Proposed Rule states that the prohibition extends to a judge’s investigation through electronic means, which would include investigation on the Internet.

Proposed Rule 2.11, entitled “Disqualification,” contains a new provision requiring disqualification of an appellate judge who “previously presided as a judge over the matter in another court ... [where] the appeal involves issues adjudicated by the judge in the other court.”

Proposed Rule 2.14, entitled “Disability and Impairment,” is a new rule requiring that the judge take “appropriate action” when he or she has “knowledge” that a lawyer’s or judge’s performance is impaired by drugs, alcohol, or some mental or physical condition. This Proposed Rule is directed toward both protecting the public and assisting the judge or lawyer.

Proposed Rule 2.16, entitled “Cooperation with Disciplinary Authorities,” is a new rule addressing the duty of a judge to cooperate with judicial and lawyer disciplinary authorities.

Proposed Rule 2.17, entitled “Cooperation with Review, Screening and Nominating Committees,” is a new rule that was adopted upon the recommendation of an interested group. The Proposed Rule is designed to prohibit a judge, in the performance of judicial duties, from retaliating against or favoring anyone who cooperates with an appropriate body to assess qualifications and recommend or nominate persons for judicial office.

CANON 3

Proposed Rule 3.13, entitled “Acceptance and Reporting of Gifts, Loans, Bequests, Benefits or Other Things of Value,” provides a more structured mode of analysis on whether a judge can accept gifts, loans, bequests, benefits, or other things of value than that currently contained in Rule 100.4(D).

Proposed Rule 3.14, entitled “Reimbursement of Expenses and Waivers of Fees or Charges,” helps clarify a judge’s obligations in what can be a murky area. Proposed Rule 3.14(B) includes the concept of a “domestic partner.” *See Terminology, G.* Proposed Rule 3.14(C) is new and further clarifies the judge’s reporting obligations when the judge “accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge’s spouse, domestic partner, or guest.”

Proposed Rule 3.15, entitled “Reporting Requirements,” requires reporting of all compensation received for extrajudicial activities in excess of \$500. This is a change from the current rule, which only requires reporting of compensation in excess of \$150.

CANON 4

Canon 4 contains Proposed Rules governing the conduct of judges and candidates running for judicial office. The Special Committee adopted the format in the ABA Model Code, but rejected many provisions that were incompatible with New York’s process of electing judges. The Special Committee also retained many provisions in the current New York rule.

The internal organization of Canon 4, most of which formerly appeared in Canon 5, is significantly modified. Proposed Rule 4.1 expressly states, in its introductory clause (“except as permitted by law, or by Rules 4.2, 4.3 and 4.4”), that there are exceptions to its provisions. It then addresses the prohibitions against political activity that apply generally to judges and judicial candidates. Proposed Rules 4.2, 4.3 and 4.4 identify those obligations and prohibitions that relate to judges and judicial candidates who seek office through various judicial selection processes.

Proposed Rule 4.3, entitled “Activities of Candidates for Appointive Judicial Office,” is new. It allows a candidate for appointment to judicial office to, among other things, “communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency.” Furthermore, the candidate is not limited to seeking endorsements from organizations regularly making recommendations to appointing authorities, and may seek endorsement from any individual or organization other than a partisan political organization.

Proposed Rule 4.5, entitled “Activities of Judges Who Become Candidates for Nonjudicial Office,” relates to the activities of judges who become candidates for nonjudicial office. Proposed Rule 4.5(B) is new and provides that judges who are merely seeking appointment to some nonjudicial office are not required to resign their position simply to be considered for an appointment.

CANON 5

The Special Committee elected to retain virtually all of Rule 100.6 (“Application of the rules of judicial conduct”) in Proposed Rule 5.1. The Proposed Rule contains slight modifications due to changes in the numbering of sections.

With its work complete, the Special Committee now submits the Proposed Rules of Judicial Conduct for adoption in New York State.

Special Committee to Review the Code of Judicial Conduct

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Revised Report (April 2011) – NYSBA Proposed Rules of Judicial Conduct

Preamble

[1] An independent, fair and impartial; judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all of the Rules contained herein are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Rules of Judicial Conduct establish standards for the ethical conduct of judges and judicial candidates. The Rules are not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Rules. The Rules are intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

Scope

[1] The Rules of Judicial Conduct consist of five Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Rules. An Application section establishes when the various Rules apply to a judge or judicial candidate.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide guidance regarding the purpose, meaning, and proper application of the Rules. Where a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional judgment of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term “must,” it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of these Rules as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[4A] The text of the Canons and Rules, including the Terminology and Application Sections, is authoritative. The Comments, by explanation and example, provide guidance with respect to the purpose and meaning of the Canons and Sections. The Comments are not intended as a statement of additional rules.

[5] The Rules of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

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

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

Terminology

The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*).¹

- (A) **“Aggregate,”** in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate’s campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate’s opponent. See Rule 2.11; 4.4.

Reporter’s Notes: This is the ABA definition, not presently in the NY Code. Inclusion recommended.

- (B) **“Appropriate authority”** means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rules 2.14; 2.15.

Reporter’s Notes: This is the ABA definition, not presently in the NY Code. Inclusion recommended.

- (C) **“Candidate”** – see **“Judicial candidate.”**

Reporter’s Notes: See the Reporter’s Notes for “Judicial Candidate.”

¹ * Denotes that the term is defined in the Terminology Section.

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

Reporter’s Notes: This is the ABA definition, not presently in the NY Code. Inclusion recommended.

- (E) **“De minimis,”** in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality. See Rule 2.11(A)(2)(b); see also **“Economic Interest”**.

Reporter’s Note: Rule 100.0(D)(5) defines “de minimis” under “economic interests” as “an insignificant interest that could not raise reasonable questions as to a judge’s impartiality.” The Committee recommends listing the definition separately, as in the ABA Model Code.

- (F) **“Degree of relationship”** is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, grandchild, great-grandchild nephew or niece. The sixth degree of relationship includes second cousins. See Rules 2/11(A)(2), (3), (C); 2.13(B).

Reporter’s Notes: The Committee recommends retaining the NY definition, unchanged.

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- (G) **“Domestic partner”** means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11(A)(2)(3)(4)(7), (B), (C); 2.13, Comment 2; 3.13(B)(7), (C)(2); 3.14(B), (C).

Reporter’s Notes: The Committee recommends adopting the ABA definition, which does not appear in the NY Code.

- (H) **“Economic interest”** means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such

a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

- (1) an interest in the individual holdings within a mutual or common investment fund;
- (2) an interest in securities held by an educational, religious, charitable, cultural, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, child, or any member of the judge's family residing in the judge's household serves as a director, an officer, an advisor, or other participant;
- (3) a deposit in an financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests;
- (4) an interest in the issuer of government securities held by the judge; or
- (5) any interest held in a blind trust, the form and terms of which have been approved by the Chief Administrator of the Courts.

See Rules 1.3; 2.11; see also **“De minimis.”**

Reporter's Notes: The ABA and NY definitions of “economic interest” are virtually identical, except that the ABA Model Code lists “de minimis” interest as a separate definition and the ASBA Model Code has rearranged some language to avoid repetition. The Committee recommends the above definition, in which the underlined language has been added to the ABA definition to conform to the Proposed Rules.

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- (I) **“Fiduciary”** includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

Reporter's Notes: The Committee recommends retaining the NY definition of “Fiduciary,” which is identical to that in the ABA Model Code.

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

Reporter's Notes: The ABA and NY definitions are virtually identical. The Committee recommends the ABA definition as it lists all three terms, whereas the NY definition refers only to “impartiality.”

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- (K) **“Impending matter”** or **“impending proceeding”** is a matter or proceeding that is reasonable foreseeable but has not yet been commenced. See Rules 2.9, 2.10, 3.13, and 4.1.

Reporter’s Notes: The Committee recommends adoption of the NY definition of “impending proceeding.” The Committee also recommend adoption of a definition of “impending matter,” as both “matter” and “proceeding” are referred to in the Proposed Rules.

- (L) **“Impropriety”** includes conduct that violates the law, court rules, or provisions of these Rules, and conduct that undermines a judge’s independence, integrity, or impartiality. See Canon 1; Rule 1.2.

Reporter’s Notes: The Committee recommends adoption of the ABA definition of “impropriety,” which is not presently in the NY Code.

- (M) **“Independence”** means a judge’s freedom from outside influence or controls, other than those established by law. See Canons 1, 4; Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

Reporter’s Notes: The NY Code defines “independent judiciary” as “one free of outside influences or control.”

- (N) **“Integrity”** means probity, honesty, uprightness, and soundness of character. See Canon 1; Rule 1.2.

Reporter’s Notes: The NY Code definition is identical, but includes a second sentence, “Integrity also includes a firm adherence to this Part or its standard of values.” The Committee recommends removing the last sentence as unnecessary and unclear.

- (O) **“Judicial candidate”** means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2, 4.4, 4.5, 5.1.

Reporter’s Notes: The Committee recommends the ABA definition of “Judicial Candidate,” which is more comprehensive than the NY Code definition. The NY Code defines “candidate” rather than “judicial candidate.” The Committee prefers the latter, as the Proposed Rules use that term more often. To avoid confusion, the Committee maintains the term “candidate” in the terminology section, with a reference to “judicial candidate.”

- (P) **“Knowingly,” “knowledge,” “known,” and “knows”** mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances. See Rules 2.11, 2.13, 2.15, 2.16, 3.6, 4.1.

Reporter’s Notes: The Committee recommends maintaining the NY definition, which is identical to the ABA Model Code definition.

- (Q) **“Law”** encompasses court rules as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2., 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12., 3.13, 3.14, 3.15, 4.1, 4.2, 4.4, 4.5.

Reporter’s Notes: The Committee recommends maintaining the NY definition, which is identical to the ABA Model Code definition.

- (R) **“Member of the candidate’s family”** means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person within whom the candidate maintains a close familiar relationship.

Reporter’s Notes: The Committee recommends adopting the ABA Model Code’s definition of “Member of the candidate’s family, which is virtually identical to the NY definition, but includes the term “domestic partner.”

- (S) **“Member of the judge’s family”** means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, 3.11.

Reporter’s Notes: The Committee recommends adopting the ABA Model Code’s definition of “Member of the judge’s family,” which is virtually identical to the NY definition, but includes the term “domestic partner.”

- (T) **“Member of a judge’s family residing in the judge’s household”** means any relative of a judge by blood or marriage, or domestic partner, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Rules 2.11, 3.13.

Reporter’s Notes: The Committee recommends adopting the ABA Model Code’s definition of “Member of a judge’s family residing in the judge’s household,” which is virtually identical to the NY definition, but includes the term “domestic partner.”

- (U) **“Nonpublic information”** means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

Reporter’s Notes: The ABA Model Code and NY definitions are identical, except that the NY definition includes the explanatory words “by law.” The Committee recommends retaining the NY definition, which is clearer.



- (V) **“Part-time judge,”** including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment. See Rule 5.1(B).

Reporter’s Notes: The Committee recommends retaining the NY definition of “Part-time judge,” which is not in the ABA Model Code.

- (W) **“Pending matter” or “pending proceeding”** is a matter or proceeding that has commenced. A matter or proceeding continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, 4.1.

Reporter’s Notes: The Committee recommends adopting the ABA Model Code definition of “pending proceeding,” which is clearer than NY’s definition. The Committee also recommends adoption of a definition of “pending matter,” as both “matter” and “proceeding” are referred to in the Proposed Rules.

- (X) **“Personally solicit”** means a request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, electronic communication, or any other means of communication. See Rules 3.7, 4.1.

Reporter’s Notes: The Committee recommends adopting the ABA Model Code definition of “Personally solicit,” which is not in the NY Code, with the addition of “electronic communication.”

- (Y) **“Political organization”** means a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Rule 4.1, 4.2.

Reporter’s Notes: The Committee recommends maintaining NY’s definition of “Political organization,” which is similar to the ABA definition, but broader.

- (X) **“Public election”** includes primary and general elections, partisan elections, and nonpartisan elections. See Rules 4.2, 4.4.

Reporter’s Notes: The Committee recommends maintaining NY’s definition of “Public election,” which is identical to the ABA definition.

- (AA) **“Require.”** The rules prescribing that a judge “require” certain conduct of others, like all of the Rules of Judicial Conduct, are rules of reason. The use of the term require in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control. See Rules 2.3, 2.10(C), 2.12(A).

Reporter’s Notes: The Committee recommends maintaining NY’s definition of “Require,” which is not in the ABA Model Code. The reference to the rules in this Part” has been replaced with “the Rules of Judicial Conduct.”

- (BB) **“Window Period”** means a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge’s or non-judge’s candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

Reporter’s Notes: The Committee recommends maintaining NY’s definition of “Window Period,” which is not in the ABA Model Code. For consistency purposes, the Committee recommends replacing “denotes” with “means.”

□□□

Canon 1

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

Rule 1.1: Compliance with the Law

A judge shall comply with the law*, including the Rules of Judicial Conduct.

Parallel Provisions: §§ 1101, 11.2, 11.6.

Reporter's Notes

The Committee decided to remove the work respect from Rule 1.1, even though it is contained in the parallel provision of the N.Y. Code. See 100.2(A) (“A judge shall respect and comply with the law....”) The Committee omitted the reference to maintain consistency with the ABA Model Code. The ABA deleted reference to a judge’s duty to respect the law in ABA Rule 1.1 because it was believed to be both impossible to define and unnecessary. ABA Reporter’s Explanation of Changes, Rule 1.1.

Rule 1.2: Promoting Confidence in the Judiciary

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

Parallel Provisions: §§ 100.1, 100.2, 100.6.

Comment

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

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

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

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

[5] Actual improprieties include violations of law, court rules or provisions of these Rules. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated these Rules or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

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

Reporter's Notes

The Committee debated whether to remove the reference to appearance of impropriety in Rule 1.2. The Committee acknowledged that there are legitimate grounds to remove the phrase. The appearance of impropriety phrase has never been used as a stand alone charge against a judge in New York. When it is charged, it is always accompanied by another charge. It should be noted that this phrase was added to the ABA Model Code at the urging of the judiciary and others, to make creating an "appearance of impropriety" an independent basis for discipline. ABA Reporter's Explanation of Changes Rule 1.2.

Rule 1.3: Avoiding Abuse of the Prestige of judicial Office

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

Parallel Provision: Rule 100.2(C).

Comment

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

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

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

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

Reporter's Notes

Rule 1.3 tracks ABA Rule 1.3 very closely. It is more precise than the current NY Code, using "personal or economic interests," which are defined terms, rather than the vaguer "private interests," a term which, at least on its face, does not clearly implicate economic interests. Also, ABA Rule 1.3 adds "or allow others to do so," a key concept that is missing from the New York Code and would cover misconduct by the judge's employees, clerks or friends. The word "abuse" in Model Rule 1.3 was changed to "use" to clarify that no use of the judicial office to advance the personal or economic interests of the judge should be permissible.

Canon 2

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

Rule 2.1: Giving Precedence to the Duties of Judicial Office

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

Parallel Provisions: § 100.3(A).

Comment

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

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

Reporter's Notes

Proposed Rule 2.1 is identical to ABA Model Rule 2.1 and provides better specificity to judges than the existing rule.

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office, including administrative duties, fairly and impartially.* It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

Parallel Provisions: § 100.3(B) (1) & (4).

Comment

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

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

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

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

Reporter's Notes

Proposed Rule 2.2 properly states the essential requirement that judges must apply the law as written. The proposed rule expressly states the judge's affirmative duty to perform judicial duties fairly and impartially. The Committee incorporated a suggestion to recognize expressly that judges acting in an administrative capacity are bound by the rule.

The second sentence of the Rule, addressing pro se litigants, was added at the suggestion of various groups. There was no evidence offered, however, that judges have been disciplined for providing reasonable accommodations to pro se litigants. Nonetheless, the Committee inserted this proposal in the black letter rule to address a matter of important concern. *See also* Comment 4. While providing reasonable accommodations to a pro se litigant may be appropriate, a judge must be careful in this realm. *See Horst v. Brown*, 72 A.D.3d 434, 900 N.Y.S.2d 13 (1st Dep't 2010)("[w]hile 'courts generally allow pro se litigants some leeway on the presentation of their case' (*Stoves & Stones v. Rubens*, 237 A.D.2d 280, 655 N.Y.S.2d 385 [1997]), in this particular case it was error to treat defendant's opposition to plaintiff's motion for summary judgment on damages as either a motion to amend defendant's answer, or a cross motion for summary judgment based on the statute of limitations.").

The Committee rejected a suggestion to combine the duties in Rules 2.2 and 2.3(a) in Rule 2.2. The Committee believes it is important to keep the obligations in Rule 2.2 and 2.3 in separate rules, as does the ABA Model Code, because they address separate problems. For example, it is possible for a judge to be impartial and objective in construing the law (Rule 2.2), but still demonstrate a bias or prejudice toward a party (Rule 2.3).

Rule 2.3: Bias, Prejudice and Harassment

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

Parallel Provisions: Rule 100.3(B)(4), (5), 100.3(C)(1).

Comment

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

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

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

Reporter's Notes

The Committee agreed to adopt most of ABA Model Rule 2.3, but to add “age,” “creed” and “color” to Rule 2.3(B) and (C). These are the only categories not included from the current New York Code. See Rule 100.3(B)(4), (5).

The Committee believes that the specificity of Section 100.3 has served New York well in enforcing compliance with the Rules of Judicial Conduct. The courts have had no trouble interpreting the rule and finding clarity in it in matters brought by the Commission on Judicial Conduct. Therefore, Proposed Rule 2.3 contains much of the specificity in Section 100.3

The Committee rejected proposals to amend Rule 2.3(B) to require judges “to make every reasonable effort to prevent court staff, court officials or others subject to the judge’s direction and control to” engage in conduct manifesting bias or prejudice. A similar amendment was suggested to Rule 2.3(C). The Committee believes that these suggested revisions would impose an undue burden on judges that is greater than that created by the Committee’s Proposed Rule.

Rule 2.4: External Influences on Judicial Conduct

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

Parallel Provision: Rules 100.2(B), (C), 100.3(B)(1).

Comment

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

Reporter's Notes

Rule 2.4(A) essentially repeats the language in the second sentence of Rule 100.3(B)(1). The phrase “partisan interests” currently found in Rule 100.3(B)(1) is covered by the phrase “political ... interests” in Proposed Rule 2.4(B).

The Committee recommends the ABA formulation of Rule 2.4(B) because it is more complete than Rule 100.2(B), adding the concept of “financial” interests as well as the broader catch-all term “other interests or relationships.”

ABA Rule 2.4(C) omits the word “special,” found in the current Rule 100.2(C). The Committee prefers the current rule, in part, because a judge should be able to say in open court that a particular party is influencing his decision by the legitimate force of its arguments. The thrust of this rule is supposed to be to prevent giving the impression that a particular person or organization is in a special position to influence the judge extra-judicially. Thus, the Committee recommends adding the word “special.”

Rule 2.5: Competence, Diligence, and Cooperation

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

Parallel Provisions: Rules 100.3(B)(1), 100.3(C)(1).

Comment

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

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

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

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A

judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Reporter's Notes

The Proposed Rule merges the requirements of competence and diligence in Rule 100.3(B)(1) and 100.3(C)(1) into one rule, applicable to both adjudicative and administrative responsibilities.

The Proposed Rule omits reference to the requirement that “a judge shall be faithful to the law.” Rule 100.3(B)(1). The duty to apply the law is captured in Proposed Rule 2.2 (“Impartiality and Fairness”).

The Proposed Rule omits reference to the mandate that a “judge shall not be swayed by partisan interests, public clamor or fear of criticism.” This prohibition is currently contained in Proposed Rule 2.4(A).

The prohibition concerning “bias or prejudice” currently in Rule 100.3(C)(1) has been moved to Proposed Rule 2.3(A).

The hortatory instruction that a judge “should cooperate with other judges and court officials in the administration of court business,” currently contained in Rule 100.3(C)(1), is maintained in Proposed Rule 2.5(B). While the Committee believes that efficient and effective administration of justice requires cooperation among all judges of the court, it made appropriate revisions to the Proposed Rules to address concerns raised by several groups. These groups noted that a mandatory requirement of cooperation might be too coercive in instances in which a court administrator acts improperly.

Rule 2.6: Ensuring the Right to Be Heard

- (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.***
- (B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.**

Parallel Provisions: Rule 100.3(B)(6).

Comment

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

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

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

Reporter's Notes

Proposed Rule 2.6(A) is identical to the first sentence in Rule 100.3(B)(6).

There appears to be no analogue to Proposed Rule 2.6(B) in the Code. The inclusion of this provision is important because of the large number of pretrial settlements in our court system and the central role the judge plays in these settlements. See 22 NYCRR 202.26(e) (noting, among other things, that "[w]here appropriate, the court may order parties, representatives of parties, representatives of insurance carriers or persons having an interest in any settlement, including those holding liens on any settlement or verdict, to also attend in person or telephonically at the settlement conference.") The Proposed Rule is designed to ensure that the judge's participation in the settlement process does not unduly interfere with the parties' right to be heard. It attempts to distinguish between permissible encouragement of settlement and the impermissible coercing of a settlement by an overzealous judge. See, e.g., *Wolff v. Laverne, Inc.*, 17 A.D.2d 213 (1st Dep't 1962) (trial court abused discretion by ordering preference after defendant refused to offer additional money to settle case).

The Committee rejected a suggested change to Rule 2.6(b) to provide that a "judge may encourage parties to a proceeding and their lawyers to settle matters in dispute *but shall act in a manner consistent with these rules* (rather than *but shall not act in a manner that coerces any party into settlement*)," coupled with a suggestion that a specific reference could be made within Rule 2.6 to Rule 2.2 and 2.3. The Committee believes that the prohibitions in Rule 2.2 and 2.3 might not cover situations that Proposed Rule 2.6 attempts to address, including the scenario in which the judge states: "Accept a plea or you are looking at the maximum."

The Committee also rejected a suggestion that the Proposed Rule be changed to state that a judge “should {rather than “may”} encourage parties to a proceeding and their lawyers to settle matters in dispute) and that the reference to the prohibition against coercion be removed. The Committee believes that clarity in this realm is important and that judges must be reminded that a party’s right to be heard can be impaired by a judge who is overzealous in seeking a settlement.

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to amend Proposed Rule 2.6 in accordance with the suggestions listed above failed. A motion was then adopted to approve Rule 2.6 as submitted by the Special Committee.

Rule 2.7: Responsibility to Decide

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

Parallel Provisions: None. Cf. Rule 100.3(B)(7) (“A judge shall dispose of all judicial matters promptly, efficiently and fairly.”).

Comment

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

Reporter’s Notes

The Proposed Rule and Comment are essentially new. The Proposed Rule acknowledges that, in certain circumstances, disqualification is required by some law other than Rule 2.11.

The Proposed Comment reflects the view of this Committee, and the ABA, that a judge sometimes improperly opts for disqualification to avoid deciding a case that the judge may regard as controversial or likely to reach an unpopular result. The Advisory Committee on Judicial Ethics has made clear via its opinions that unnecessary disqualification is disfavored and can itself erode confidence in the judiciary. See ACJE Opinion 07-25 (quoting ACJE Opinion 92-75, “...a judge should not recuse himself or herself from proceedings unless his or her impartiality could be questioned or would otherwise create an appearance of impropriety ... the judge should not consider recusal unless he or she believes that he or she could not be impartial”).

It was suggested that this rule might require a judge to provide a reason for disqualification to an administrator, and that it would conflict with Rule 2.11(D), which provides that a “judge need not disclose the reasons for recusal under these Rules to the *parties* or to the *public*.” Requiring a judge to reveal the basis for her disqualification to a court official would not violate Rule 2.11, as the official is not a “party” or member of the “public.”

Contrary to some of the groups who commented on this Proposed Rule, the Committee believes that issues regarding the timeliness of issuing a decision are not raised in this Rule, but are addressed in others. *See* Rule 2.5(A).

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to delete Proposed Rule 2.7 failed. A motion was then adopted to approve Proposed Rule 2.7 as submitted by the Special Committee.

Rule 2.8: Decorum, Demeanor, and Communication with Jurors

- (A) A just shall require order and decorum in proceedings before the court.**
- (B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge’s direction and control.**
- (C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.**

Parallel Provisions: Rules 100.3(B)(2), 100.3(B)(3), 100.3(B)(10).

Comment

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

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

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

Reporter’s Notes

Proposed Rule 2.8(A) is identical to Rule 100.3(B)(2).

Proposed Rule 2.8(B) extends the duty of courtesy, currently contained in Rule 100.3(B)(3), to court staff and court officials.

The Committee rejected a suggested revision to Rule 2.8(B) to change the obligation from one requiring a judge to ensure that lawyers, court staff, court officials and others subject to the judge's direction and control be patient and dignified, to one requiring the judge to "make every reasonable effort, including providing appropriate supervision." The Committee believes that these suggested revisions would impose an undue burden on judges that is greater than that created by the Committee's Proposed Rule. *See* Reporter's Notes to Rule 2.3. Furthermore, the proposed rule is identical to the current rule, *see* Rule 100.3(B)(3), and there is no indication that the rule is causing any problems in its current application.

Proposed Rule 2.8(C) opts to retain the provisions in Rule 100.3(B)(10), rather than adopting ABA Rule 2.8(C), as the existing rule clarifies that a judge "may express appreciation to jurors for their service to the judicial system and the community." *See* NY PJI 1:29 Alternate Jurors ("On behalf of the Court and the parties, I thank you for your service.").

Rule 2.9: Ex Parte Communications and Investigation

- (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:**
- (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes that do not affect a substantial right of any party is permitted, provided:**
 - (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and**
 - (b) the judge, insofar as practical and appropriate, makes provision promptly to notify all other parties or their lawyers of the substance of the ex parte communication, and gives the parties an opportunity to respond.**
 - (2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and provides a copy of such advice to all parties and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.**

- (3) A judge may consult with (i) court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities and (ii) judges who have neither been previously disqualified from hearing the matter nor have appellate jurisdiction over the matter, provided that in all cases the consulting judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
- (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers on agreed-upon matters in an effort to settle matters pending before the judge.
- (5) A judge may initiate, permit, or consider any ex parte communications when expressly authorized by law* to do so.
- (6) A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with these Rules.
- (B) If a judge receives an unauthorized or inadvertent ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
- (C) A judge shall not investigate facts in a matter independently, except as permitted by law, and shall consider only the evidence presented and any facts that may properly be judicially noticed.
- (D) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under these Rules.

Parallel Provision: Rule 100.3(B)(6).

Comment

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

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

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

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

[5] A judge who has been consulted by another judge under paragraph (A)(3), but who knows he or she would be disqualified from hearing the matter under Rule 2.11, must decline to respond.

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

Reporter's Notes

Proposed Rule 2.9(A) contains most of the materials in Rule 100.3(B)(6), with the exception of the first sentence of the current Rule, which is contained in Proposed Rule 2.6(A). There are, however, some proposed additions.

The Committee recommends adopting Proposed Rule 2.9(A)(1), which includes a provision for allowing ex parte communications for “emergency purposes.” The term “substantive” was added to this provision in recognition of the fact that some ex parte communications permitted under this rule, which do not relate to substantive matters, could still enable a party to gain an inappropriate advantage related to the merits of the case.

The Committee recommends the addition of Rule 2.9(A)(2), which allows the judge to consult with disinterested experts, but only after providing appropriate notice to the parties before such consultation. This provides the parties with an opportunity to object to the proposed consultation in advance and to advise the judge of any reasons why the particular consultation is not appropriate. This provision no longer allows the judge to obtain oral advice from a disinterested expert, as is currently permitted by Rule 100.3(B)(6)(a).

The Committee recommends the addition of the commonly understood limitations on a judge consulting with court staff and officials, or with other judges, contained in Proposed Rule 2.9(A)(3). Therefore, the Proposed Rule reminds judges that in such consultations, judges should “make reasonable efforts to avoid receiving factual information that is not part of the record” and should not “abrogate the responsibility personally to decide the matter.” In addition, a judge cannot consult with a judge who has previously been disqualified from hearing the matter or who has appellate jurisdiction over the matter.

The Committee rejected a proposal to remove the last clause from Proposed Rule 2.9(A)(4) (“in an effort to settle matters pending before the judge.”). Proposed Rule 2.9(A)(1) does permit the judge to consider ex parte communications on various matters other than settlement and the Committee believed that removing the clause would unduly expand the scope of permitted ex parte communication.

The Committee rejected a suggestion to delete “ex parte” from Proposed Rule 2.9(A)(5) and thereby permit judges to engage in any communications authorized by law. The Committee

believed that the removal of “ex parte” from the Proposed Rule could cause problems because a judge might wonder if the more general rule permitting “communications” would allow for the more specific “ex parte communication.”

The contents of paragraph (A)(6), which permits a judge to consult ethics advisory committees, outside counsel, or legal experts concerning the judge’s compliance with the Rules of Judicial Conduct, was elevated from the Comments to the body of the Rule.

The Committee voted to include new Comment [5] over a dissent. New Comment [5] is not included in the present New York rule or comments and is not contained in the ABA Model Code.

The Committee recommends the adoption of Rule 2.9(B), which does not contain an exception that allows the judge to refrain from disclosing information contained in an unauthorized or inadvertent ex parte communication bearing upon the substance of a matter. See ABA Rule 2.9(A)(2). The Committee reviewed ACJE Opinion 08-23, but after extensive discussion concluded that the failure to reveal the substance of the communication would likely result in a violation of due process. Therefore, we recommend essentially retaining the language in current Rule 100.3(B)(6)(a).

Proposed Rule 2.9(C) contains new material, which was previously found only in Comment 3.9. The Committee believes that the important prohibition against independent investigation warrants inclusion in the black letter rules. Similarly, the important and undisputed requirement that a judge only consider the evidence presented and any facts subject to judicial notice should be included in the Rules. Manifestly, the judge’s duty to consider only the evidence presented by the parties is a defining feature of the judge’s role in our adversarial system and warrants mention in the Rule.

The Committee rejected a proposal to remove the prohibition against a judge “investigating facts in a matter independently.” Interested groups suggested that the prohibition against investigation should not be dealt with in discipline, but rather should be a basis for an appeal. The Special Committee noted that a judge might not disclose improper investigation in her decision, and thus it might not form the basis of an appeal. The Committee also believes that there is a distinction between improper independent “investigation” and proper “research,” such as research of case law and nonlegal information to make a *Frye* determination.

Similarly, Proposed Rule 2.9(D) contains new material, which was previously found only in Comment 3.11. This important duty of supervision cannot be inferred from the current Rules and, therefore, should be included in the black letter rules.

Several groups noted that Proposed Rule 2.9(D) states essentially the same requirement embodied in Proposed Rule 2.12(A). While technically true, the Committee believes it is important to include a specific provision within Proposed Rule 2.9 regarding court staff, etc., regarding ex parte communications. The Committee also believes that the Proposed Rule obligating the judge to “require” court staff, etc., to act consistently with the judge’s obligations under the rule is actually less burdensome than a suggested revision requiring the judge to make

“reasonable efforts” to ensure that the rule is not violated. *See* Reporter’s Notes to Proposed Rule 2.3.

The Committee rejected proposals to add a definition of “ex parte communication” to the Proposed Rule. After much debate on the issue with interested groups, it was apparent that the proposed definitions were unworkable and that it would be difficult to formulate a specific definition covering all ex parte communications. Given the range of contexts in which such communications might potentially arise in the judicial context, it appears that a definition would (a) be so broad as to be, practically, meaningless or (b) so narrow as to be dangerous.

Finally, current Rule 100.3(B)(6)(e) prohibits a judge from “initiat[ing] or consider[ing] any ex parte communications when authorized by law to do so.” It does not appear to be causing any problems despite the fact that the Rule does not define ex parte communications and limits ex parte communications to those “authorized by law.”

Rule 2.10: Judicial Statements on Pending and Impending Cases

- (A) A judge shall not make any public comment about a matter pending* or impending* in any court within the United States or its territories, or make any nonpublic comment that might substantially interfere with a fair trial or hearing in such a court. For the purposes of this rule, comments made in an academic or educational setting shall be deemed to be nonpublic comments.**
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.**
- (C) A judge shall require court staff, court officials, and others subject to the judge’s direction and control to refrain from making comments that the judge would be prohibited from making by paragraphs (A) and (B).**
- (D) Notwithstanding the restrictions in paragraph (A), a judge may make public comments in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity. In addition, a judge may comment on a pending or impending matter referenced in paragraph (A) if (i) done in a classroom or other academic setting, (ii) the comment is reasonably related to the academic subject matter, (iii) the comment is unlikely to interfere substantially with a fair trial or hearing in the matter, and (iv) the matter is not pending or impending before the judge, a court on which the judge serves, or a court under the judge’s appellate jurisdiction.**

Parallel Provision: Rule 100.3(B)(8), (9).

Comment

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] A judge should be particularly cautious if comments pertain to a pending or impending jury trial.

Reporter's Notes

ABA Model Rule 2.10(A) only prohibits a judge from making public comments "that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." The Committee believes that an absolute rule prohibiting a judge from making any public comments about a pending or impending proceeding, currently embodied in the first sentence of Rule 100.3(B)(8), is more appropriate.

Paragraph (D) permits a judge to make a comment otherwise prohibited by paragraph (A) in certain limited situations, including in an academic setting. The Committee rejected a recommendation to broaden Rule 2.10(D) to permit a judge to comment in an "educational setting," such as a CLE, because it is too expansive and views expressed in such settings could easily become public.

The Committee elected not to adopt ABA Model Rule 2.10(E) and Comment 3 thereto. A substantial majority of the Committee believes that the judge should not be permitted to respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to amend Proposed Rule 2.10(A) to add "For the purposes of this rule, comments made in an academic or educational setting shall be deemed to be nonpublic comments" was approved. A motion was then adopted to approve Rule 2.10 as amended.

Rule 2.11: Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

- (2) The judge knows* that the judge, the judge’s spouse or domestic partner,* or a person within the sixth degree of relationship* to either of them, or the spouse or domestic partner of such a person is:**

 - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party; or**
 - (b) a person who has more than a de minimis* interest that could be substantially affected by the proceeding.**
- (3) The judge knows that the judge or the judge’s spouse or domestic partner, or a person known by the judge to be within the fourth degree of relationship to either of them. Or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a materials witness in the proceeding.**
- (4) The judge knows that he or she, individually or as a fiduciary,* or the judge’s spouse, domestic partner, parent, child, or any member of the judge’s family residing in the judge’s household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.**
- (5) The judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge’s adjudicative capacity that commits the judge with respect to**

 - (a) an issue in the proceeding; or**
 - (b) the parties or controversy in the proceeding.**
- (6) The judge:**

 - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;**
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;**
 - (c) was a material witness concerning the matter; or**

- (d) **previously presided as a judge over the matter in another court, is now serving as an appellate judge in the matter, and the appeal involves issues adjudicated by the judge in the other court.**
- (7) **Notwithstanding the provisions of paragraphs (A)(2), (3) and (4) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a fiduciary, the judge's spouse, domestic partner, parent, child, or any member of the judge's family residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, judge's spouse, domestic partner, parent, child, or any member of the judge's family residing in his or her household as the case may be, divests himself or herself of the interest which provides the grounds for disqualification.**
- (B) **A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse, domestic partner, parent, child, or any member of the judge's family residing in the judge's household.**
- (C) **A judge subject to disqualification under this Rule, other than the disqualification for bias or prejudice under paragraph (A)(1), the disqualification for having served as a lawyer in the matter included in paragraph (A)(6)(a), the disqualification for having been a material witness in the matter included in paragraph (A)(6)(c), or the disqualification for knowing that the judge, the judge's spouse or domestic partner, or a person within the sixth degree of relationship to either of them or the spouse or domestic partner of such a person is a party to the proceeding included in paragraph (A)(2)(a), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties who have appeared and not defaulted and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.**
- (D) **A judge need not disclose the reasons for recusal under these Rules to the parties or to the public.**

Parallel Provision: Rule 100.3(E).

Comment

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (7) apply. The term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(b), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

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

- (1) an interest in the individual holdings within a mutual or common investment fund;
- (2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;
- (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests;
- (4) an interest in the issuer of government securities held by the judge; or
- (5) any interest held in a blind trust, the form and terms of which have been approved by the Chief Administrator of the Courts.

[7] Rule 2.11(A)(6)(d) only requires disqualification if the judge previously presided over the matter in another court and the appeal involves issues adjudicated in the other court. The purpose of the rule, which is similar to 28 USC § 47, is to ensure that an appellate court is comprised of judges who are uncommitted and uninfluenced by having expressed or formed an opinion in the lower court. *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339, 343-44

(1913). The fact that the judge played some role in the case below does not disqualify him from sitting on appeal from unrelated aspects of the same case.

[8] Rule 2.11(c) lists several grounds for disqualification that may not be waived. While the disqualification arising under Rule 2.11(A)(6)(a) when the judge has served as a lawyer in the matter in controversy may not be waived, if the judge was merely associated with a lawyer who participated substantially as a lawyer in the matter during such association, that latter disqualification may be waived in accordance with Rule 2.11(c).

Reporter's Notes

The provisions in Proposed Rule 2.11(A)(2) comport with section 14 of the Judiciary Law. While suggestions were made to change the degree of relationship, they are more appropriate for legislative action.

The Committee expressed concern that under ABA Model Rule 2.11(A)(6)(d) a judge who presided over a ministerial matter previously in the proceeding would subsequently be disqualified from any aspect of the proceeding. Therefore, Proposed Rule 2.11(A)(6)(d) only requires disqualification if the judge previously presided over the matter in another court and the appeal involves issues adjudicated in the other court. The purpose of the rule, which is similar to 28 USC § 47, is to ensure that an appellate court is comprised of judges who are uncommitted and uninfluenced by having expressed or formed an opinion in the lower court. *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339, 343-44 (1913). The fact that the judge played some role in the case below does not disqualify him from sitting on an appeal from unrelated aspects of the same case.

During the Committee's work, the United States Supreme Court handed down *Caperton v. A.T. Massey*, ___ U.S. ___, 129 S.Ct. 2252 (2009). The Committee considered several possible ways to address the concerns raised in *Caperton*, including incorporating a provision similar to ABA Model Rule 2.11(A)(4) and/or addressing the concerns in a Comment explaining how certain campaign contributions could require disqualification under the introductory language in Proposed Rule 2.11(A).

After discussion of *Caperton*, the Committee opted not to make any specific change in the Proposed Rules to incorporate *Caperton*'s holding. The Committee does believe, however, that *Caperton* is worth of further study as it raises issues under Rule 2.11. *See also* ABA Model Rule 2.13(B)(prohibiting judge from appointing a lawyer to a position if, among other things, the judge knows that the lawyer has contributed a certain amount to the judge's campaign).

The issues are further complicated by New York's law which prohibits a judge from obtaining information about campaign contributions. If *Caperton*'s holding is to be specifically addressed, it must likely require some form of disclosure by parties and lawyers appearing before the judge.

In addition to the *Caperton* decision, the Committee found the following materials helpful in studying the problem: 1) ACJE Opinion 04-106 (2004), 2) ABA Model Rule 2.11(A)(4), 3) Brief for American Bar Association as *Amicus Curiae* in *Caperton*, 2009 WL 45978 pp. 16-17

(noting that Alabama and Mississippi have adopted some form of ABA Model Rule 2.11(A)(4), 4) Commission's Interim Report, pp. 23-26, 5) Report of Commission to Promote Public Confidence in Judicial Elections, Appendix C, Proposed Changes to Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct.

Paragraph (D) is new, and recognizes that a judge need not disclose the reasons for disqualification to the parties or the public.

Rule 2.12: Supervisory Duties

- (A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under these Rules.**
- (B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharged their judicial responsibilities, including the prompt disposition of matters before them.**

Parallel Provisions: Rule 100.3(C)(2).

Comment

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Rules if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads properly.

Reporter's Notes

The duty of supervision in Proposed Rule 2.12(A) is expanded beyond that currently in Rule 100.3(C) to include all of the judge's obligations under the Code, and not simply those "standards of fidelity and diligence that apply to the judge."

Proposed Rule 2.12(B) reflects the importance of the role served by a supervisory judge to ensure the prompt discharge of judicial responsibilities.

The mandate that a judge require her staff to "refrain from manifesting bias or prejudice in the performance of their judicial duties," currently in Rule 100.3(C)(2), is contained in Proposed Rule 2.3(B) and need not be repeated here.

Rule 2.13: Administrative Appointments

- (A) **In making administrative appointments, a judge:**
- (1) **shall exercise the power of appointment impartially* and on the basis of merit; and**
 - (2) **shall avoid nepotism, favoritism, and unnecessary appointments.**
- (B) **A judge shall not appoint or vote for the appointment of any person as a member of the judge’s staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the fourth degree of relationship of either the judge or the judge’s spouse or domestic partner or the spouse or domestic partner of such a person. A judge shall refrain from recommending a relative within the fourth degree of relationship of either the judge or the judge’s spouse or domestic partner or the spouse or domestic partner of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse or domestic partner of the town or village justice, or other member of such justice’s household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing or good cause.**
- (C) **A judge shall not approve compensation of appointees beyond the fair value of services rendered.**

Parallel Provision: Rule 100.3(C)(3).

Comment

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

Reporter’s Notes

Proposed Rule 2.13(A) is essentially identical to the first three sentences in Rule 100.3(C)(3).

In lieu of recommending ABA Model Rule 2.13(B), the Committee’s Proposed Rule 2.13(B) includes New York’s own rules on judicial appointments, currently housed in Rule 100.3(C)(3) (all but the first four sentences). ABA Model Rule 2.13(B) would likely be unworkable under

current New York law, which prohibits a judge from learning about the source and amount of campaign contributions. See Reporter's Notes to Proposed Rule 2.11.

Proposed Rule 2.13(C) is identical to the fourth sentence in Rule 100.3(C)(3).

Rule 2.14: Disability and Impairment

A judge having knowledge that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Parallel Provisions: None.

Comment

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory authority over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of a referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending on the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15 (requiring reporting to an "appropriate authority if the judge has knowledge that conduct constitutes a violation of the Rules of Judicial Conduct or the Rules of Professional Conduct).

Reporter's Notes

The Committee believes that "knowledge" of a lawyer or another judge's impairment should be required before "appropriate action" is mandated, rather than "a reasonable belief," as currently stated in ABA Model Rule 2.14.

If the judge possesses knowledge that the impairment resulted in the violation of the Rules of Judicial Conduct or the Rules of Professional Conduct, she is required to take appropriate action under Rule 2.15. See Comment 2.

At the suggestion of several groups, the Committee removed the term "emotional" from the Proposed Rule because it was too broad a category and might make adherence to the Rule somewhat difficult.

The Committee rejected proposals to make the requirement in Proposed Rule 2.14 hortatory in nature. While the Proposed Rule requires action in certain circumstances, it contains its own safe harbor and, as long as a judge has taken some reasonable action, he or she will not be subject to discipline.

Rule 2.15: Responding to Judicial and Lawyer Misconduct

- (A) A judge having knowledge* that another judge has committed a violation of these Rules that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.***
- (B) A judge having knowledge that a lawyer has committed a violation of the Rules of professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.**
- (C) A judge who has a reasonable belief that there is a substantial likelihood that another judge has committed a violation of these Rules shall take appropriate action.**
- (D) A judge who has a reasonable belief that there is a substantial likelihood that a lawyer has committed a violation of the Rule of Professional Conduct shall take appropriate action.**

Parallel Provisions: Rule 100.3(D)(3) (for Rule 2.15 (a) and (b)); Rule 100.3(D)(1) (for Rule 2.15(c)); Rule 100.3(D)(2) (for Rule 2.15(D)).

Comment

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on a judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offences that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated these Rules, communicating with a supervising judge, or reporting the suspected

violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

Reporter's Notes

The Committee adopted ABA Model Rule 2.15, agreeing that it was appropriate to consolidate the rules regarding a judge's response to the misconduct of lawyers and judges. These obligations, which are consistent with those in Rule 100.3(D), parallel those governing a lawyer who learns that another lawyer has violated the Rules of Professional Conduct. *See* New York Rules of Professional Conduct, Rule 8.3(a). Rule 100.3(D)(3) was deemed unnecessary.

The Committee rejected several proposals to add a reasonable belief standard to Proposed Rule 2.15(C) and (D). The current language in these paragraphs, requiring a "substantial likelihood" of a violation, establishes an objective standard triggering the judge's obligation to take "appropriate action." In addition, the proposed language is identical to that in the current CJC at Rule 100.3(D). It is also quite similar to the language used in the current New York Rules of Professional Conduct to define a lawyer's obligation to report. *See* Rule 8.3(a) ("A lawyer who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.").

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to amend Proposed Rule 2.15(C) and (D) to add a "reasonable belief" standard in accordance with the proposals referenced above was approved on a standing vote of 81-57. A motion was then adopted to approve Rule 2.15 as amended.

Rule 2.16: Cooperation with Disciplinary Authorities

- (A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.**
- (B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.**

Parallel Provision: No similar provision.

Comment

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

Reporter's Notes

The Committee adopted ABA Model Rule 2.16, which has no counterpart in the Rules. Given a lawyer's obligation under the Rules of Professional Conduct to cooperate with a disciplinary authority, it would be unethical for a judge to retaliate against a lawyer performing that duty. *See* Rule 8.3(b) ("A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct."). As noted in the Comment to the Proposed Rule, judicial cooperation with investigations of lawyers and judges is essential to the integrity of the judicial system and the protection of the public.

Rule 2.17: Cooperation With Review, Screening and Nominating Committees

A judge, in the performance of judicial duties, shall not retaliate, directly or indirectly, against a person known or believed to have assisted or cooperated with a nominating commission or screening or review panel established by governmental authority, political party, or bar association for the purpose of assessing the qualifications of, recommending, or nominating persons for judicial office. Additionally, in the performance of judicial duties, a judge shall not favor such a person.

Parallel Provisions: No similar provision.

Comment

[1] Political parties are included in this Rule because their recommendations may lead directly to nomination and office for a judge, as are the recommendations of senators' screening panels. A bar association is never a nominating commission, but a judiciary committee of a bar association might be considered a screening panel depending on the circumstances.

Reporter's Notes

The Proposed Rule, which is not in the ABA Model Code or New York Code, was adopted upon the recommendation of an interested group. The Proposed Rule is designed to prohibit a judge, in the performance of judicial duties, from retaliating against anyone who cooperates with an appropriate body to assess qualifications and recommend or nominate persons for judicial office.

Canon 3

A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF THE JUDICIAL OFFICE.

Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or these Rules. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;**
- (B) participate in activities that will lead to frequent disqualification of the judge;**
- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity or impartiality;**
- (D) engage in conduct that would appear to a reasonable person to be coercive; or**
- (E) make use of court premises, staff, stationery, equipment or other resources, except for incidental use of a personal, non-business nature, or for activities that concern the law, the legal system, the administration of justice, or unless such additional use is permitted by law.**

Parallel Provisions: Rule 100.4(A).

Comment

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias and prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity,

disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or membership for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

Reporter's Notes

The Committee agreed to use ABA Rule 3.1 to essentially replace New York's Rule 100.4(A). The provisions in Rule 3.1 are more specific and provide better guidance to judges engaged in extrajudicial activities.

An interested group raised concerns regarding the application of the Proposed Rule in instances in which a judge uses court resources to, for example, call home. The Committee addressed these concerns with an amendment to Proposed Rule 3.1(E) permitting "incidental use of a personal, non-business nature." The Committee also emphasizes in this regard that the "Rules of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances." *See* Scope, Paragraph [5]. Therefore, the Proposed Rule must be read in context: that is, with respect to "extrajudicial activities," which in the words of the governing Canon preceding Rule 3.1, are activities which raise "the risk of conflict with the obligations of judicial office." De minimis use of a phone to call home or of a copier to make a personal copy is not "extrajudicial conduct in this sense.

Rule 3.2: Appearances before Governmental Bodies and Consultation with Government Officials

A full-time judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or legislative body or official, except:

- (A) in connection with matters concerning the law, the legal system, or the administration of justice;**
- (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or**
- (C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary* capacity.**

Parallel Provisions: Rule 100.4(C)(1).

Comment

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of these Rules, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

Reporter's Notes

The Committee recommends adoption of ABA Rule 3.2 in its entirety to essentially replace New York's Rule 100.4(C)(1), with some minor revisions. The word "voluntarily" was added to the introductory clause of the provision to clarify that judges who are formally summoned to appear before a governmental body may do so.

The substance of Rule 3.2(B) is new. It permits judges who have acquired knowledge in their judicial duties to share this information with other governmental bodies or officials.

Rule 3.3: Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

Parallel Provisions: Rule 100.2(C).

Comment

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Reporter's Notes

Although the current New York rule better integrates its rationale, the ABA rule (with the addition of its official comment) provides far more specificity, particularly in relation to the various contexts in which a judge may be asked to testify as a character witness.

Rule 3.4: Appointments to Governmental Positions

- (A) A full time judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.**
- (B) A judge shall not accept appointment or employment as a peace officer or police officer as those terms are defined in section 1.20 of the Criminal Procedure Law.**

Parallel Provisions: Rule 100.4(C)(2).

Comment

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

Reporter's Notes

The provisions in Proposed Rule 3.4 essentially mirror those contained in Rule 100.4(C)(2). The word "board" was added to the list of governmental entities to which a judge cannot accept an appointment so as to make the list more comprehensive. The exceptions are essentially carried over from Rule 100.4(C)(2)(a), but the term "improvement" was removed. The Committee believes it is appropriate to carry forward the restriction in Rule 100.4(C)(2)(b), which is specific to New York. See Proposed Rule 3.4(B).

Rule 3.5: Use of Nonpublic Information

A judge shall not intentionally disclose or use nonpublic information* acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties.

Parallel Provisions: Rule 100.3(B)(11).

Comment

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[2] This rule is not intended, however, to affect a judge’s ability to act on information as necessary to protect the health or safety of the judge or a member of a judge’s family, court personnel, or other judicial officers if consistent with other provisions of these Rules.

Reporter’s Notes

Proposed Rule 3.5 essentially mirrors Rule 100.3(B)(1)). The word “intentionally” was added to the Proposed Rule because the Committee believes that it is unfair to impose discipline for an unintentional disclosure.

Rule 3.6: Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, sex, gender, religion, national origin, ethnicity, color, creed, disability, marital status or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge’s attendance at an event in a facility of an organization that the judge is not permitted to join in not a violation of this Rule when the judge’s attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization’s practices.

Parallel Provisions: Rule 100.2(D).

Comment

[1] A judge’s public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge’s membership in an organization that practices invidious discrimination creates the perception that the judge’s impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interests to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5] This Rule does not apply to national or state military service.

Reporter's Notes

Rule 3.6(A) is based primarily on the parallel ABA Rule, but includes five additional grounds of invidious discrimination contained in Rule 100.2(D): age, creed, color, disability, and marital status.

The Committee deemed it appropriate to move the substance of the second sentence in Rule 100.2(D) to Comment 2. A violation of Proposed Rule 3.6(A) requires that the organization engage in "invidious discrimination." Comment 2 to Proposed Rule 3.6 provides guidelines for defining invidious discrimination, but recognizes that the issue is primarily one of law. Moreover, the definition will be subject to change over time as the law evolves in this area.

Rule 3.6(B) contains essentially the same material that currently resides in Commentary 2.10 to Rule 100.2. Unlike the current Rule, 3.6(B) does not give the judge a one-year period to make immediate efforts to have the organization discontinue its invidiously discriminatory practices. Commentary 2.11. Rather, Comment 3 to the proposed Rule requires a judge in such circumstances to resign immediately.

Comment 4, covering membership in a religious organization, and Comment 5, covering membership in national or state military service, are new. The Committee rejected a suggestion to include Comments 4 and 5 in the black letter rule. As noted above, a violation of Proposed Rule 3.6(A) requires that the organization engage in "invidious discrimination." Comment 2 to proposed Rule 3.6 provides adequate guidelines for defining invidious discrimination, which will be subject to change over time as the law evolves in this area.

Rule 3.7: Participation in Educational, Religious, Charitable, Cultural, Fraternal, or Civil Organizations and Activities

- (A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, cultural, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
- (1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities except that a judge may solicit contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority. A judge shall not, however, use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.
 - (2) attending an organization's fund-raising events, but the judge may not be a speaker or the guest of honor at such events. Nothing in this subparagraph shall prohibit a judge from being a speaker or guest of honor at a court employee organization, bar association or law school function or from accepting at another organization's fund-raising event an unadvertised award ancillary to such event;
 - (3) making recommendations to such a public or private fund-raising organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and
 - (4) serving as an officer, director, trustee, member, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:
 - (a) will be engaged in proceedings that would ordinarily come before the judge; or
 - (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide pro bono public legal services.

Parallel Provisions: Rule 100.4(C)(2), Rule 100.4(C)(3).

Comment

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph (A)(4). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civil organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono public legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. See Rule of Attorney Conduct, 6.1. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono public legal work, and participating in events recognizing lawyers who have done pro bono public work.

Reporter's Notes

The Committee, after considering comments from various groups, recommends that the current New York rule be changed to permit the judge to engage in some limited forms of solicitation for contributions and memberships as described in paragraph (A)(1). The Committee elected to maintain New York's current prohibition against a judge being a speaker or guest of honor at an organization's fund-raising event, rather than adopting ABA Rule 3.7(a)(4)'s more permissive standard. The Committee believes that this conduct, in effect, attempts to use the prestige of the judge's office for fund-raising.

Rule 3.8: Appointments to Fiduciary Positions

- (A) A judge shall not accept appointment to serve in a fiduciary* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, designated by an instrument executed after January 1, 1974, except for the estate, trust, or person of a member of the judge's family,* or, with the approval of the Chief Administrator of the Courts, a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then only if such service will not interfere with the proper performance of judicial duties.
- (B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceeding in the court on which the judge serves, or one under its appellate jurisdiction.
- (C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.
- (D) If a person who is serving in a fiduciary capacity becomes a judge, he or she must comply with this Rule as soon as reasonable practicable, but in no event later than one year after becoming a judge.
- (E) Any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from the provisions in paragraphs (A) and (B) of this Rule during the period of such interim or temporary appointment.

Parallel Provisions: Rule 100.4(E).

Comment

[1] A judge should recognize that other restrictions imposed by these Rules may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

Reporter's Notes

Rule 100.4(E)(1) limits the prohibition to appointment of fiduciary positions to a designation by an instrument executed before January 1, 1974. Thus fiduciary appointments resulting from a designation in an instrument executed before January 1, 1974 are permitted. The Committee believes that such a grandfathering provision, in effect since January 1, 1974, the effective date in the Code of this prohibition of such service, could not be eliminated at this late date and, if it were, would undoubtedly face a court challenge. Although 34 years have passed since the critical date, January 1, 1974, would there undoubtedly be situations where the provision would

still have vitality. Thus, the grandfather protection for appointments to a fiduciary position pursuant to a designation in an instrument executed before January 1, 1974 is included in Proposed Rule 3.8(A).

At the suggestion of several interested groups, the Committee amended Proposed Rule 3.8(A) to permit a judge, with the approval of the Chief Administrator of the Courts, to serve in a fiduciary position for a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence. This confirms with the current Rule in section 100.4(E)(1). The Committee also notes that definition "S" defines "member of the judge's family" to include a "domestic partner." Definition "G", in turn, defines "Domestic partner" in relatively broad terms to include 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." Therefore, the term "member of the judge's family: in Rule 3.8 includes a gay partner.

The Committee also removed the provision in Rule 3.8(A) and (D) requiring a judge to demonstrate "good cause" when applying to the Chief Administrator of the Courts for an exemption from these provisions. The deleted language imposed an additional and unnecessary burden on those making such applications.

Rule 3.9: Service as Arbitrator or Mediator

A full time judge shall not act as an arbitrator or mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.*

Parallel Provision: Rule 100.4(F).

Comment

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

Reporter's Notes

Proposed Rule 3.9, which is identical to the ABA Model Rule, is almost identical to Rule 100.4(E) and accomplishes the same prohibition against acting as an arbitrator or mediator unless it is expressly authorized by law.

The Rule also bars "perform[ing] other judicial functions apart from the judge's official duties" unless so authorized. Rule 100.4(F) bars "otherwise perform[ing] judicial functions in a private capacity" unless so authorized. The distinction in language signals no substantive difference.

Rule 310: Practice of Law

A full-time judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to a member of the judge's family*.

Parallel Provision: Rule 100.4(G).

Comment

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

Reporter's Notes

In interpreting the first sentence of Rule 3.10, one must refer to the "Application" provisions of the Rules, which, for example, exempt part-time judges from this provision. Rule 5.1(B)(1).

The second sentence of ABA Model Rule 3.10 gives judges more leeway in providing legal services to their family members than the New York formulation. The former permits only giving legal advice, while the latter permits the judge to review and actually draft documents as well. The Committee prefers the narrower New York view, since permitting judges to draft legal documents for family members creates the risk, albeit small, that judges will be dragged into disputes regarding the drafting of documents that will allow public questions to be raised about their legal competence and acumen.

Rule 3.11: Financial, Business or Remunerative Activities

(A) A judge shall not engage in financial and business dealings that:

- (1) may reasonably be perceived to exploit the judge's judicial position;**
- (2) involve the judge with any business, organization or activity that ordinarily will come before the judge;**
- (3) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves; or**
- (4) result in violation of other provisions of these Rules or any other law.**

(B) A judge, subject to the requirements of these Rules, may hold and manage investments of the judge and members of the judge's family*, including real estate.

- (C) **A full-time judge shall not serve as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity, except that:**
- (1) **A judge, subject to the requirements of this Part, may manage and participate in a business entity engaged solely in investment of the financial resources of the judge or members of the judge’s family*;² and**
 - (2) **Any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this paragraph during the period of such temporary or interim appointment.**
- (D) **A judge shall manage the judge’s investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.**

Parallel Provision: Rule 100.4(D).

Comment

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of these Rules. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

[2] The New York State Constitution prohibits certain full-time judges from “hold[ing] any other public office except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or of the State of New York. ...” N.Y. Const., Article 6, §20.

Reporter’s Notes

The differences between New York’s Rule 100.4(D) and ABA Model Rule 3.11 are small but significant. The Committee prefers the New York rule, since it places more limits on the judge’s ability to engage actively in business ventures and has a broader prohibition on judges having business dealings with those likely to come before them. In interpreting proposed Rule 3.11, one must refer to the “Application” provisions of the Rules, which, for example, exempt part-time judges from this provision. Rule 5.1(B)(1).

The Committee recommends deleting the contents of Rule 100.4(D)(3)(a), as it is moot.

The Committee elected not to carry over the provisions in Rule 100.4(H)(1)(c) prohibiting a full-time judge from soliciting or receiving compensation for extra-judicial activities performed for or on behalf of New York State and various related entities. The origin of this subdivision was unclear. The Committee did, however, make express reference to the more limited provisions in Article 6, Section 20, of the New York State Constitution.

Rule 3.12: Compensation for Extrajudicial Activities

A full time judge may accept reasonable compensation, or reimbursement of reasonable and necessary expenses, for extrajudicial activities permitted by these Rules or other law* unless such acceptance would appear to a reasonable person to undermine the judge’s independence,* integrity,* or impartiality.* “Reasonable compensation” shall mean an amount that does not exceed a reasonable amount and does not exceed what a person with similar qualifications, who is not a full time judge, would receive for the same activity. A judge receiving compensation under this provision must comply with the reporting requirements in Rule 3.15(A).

Parallel Provision: Rule 100.4(H).

Comment

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

Reporter’s Notes

The Committee believes that the ABA Model Rule formulation in Rule 3.12 is more elegant than New York’s Rule 100.4(H), while covering essentially the same concepts. Nevertheless, the Committee added the phrase “or reimbursement of reasonable and necessary expenses” to proposed Rule 3.12 after “reasonable compensation.” The ABA omitted this because the issue of expenses is addressed in detail in ABA Model Rule 3.14, but that is an insufficient reason. The issue of compensation is also dealt with in more detail in Model Rule 3.13 and is also the subject of this rule. The Committee recommends incorporating New York’s Rule 100.4(H)(1)(a) into Proposed Rule 3.12 as the last sentence.

Rule 3.13: Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Thing of Value

- (A) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law* or would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*
- (B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:
- (1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
 - (2) gifts, loans, bequests, benefits or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending* or impending* before the judge would in any event require disqualification of the judge under Rule 2.11;
 - (3) ordinary social hospitality;
 - (4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
 - (5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
 - (6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;
 - (7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or
 - (8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, domestic partner,* or other family member of a judge residing in the judge's household,* but that incidentally may benefit the judge.
- (C) Unless otherwise prohibited by law or by paragraph (A), a judge must report any gifts, loans, bequests, benefits or other thing of value as required by statute or court rule.

Parallel Provision: Rule 100.4(D)

Comment

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items need not be publicly reported. As the value of the benefit or the likelihood that the source of the benefit will appear before the judge increases, the judge is either prohibited under paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report it.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances, and does not require public reporting.

[3] Business and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

[5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other Rules of these Rules, including Rule 4.4.

Reporter's Notes

Rule 100.4(D) is quite similar to ABA Model Rule 3.13, which formed the basis for Proposed Rule 3.13. In many instances, the Proposed Rule's prohibitions are broader than those in Rule 100.4(D), and in some circumstances (public testimonials, invitations to Bar functions or other bar-related dinners, invitation to non-legal educational or civic dinners and gifts, loans or bequests from persons whose interests may or already have come before the judge) the Proposed Rule requires additional reporting. Furthermore, Proposed Rule 3.13 provides a more structured mode of analysis than that in Rule 100.4(D).

Proposed Rule 3.13(A) is expanded somewhat beyond the language in Rule 100.4(D)(5). The new York rule requires a judge to "urge members of the judge's family residing in the judge's household not to accept a gift, bequest, favor or loan from anyone," with limited exceptions. *See* Rule 100.4(D)(5). The Committee agrees with this broader prohibition contained in the New York Rule, and proposed a rule that reflects this position. *See* Proposed Rule 3.13(A).

Proposed Rule 3.13(B) lists certain items a judge may accept without reporting. Acceptance of these items must still pass muster under Proposed Rule 3.13(A). The Committee believes that the items included in Proposed Rule 3.13(B) can typically be accepted without undermining the judge's independence, integrity or impartiality or giving any appearance of impropriety.

Proposed Rule 3.13(C) lists certain items a judge may accept, but which must be reported. Acceptance of such items must also pass muster under Proposed Rule 3.13(A). The Committee believes that acceptance of the items listed in Proposed Rule 3.13(C)(3) will rarely satisfy the standards outlined in Proposed Rule 3.13(A). While the current New York rule does not permit them (see Rule 100.4(D)(1), (5)), the Committee believes that the Proposed Rule is clearer, easier to understand and presents a more simplified, logical and practical approach than that in Rule 100.4(D).

Although an interested group noted that the reporting requirements in the Proposed Rule will deter judges from attending bar functions, the Committee ultimately decided to retain it. A report under Rule 3.13(C) is only required where the value of the invitation is in excess of \$500. *See* Rule 3.15(A)(2). Although judges must file an "Annual Statement of Financial Disclosure" on an annual basis, the requirements in Rules 3.13 and 3.15 serve different functions.

The Special Committee recommends extending the reporting requirements in Proposed Rule 3.13 to part time judges. *See* Rule 5.1, Reporter's Notes.

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to amend Proposed Rule 3.13 to eliminate most of Proposed Rule 3.13(C) was approved. A motion was then adopted to approve Rule 3.13 as amended. In addition, the House of Delegates rejected the recommendation to extend the reporting requirements in Proposed Rule 3.13 to part time judges.

Rule 3.14: Reimbursement of Expenses and Waivers of Fees or Charges

- (A) **Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by these Rules.**
- (B) **Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonable incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner,* or guest.**
- (C) **A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall report the same as required by statute or court rule.**

Parallel Provisions: Rule 100.4(H)(1), (2); Rule 100.4(I).

Comment

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of the duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by these Rules.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of these Rules.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

- (a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;
- (b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;
- (c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

- (d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;
- (e) whether information concerning the activity and its funding sources is available upon inquiry;
- (f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, those 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.

Reporter's Notes

To the extent it addresses expense reimbursement, New York Rule 100.4(H)(1)(B) is essentially the same as Proposed Rule 3.14(A) and (B), which contains the language in ABA Model Rule 3.14(A) and (B). The Proposed Rule's reference to Rules 3.1 and 3.13(A) help to capture all of the requirements in New York Rule 100.4(H)(1). Proposed Rule 3.14(B) includes the concept of "domestic partner." *See* Terminology, G. Proposed Rule 3.14(C) is new. It further clarifies the judge's reporting obligations.

The requirements in Proposed Rule 3.14 are extended to part time judges. *See* Rule 5.1, Reporter's Notes. The Proposed Rule does not apply to the reimbursement of expenses properly incurred in behalf of clients of the part-time judge in private practice, as those clients would be deemed an "employing entity" under Proposed Rule 3.14(A).

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to amend Proposed Rule 3.14(C) to eliminate the reference to the reporting requirements in Proposed Rule 3.15 was approved. A motion was then adopted to approve Rule 3.14 as amended. In addition, the House of Delegates rejected the recommendation to extend the reporting requirements in proposed Rule 3.14 to part-time judges.

Rule 3.15: Reporting Requirements

- (A) A judge shall comply with the reporting requirements required by statute and/or by the Rules of the Chief Administrator of the Courts.**
- (B) Financial disclosure. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this section and in section 2.11(C) of this Part, or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.**

- (C) **A full-time judge shall report the date, place and nature of any activity for which the judge received compensation in excess of [\$150] \$500, and the name of payor and the amount of compensation so received. Compensation or income of a spouse, or domestic partner, attributed to the judge by operation of community property law is not extra-judicial compensation to the judge. The judge’s report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.**

Parallel Provisions: Rule 100.4(H)(2), Rule 100.4(I).

Comment

Rule 3.15 requires the judge to report all compensation the judge received for activities outside judicial office. Rule 3.12. In certain instances, the judge is also required to disclose the acceptance of gifts and other things of value, Rule 3.13(C), and reimbursement of expenses and waivers of fees or charges. Rule 3.14(C). A judge has the rights of any other citizen, including the right to privacy of the judge’s financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge’s duties.

Reporter’s Notes

Under New York’s current rule, reporting is limited to “compensation” in excess of \$150, which includes expenses beyond the actual (and reasonable) costs of travel, meals and lodging for the judge and, where appropriate, his or her spouse, domestic partner or guest. Rule 100.4(H)(2). New York’s rules do not require reporting “gifts,” unless it involves a gift or loan in excess of \$150 by someone whose interests are not before the judge. Rule 100.4(D)(5)(h).

The ABA Model Rule formulation requires reporting of all compensation, and gives and reimbursement of expenses that exceed a certain set amount. ABA Model Rule 3.15(A).

The Committee recommends adoption of the ABA formulation requiring reporting of all compensation. Proposed Rule 3.15(A)(1). The Committee recognizes the burdens placed on judges by the reporting requirements in Proposed Rule 3.15(A) for gifts and other things of value as permitted by Rule 3.13(C) and for reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A), but believes they are necessary to safeguard the integrity of the judicial system. The reporting requirements are only triggered in situations in which questions of propriety may be raised. In the Committee’s view, the threshold should be \$500.

New York’s rules concerning the timing and content of reports, currently in Rule 100.4(H)(2), are retained in Proposed Rule 3.15(C-D).

Although an interested group noted that the reporting requirements in the Proposed Rule will deter judges from attending bar functions, the Committee ultimately decided to retain it. A report under Proposed Rule 3.13(C) is only required where the value of the invitation is in excess of \$500. *See* Proposed Rule 3.15(A)(2). Although judges must file an “Annual Statement of

Financial Disclosure,” on an annual basis, the requirements in Proposed Rules 3.13 and 3.15 serve different functions.

The reporting requirements in proposed Rule 3.15 are extended to part time judges. *See* Rule 5.1, Reporter’s Notes.

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to amend Proposed Rule 3.15 to eliminate the reporting requirements beyond those required by statute and/or by the Rules of the Chief Administrator of the Courts was approved. A motion was then adopted to approve Rule 3.15 as amended. In addition, the House of Delegates rejected the recommendation to extend the reporting requirements in Proposed Rule 3.15 to part time judges.

Canon 4

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

- (A) **Except as permitted by law,* or by Rules 4.2 and 4.4, a judge or judicial candidate* shall not:**
- (1) **act as a leader in, or hold an office in, a political organization;***
 - (2) **make speeches on behalf of a political organization;***
 - (3) **publicly endorse or oppose a candidate for any public office;**
 - (4) **solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office;**
 - (5) **attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;**
 - (6) **personally solicit* or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;**
 - (7) **use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;**
 - (8) **use court staff, facilities, or other court resources in a campaign for judicial office;**

- (9) **knowingly,* or with reckless disregard for the truth, make any false or misleading statement of material fact, including, but not limited to, statements relating to the identity, qualifications, current position or other fact concerning the candidate or an opponent;**
 - (10) **make any public comment about a pending* or impending* proceeding in any court within the United States or its territories; or**
 - (11) **in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.**
- (B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).**

Parallel Provisions: Rules 100.3(B)(8), 100.5(A)(1), 100.5(A)(4)(b).

Comment

General Considerations

[1] Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.

[2] When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.

Participation in Political Activities

[3] Public confidence in the independent and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations.

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These Rules do not prohibit candidates from campaigning on

their own behalf, or from endorsing or opposing candidates for the same judicial office for which they are running. See Rules 4.2(B)(2) and 4.2(B)(3).

[5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no “family exception” to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member’s political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidate should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member’s candidacy or other political activity.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. For purposes of this Canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate, and is not prohibited by paragraphs (A)(2) or (A)(3).

Statements and Comments Made During a Campaign for Public office

[7] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees. Paragraph (A)(9) obligates candidates and their committees to refrain from making false or misleading statements of material fact or from omitting facts necessary to make the communication considered as a whole not materially misleading.

[8] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate’s integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(9), (A)(10), or (A)(11), the candidate may make a factually accurate public response. In addition, when an independent third party has made unwarranted attacks on a candidate’s opponent, the candidate may disavow the attacks, and request the third party to cease and desist.

[9] Subject to paragraph (A)(10), a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case.

[10] Paragraph (A)(10) prohibits judicial candidates from making comments that might impair the fairness of a pending or impending judicial proceeding and from making any public comment about a pending or impending proceeding in any court within the United States or its territories. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

Pledges, Promises, or Commitments Inconsistent with Impartial Performance of the Adjudicative Duties of Judicial Office

[11] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

[12] Paragraph (A)(11) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[13] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that that candidate for judicial office has specifically undertaken to reach a specific result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

[14] A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse.

[15] Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(11) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(11), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.11.

Reporter's Notes

The Committee recommends adoption of a substantial portion of ABA Rule 4.1, but decided not to recommend adoption of paragraphs 6 and 7 of that Rule, which were incompatible with New York's process of electing judges.

Proposed Rule 4.1(A)(9) was altered to make clear that discipline should only be imposed making a false or misleading statement of "material fact."

Proposed Rule 4.1(A)(10) contains the substance of ABA Rule 4.1(A)(12), but also maintains the current New York Rule, embodied in Rule 100.3(B)(8).

The Committee rejected a recommendation to remove "issues" from Proposed Rule 4.1(A)(11) because that portion of the provision may be unconstitutional in light of *Minnesota v. White*, 536 U.S. 765 (2002). The Committee believes that the provision conforms with the ruling in *Minnesota v. White*. A judge or judicial candidate who announces her personal views on a matter that is likely to come before the court does not violate the Proposed Rule unless the communication demonstrates a closed mind on the matter or includes a pledge to rule in a specific fashion if the matter comes before the court.

Rule 4.2: Political and Campaign Activities of Judicial Candidates in Public Elections

(A) A judicial candidate* for elective and appointive office shall:

- (1) act at all times in a manner consistent with the independence,* integrity,* and impartiality* of the judiciary;**
- (2) communicate with and answer truthfully any and all inquiries made by a selection, screening, or nominating commission or similar agency;**
- (3) comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction;**

A judicial candidate* for elective and appointive office may:

- (4) communicate with appointing or confirming authorities, and seek support from any person or organizations including newspaper, television, radio and other media editorial boards, and any other organizations which might select or endures that person's candidacy for elected or appointed judicial office so long as it does not violate any other provision of these Rules or other law;**

A judicial candidate* for elective and appointive office should:

- (5) review and approve the content of all campaign statements and materials, including all applications, produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and**

- (6) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1.**
- (B) During the permissible Window Period,* a candidate for elective judicial office may, unless prohibited by law*:**
- (1) establish a campaign committee pursuant to the provisions of Rule 4.4;**
 - (2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;**
 - (3) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is part and permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;**
 - (4) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is \$250 or less. A candidate may not pay more than \$250 for a ticket unless he or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function; and**
 - (5) seek, accept, or use endorsements from any person or organization, as long as it does not violate any other provision of these Rules.**

Parallel Provisions: Rule 100.5(A)(4).

Comment

[1] Paragraph (B) permits judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may not engage in these activities before the Window Period. *See* Terminology, BB.

[2] Despite paragraph (B), judicial candidates for public election remain subject to many of the provisions of Rule 4.1. For example, a candidate continues to be prohibited from soliciting funds for a political organization, knowingly making false or misleading statements during a campaign, or making certain promises, pledges, or commitments related to future adjudicative activities. *See* Rule 4.1(A), paragraphs (4), (11), and (13).

[3] In partisan political elections for judicial office, a candidate may be nominated by, affiliated with, or otherwise publicly identified or associated with a political organization, including a

political party. This relationship may be maintained throughout the period of the public campaign, and may include use of political party or similar designations on campaign literature and on the ballot.

[4] In nonpartisan public elections or retention elections, paragraph (B)(5) prohibits a candidate from seeking, accepting, or using nominations or endorsements from a partisan political organization.

[5] Judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations.

[6] For purposes of paragraph (B)(3), candidates are considered to be running for the same judicial office if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election. In endorsing or opposing another candidate for a position on the same court, a judicial candidate must abide by the same rules governing campaign conduct and speech as apply to the candidate's own campaign.

[7] Although judicial candidates in nonpartisan public elections are prohibited from running on a ticket or slate associated with a political organization, they may group themselves into slates or other alliances to conduct their campaigns more effectively. Candidates who have grouped themselves are considered to be running for the same judicial office if they satisfy the conditions described in Comment [6].

Reporter's Notes

Proposed Rule 4.2(A) essentially mirrors the provisions in ABA Model Rule 4.2, with some minor revision.

Proposed Rule 4.2(B), while containing some provisions in ABA Model Rule 4.2(B), essentially retains the structure of the New York Code, which includes a definition of Window Period. *See* Proposed Terminology, BB. This definition obviates the need to repeat the time frames in the body of the Rules.

The Committee rejected the provisions in ABA Model Rule 4.2(B)(3), which allow a candidate to “publicly endorse or oppose candidates for the same judicial office for which he or she is running.” The New York rule currently embodied in Rule 100.5(A)(2)(iii-iv) is retained in Proposed Rule 4.2(B)(3).

The Committee rejected the provisions in ABA Model Rule 4.2(B)(4), in favor of the provisions in Rule 100.5(A)(2)(v). They are retained in Proposed Rule 4.2(B)(4).

The language in Proposed Rule 4.2(B)(5) is new, and is borrowed from ABA Model Rule 4.2(A)(5). The Committee believes that there are many instances in New York in which a candidate for elective judicial office may “seek accept or use endorsements” from a “partisan political organization” and, therefore, did not include that ABA language in the Proposed Rule.

The Committee rejected ABA Model Rule 4.2(A)(6), which allows a candidate for elective judicial office to contribute to a political organization or candidate for public office.

The Committee also rejected ABA Model Rule 4.2(C), which allows a judicial candidate in a partisan public election to, among other things, identify herself as such. All campaigns in New York are partisan and there is no need for the distinctions in the AMA Model Code. These constraints are addressed in Proposed Rule 4.2(A&B).

The Committee rejected a proposal to include appointed judges within the Proposed Rule. Canon 4 is sequentially organized. Proposed Rule 4.1 applies to all judges and judicial candidates. Proposed Rule 4.2 covers political and campaign activities of judicial candidates in public elections, and Proposed Rule 4.3 covers candidates for appointive judicial office.

Before the NYSBA House of Delegates meeting held on April 2, 2011, a motion to amend Proposed Rule 4.2(A) to include candidates for elective and public office within its provisions was approved. The amendment also moved certain provisions from Proposed Rule 4.3 to the body of Rule 4.2(A). A motion was then adopted to approve Rule 4.2(A) as amended.

Reporter's Notes

Proposed Rule 4.3 has no counterpart in New York's Code. Proposed Rule 4.3(A) is identical to the ABA Model Code provision. Proposed Rule 4.3(B) is similar to ABA Model Rule 4.3(B), but replaces the word "endorsements" with the more inclusive term "support" and adds a proviso that the conduct not violate other provisions in the rules or law.

Given the action taken before the NYSBA House of Delegates meeting held on April 2, 2011, pertaining to Proposed Rule 4.2(A), *see* Reporter's Notes to Proposed Rule 4.2, Proposed Rule 4.3 was withdrawn by the Special Committee.

Rule 4.4: Campaign Committees

- (A) A judicial candidate* subject to public election* may establish a campaign committee of responsible persons during the permissible Window Period,* to manage and conduct a campaign for the candidate, subject to the provisions of these Rules. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of these Rules and other applicable law.***

- (B) A judicial candidate subject to public election shall direct his or her campaign committee:**

- (1) to adhere to the applicable provisions of the Election Law, including but not limited to campaign contribution limits, and**
 - (2) to comply with all applicable requirements of law* for the raising, expenditure, disclosure and divestiture of campaign contributions.**
- (C) At the start of a campaign, and periodically thereafter, the candidate shall instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law.**

Parallel Provisions: Rules 100.5(A)(5), 100.5(A)(4)(g).

Comment

[1] Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This Rule recognizes that in New York, judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions.

[2] Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

[3] Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee in connection with such contributions, so they do not accept contributions that would create grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11.

Reporter's Notes

Proposed Rule 4.4(A) contains much of the language in ABA Model Rule 4.4(A), but includes the existing New York language requiring that the campaign committee be composed of "responsible persons." Rule 100.5(A)(5). The Proposed Rule also includes a reference to the Window Period. *See* Proposed Terminology, BB.

Proposed Rule 4.4(B), instead of using the ABA's more general language contained in Model Rule 4.4(B), refers to the more specific provisions of the Election Law.

Proposed Rule 4.4(C), added at the suggestion of a bar association, emphasizes the importance of requiring a judge to instruct his or her campaign committee to solicit contributions that are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law.

The Committee accepted a revision to add “and periodically thereafter” to Proposed Rule 4.4(C) to better describe the judge’s obligations to instruct her campaign committee regarding the solicitation and acceptance of contributions.

Rule 4.5: Activities of Judges Who Become Candidates for Nonjudicial Office

- (A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law* to continue to hold judicial office.**
- (B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of these Rules.**

Parallel Provisions: Rule 100.5(B).

Comment

[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises or commitments to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.

[2] The “resign to run” rule set forth in paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the “resign to run” rule.

Reporter’s Notes

The Committee recommends replacing the provisions in Rule 100.5(B) with Proposed Rule 4.5, which is identical to the ABA Model Rule. Proposed Rule 4.5(A) retains the traditional concept of “resign-to-run,” which ensures that a judge cannot use her judicial office to promote her candidacy. The specific exception in Rule 100.5(B), allowing a judge “to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so” is captured in the “permitted by law” language in Proposed Rule 4.5(A).

Proposed Rule 4.5(B) is new and has no counterpart in the new York Rules. The Committee believes that if a judge becomes a candidate for a nonjudicial appointive office, she should not be required to resign from judicial office if she otherwise complies with the Rules. The rationale

supporting the “resign-to-run” rule is not nearly as compelling as when elective nonjudicial office is sought by a sitting judge.

Canon 5

APPLICATION

Rule 5.1: Application of the Rules of Judicial Conduct

- (A) **General application.** All judges in the unified court system and all other persons to whom by their terms these rules apply, e.g., candidates for elective judicial office, shall comply with these rules of judicial conduct, except as provided below. All other persons, including judicial hearing officers, who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.
- (B) **Part-time judge. A part-time judge:**
- (1) is not required to comply with Rules 3.2, 3.4(A), 3.7(A)(4)(b), 3.8(A) and (B), 3.9, 3.10, 3.11(C), 3.12, 3.13, 3.14, and 3.15;
 - (2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;
 - (3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;
 - (4) may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge’s duties.
- (C) **Administrative law judges.** The provisions of this Part are not applicable to administrative law judges unless adopted by the rules of the employing agency.
- (D) **Time for compliance.** A person to whom these rules become applicable shall comply immediately with all provisions of this Part, except that, with respect to Rules

3.11(C) and 3.8, such person may make application to the Chief Administrator for additional time to comply, in no event to exceed one year, which the Chief Administrator may grant for good cause shown.

Parallel Provisions: Rule 100.6.

Comment

[1] The provisions of the Rules of Judicial Conduct should be applied by the employing agency to administrative law judges with due consideration for the characteristics of the particular administrative law judges. In general, the provisions addressing political activity, partiality and conflicts of interest may be applicable to persons performing quasi-judicial functions.

[2] If serving as a fiduciary when selected as a judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as a fiduciary but only for the period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year, and only on approval of the Chief Administrator of the Courts for good cause shown. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11(C), continue in that activity for a reasonable period but in no event longer than one year, and only on appropriate of the Chief Administrator of the Courts for good cause shown.

Reporter's Notes

Although the ABA Model Code contains an Application section prior to Canon 1, the Committee elected to retain virtually all of Rule 100.6 (“Application of the rules of judicial conduct”) in Proposed Rule 5.1. The Proposed Rule contains slight modifications due to changes in the numbering of sections.

The acceptance and reporting requirements in Proposed Rules 3.13, 3.14, and 3.15 apply to part-time judges. Since a judge need not report a gift from anyone whose appearance before the judge would trigger disqualification, *see* Proposed Rule 3.13(B)(2), if a part-time judge properly received a gift from a client in her private practice, the part-time judge would not be required to report it since she could not preside over the client’s case in any event.

The Committee rejected a suggestion to add an additional Comment expressly encouraging the application of the Proposed Rules to administrative law judges via executive order, administrative rule making, or legislative action. The Committee believes that such a recommendation is beyond the scope of its jurisdiction.

Given the action taken before the NYSBA House of Delegates meeting held on April 2, 2011, pertaining to Proposed Rules 3.13, 3.14, and 3.15, *see* Reporter’s Notes to Proposed Rules 3.13, 3.14, and 3.15, the Special Committee deemed it appropriate to conform Proposed Rule 5.1(B)(1) to include reference to those sections.

