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## **MAINE CODE OF JUDICIAL CONDUCT**

### **Introductory Note**

The Maine Code of Judicial Conduct is promulgated by the Supreme Judicial Court following its second comprehensive review since the Court originally adopted the Code of Judicial Conduct in 1974. The original Code was based on the American Bar Association's (ABA) 1972 Code of Judicial Conduct, with adjustments to accommodate Maine practice. In 1990, the ABA adopted the Model Code of Judicial Conduct. In 1991, the Court initiated its first comprehensive review of the Maine Code of Judicial Conduct. After that review, a revision of the Maine Code of Judicial Conduct was adopted in 1993. Since 1993 the Court has, on a few occasions, adopted amendments to the Code, particularly to clarify financial reporting requirements, recognize judges' capacity to enable settlement discussions, and support fair participation in judicial processes by unrepresented individuals, but the Code remains largely as adopted in 1993.

In 2007 the ABA revised its Model Code of Judicial Conduct. In late 2010, at the suggestion of the Committee on Judicial Responsibility and Disability (the Committee), the Court initiated a second comprehensive review of the rules and practices relevant to judicial ethics issues. Initially the Committee had proposed that most of the changes in the judicial ethics rules recommended in the 2007 ABA revision be incorporated into the Maine Code of Judicial Conduct. In 2011, the Court published the Committee's recommendations for public comment. After receiving comments, and upon further review, the Court determined that the proposed amendments to the 1993 Maine Code recommended by the Committee were so substantial that the Court should, instead, develop a draft that follows the organization of the ABA recommended Model Code, with appropriate adjustments for Maine practice. Adoption of the ABA Model Code's suggested numbering and organization for the rules governing judicial ethics will simplify research and comparison with judicial ethics practice in other jurisdictions.

In 2012, the Court produced a draft of the Maine Code of Judicial Conduct that tracked the organization and numbering of the 2007 ABA Model Code, updated by the ABA with a 2011 edition. The Court's original revision was not supported by comments or advisory notes. However, considering the relatively brief and very general nature of the Canons and Rules based on the

ABA Model Code, it was evident that, as with the 1993 revision of the Maine Code of Judicial Conduct, detailed Advisory Notes are necessary.

The Advisory Notes associated with the individual Canons and Rules that follow are drafted to support application of the Canons and Rules and to recognize aspects of Maine practice that differ from national models. They are intended to provide guidance to judges, the Committee, the bar, and the public for application of the Code to the nuanced factual and legal issues that regularly arise as the Canons and the Rules are applied to specific situations in the sometimes difficult and emotionally charged court proceedings from which ethics issues tend to arise—usually involving highly ethical judges trying to do their best. The Canons, Rules and supporting Advisory Notes must also be read and applied in a context that recognizes that not every error that a judge may make constitutes an ethical violation. One recent national review of judicial ethics issues, comparing appellate review and ethics review, has recognized a “general principle” that

when judges make honest mistakes, the appropriate remedy is appeal, not discipline. To reverse judges for honest mistakes is salutary; to punish judges for honest mistakes threatens their decisional independence. Although state judges have an ethical duty to “uphold and apply the law,” errors are subject to reversal, not discipline, unless the errors are so egregious or chronic as to manifest bad faith or incompetence.

Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Fla. L. Rev. 493, 526-27 (April 2013).

The Preamble to this Code, in language very similar to that appearing in the Preamble and Scope section on the ABA Model Code,<sup>1</sup> states:

Although the black letter of the Rule is binding and enforceable when using terms such as “shall” or “must”, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline is warranted should be determined through a reasonable and reasoned application of the Rules, with consideration of the seriousness of the transgression, the extent of any pattern of improper activity, any previous violations, and the effect of the improper activity upon the judicial system or others.

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<sup>1</sup> See ABA Model Code of Judicial Conduct (2011 ed.), Scope, ¶ 6.

Maine practice has some special attributes that are important to respect in drafting and applying a Code of Judicial Conduct. Pursuant to the Maine Constitution, judges in the State Judiciary are appointed by the Governor for seven-year terms, subject to confirmation by the Legislature.<sup>2</sup> Every recent Governor of the State of Maine has made judicial appointments based on recommendations, after careful review of qualifications, by a committee of experienced attorneys and members of the public. Those recommended to the Governor for appointment have tended to be applicants for appointment viewed by the committee as most qualified for judicial service, often without regard to partisan or political considerations. Governors have usually followed their committees' recommendations in making appointments. The combination of the qualifications- and integrity-focused judicial selection process and the significant accountability fostered by the seven-year terms has produced a judiciary that is generally well qualified and sensitive to issues of ethics, skill, and temperament that are important for fostering public respect for the judiciary.

Maine practice also differs from that of some other states in valuing close and regular professional contacts between the bench and the bar and in fostering involvement of judges with lawyers and nonlawyers in the larger community where judges live and work. The value of the regular professional contacts that characterize bench-bar relations in Maine was recognized by Judge William J. Kayatta of the United States Court of Appeals for the First Circuit at a 2014 investiture ceremony for a new Bankruptcy Judge.<sup>3</sup> There Judge Kayatta observed:

Now, some of you may have been to investitures before, I've been to a few, and I will tell you that in the larger metropolitan areas of this country, these investitures are somewhat like a coming out party. Notables and observers gather to take their first look, in some cases, at this new person who they may not know very [well] who is going to now be wielding federal judicial power in their area.

In Maine, though, it's so different. We generally come to know one another in our communities and our professional lives, and so it's not a coming out party. In some ways, it's more of a celebration. Our

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<sup>2</sup> Maine's Probate Judges are elected in each county for four-year terms. Probate Judges are subject to the Maine Code of Judicial Conduct, which includes, for Probate Judges and judicial election candidates, special accommodations to recognize their election processes.

<sup>3</sup> Investiture Ceremony for Bankruptcy Judge Peter G. Cary, United States Bankruptcy Court, Portland, Maine, May 9, 2014 (Tr. 4).

familiarity with each other means that our new Bankruptcy Judge . . . has been carried to his new position by a well-earned reputation upon which we can ground our expectations for future success. I suspect that this also accounts for the smiles I see in this courtroom here today. His reputation precedes him widely.<sup>4</sup>

The close professional relations of the bench and the bar, and the resulting importance of reputation, foster maintenance of high ethical standards by both, supported by a prevailing assumption that judges and lawyers know each other and their reputations, and that how they act and what they say in a proceeding today can affect both that proceeding and a matter that may be of importance five or ten or more years in the future.

As the Law Court has recognized, “the legal and judicial communities are small and lawyers and judges necessarily know one another and enjoy cordial professional relationships.” *Samsara Mem’l Trust v. Kelly, Rimmel & Zimmerman*, 2014 ME 107, ¶ 24, 102 A.3d 757. Rejecting a claim that a judge erred by not recusing or disclosing a professional relationship with an individual who was of counsel to a law firm-litigant and had previously served with the judge on the bench for eighteen years, the Law Court observed:

It is unavoidable, and indeed desirable, that judges who serve on the bench together will necessarily develop close professional relationships. We do not expect that such cordial relationships will end if a judge leaves the bench and returns to the practice of law. We are cognizant that the party status of the law firm in this instance makes this case somewhat different from those where a former colleague is simply an advocate for a party before the court. However, it remains a “fact of litigation in small Maine communities that a judge, or members of his or her family, may know of a party, or a witness, or someone related to a party or a witness, or may even have done business with somebody whose name may come up in a case.”

*Id.* ¶ 35 (quoting *Charette v. Charette*, 2013 ME 4, ¶ 24, 60 A.3d 1264).

This revised Maine Code of Judicial Conduct and its Advisory Notes recognize and respect these special attributes of Maine practice.

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<sup>4</sup> Bankruptcy Judge Peter G. Cary began his professional career as a law clerk serving several Justices of the Maine Superior Court. He then joined a law firm that maintained a statewide practice in many areas of the law and became well known to the bench and the bar through court appearances and participation in bar events and other professional development activities.

The Code of Judicial Conduct reaffirms the commitment of the Maine Judiciary to the highest standards of ethical conduct and assures the public that Maine judges are subject to specific and nationally recognized standards of conduct and are accountable for compliance with those standards.

The Preamble and each Canon and Rule in the republished Code are supported by Advisory Notes providing interpretive guidance for each Rule and indicating the provision of the 1993 Maine Code to which the Canon or Rule is most closely related. The Advisory Notes also address Maine variations from the 2011 edition of the ABA Model Code of Judicial Conduct and refer, when appropriate, to relevant precedent addressing judicial ethics issues. Reviewers should also recognize that many Rules, following the ABA numbering system, have provisions that are sometimes similar or repetitive in effect.<sup>5</sup> Thus, portions of Advisory Notes to one Rule may have application to another Rule that addresses a similar issue.

The guidance in the Advisory Notes is supplemented by citations to relevant Comments to the Rules in the 2011 edition of the ABA Model Code or the Advisory Committee’s Notes supporting the 1993 Maine Code of Judicial Conduct. Some interpretive guidance may also be found in the Comments to the individual Rules in the ABA Model Code, when the Model Code Rule at issue is the same or substantially similar to the wording of the Maine version of that Rule.

In accordance with past practice, the Advisory Notes, like the 1993 Advisory Committee’s Notes, “will be considered as contemporaneous manifestations of intent that may serve as authoritative aids to interpretation.” Maine Code of Judicial Conduct, Introductory Advisory Committee’s Notes, at 22 (West 1993) (citing 1 Field, McKusick & Wroth, *Maine Civil Practice* § 1.4 (2d ed. 1970)). As the ABA Model Code notes, its Comments “provide guidance regarding the purpose, meaning, and proper application of the Rules.”<sup>6</sup>

This revised Code, like its predecessors, is adopted pursuant to the inherent authority of the Supreme Judicial Court to prescribe rules governing the conduct of the judges of all courts that constitute the Maine Judiciary. *See* 4 M.R.S. §§ 1, 7, 9-B (2014); *In re Dunleavy*, 2003 ME 124, ¶¶ 8-10, 838 A.2d

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<sup>5</sup> See, for example, Rule 1.1, addressing a duty to comply with the law, and Rule 2.2, addressing a duty to uphold and apply the law; or Rules 2.2 and 2.11, addressing judicial impartiality; or Rules 2.11 and 3.11, addressing impartiality in relation to personal finance, family, and prior professional relationships; or Rules 3.1, 3.7, and 3.12, addressing extrajudicial activities; or Rules 2.3 and 3.6, addressing certain bias and discrimination issues.

<sup>6</sup> ABA Model Code of Judicial Conduct (2011 ed.), Scope, ¶ 3.

338; *In re Cox*, 658 A.2d 1056, 1057 (Me. 1995); *In re Benoit*, 487 A.2d 1158, 1170-71 (Me. 1985).

This Code has been adopted by the Court after consideration of comments and suggestions from members of the bench, bar, and public. Issues concerning Probate Court judges' part-time status, particularly their representation of clients in probate court matters, generated substantial negative comments. That issue, however, is a matter that can only be addressed by legislative action.

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# **MAINE CODE OF JUDICIAL CONDUCT**

## **COVERAGE AND EFFECTIVE DATE**

### **I. IN GENERAL**

(A) Every justice, judge, family law magistrate, active retired justice, and active retired judge of the Supreme Judicial Court, the Superior Court, and the District Court shall comply with the provisions of this Code from the time the justice, judge, or magistrate takes the oath of office.

(B) A judge of the Probate Courts shall comply with the provisions of this Code, except that a judge of probate:

(1) Is required to comply with Rules 2.10 and 3.2 only while serving as a judge, or as to matters pending in the judge's court; and

(2) Is not required to comply with Rules 3.8, 3.9, 3.10, 3.11(B), 3.12, and 4.1(A)(1)-(4). A judge of probate shall not, however, act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

### **II. EFFECTIVE DATE**

This Code takes effect on September 1, 2015.

### **III. TIME FOR COMPLIANCE**

All persons to whom this Code is applicable on the effective date, and all persons to whom this Code thereafter becomes applicable, shall comply immediately with all provisions of this Code except Rules 3.6, 3.8, 3.11(B), and 3.11(C), and should comply with these provisions as soon as reasonably possible and shall do so in any event within the period of one year.

### **IV. TITLE**

This Code may be known and cited as the Maine Code of Judicial Conduct.

## **Advisory Notes – 2015**

The Coverage and Effective Date section is similar to Part II, sections 1, 2, and 4 of the 1993 Code, with changes in terminology to reference current judicial officers and applicable sections of the revised Code. It is also drawn from the Application section of the ABA Model Code (2011 ed.), but it is very different from the Application section of the ABA Model Code, which addresses in detail categories of judges that are not relevant to Maine practice.

# MAINE CODE OF JUDICIAL CONDUCT

## PREAMBLE

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

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, integrity, fairness, and competence.

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

The Code of Judicial Conduct consists of five Canons, Canons 1, 2, 3, 4, and 6. Canon 6 is generally unchanged from current Canon 6. There is no Canon 5. Numbered Rules appear under each Canon. The Terminology section provides additional guidance in interpreting and applying the Code.

The Canons state overriding principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule or the Canons, supporting Advisory Notes provide important guidance in interpreting the Rules. When a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action is authorized for action or inaction within the bounds of such discretion.

To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by

the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

This Code sets forth 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 Code is not to be construed or applied in any manner that would impinge upon the essential independence of judges in making judicial decisions.

The Code is designed to provide standards for the regulation of judicial conduct through disciplinary proceedings when necessary. Although the black letter of the Rule is binding and enforceable when using terms such as “shall” or “must,” it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline is warranted should be determined through a reasonable and reasoned application of the Rules, with consideration given to the seriousness of the transgression, the extent of any pattern of improper activity, any history of previous violations, and the effect of the improper activity upon the judicial system or others.

The Code does not establish any basis for civil or criminal liability. Nor 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.

### **Advisory Notes – 2015**

The Preamble paragraphs incorporate, though with significant revision, what appeared within the paragraphs of the Preamble in the 1993 Maine Code of Judicial Conduct. The paragraphs are divided to track the organizational style of the ABA Model Code. The separation between the Preamble and Scope sections suggested in the ABA Model Code is eliminated in this revision, which combines the Preamble and Scope sections into a single Preamble section as exists in the 1993 Maine Code of Judicial Conduct. The 2011 edition of the ABA Model Code provided no commentary to support the Preamble or Scope sections. The 1993 Advisory Committee’s Notes that supported adoption of the Preamble at that time continue to provide useful guidance to interpretation.

The Preamble now states the purposes of the Code and the general substantive and interpretive principles that underlie it. The Preamble notes that “[t]he Canons state overriding principles of judicial ethics that all judges must observe.” The Preamble then notes:

This Code sets forth 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 Code is not to be construed or applied in any manner that would impinge upon the essential independence of judges in making judicial decisions.

To apply this Code properly, one must examine a judge's action that is subject to inquiry in light of the totality of the circumstances and the statutes, precedents, court rules, this Code of Judicial Conduct, its Introductory Note, the Advisory Notes to this Code, the 1993 Advisory Committee's Notes, and any Advisory Notes to amendments to the 1993 Code since 1993 in deciding whether a judge complied with his or her ethical obligations.

### **1993 Advisory Committee's Note to the Preamble**

The Preamble states the purposes of the Code and the general substantive and interpretive principles that underlie it. Specifically, the Preamble makes clear that all parts of the Code are "authoritative," that is, set out rules that govern judicial conduct.

Those rules are mandatory when the word "shall" is used and aspirational when "should" is used. The 1974 Code used "should" throughout, but its provisions were characterized by the Supreme Judicial Court as mandatory "minimum standards of conduct and propriety" in the first case to arise under the Code and have been so viewed in all subsequent cases. See *Matter of Ross*, 428 A.2d 858, 861 (Me. 1981); see, e.g., *Matter of Kellam*, 503 A.2d 1308, 1311 (Me. 1986) (canon "requires" certain conduct); *Matter of Barrett*, 512 A.2d 1030, 1033-34 (Me. 1986) (canon "directed [judge] in plain language" to take certain action); *Matter of Benoit*, 523 A.2d 1381, 1383 (Me. 1987) ("the plain proscription" of canon); see also ABA Code (1972), Introduction ("The canons and text establish mandatory standards unless otherwise indicated"); *United States v. Anderson*, 798 F.2d 919 (7th Cir., 1986) ("should" interpreted as mandatory in applying state Code of Judicial Conduct). The use of "shall" and "should" eliminates any confusion as to which provisions are mandatory and which are aspirational. See ABA Standing Committee, *Report 5*. Violation of mandatory rules by a judge may result in disciplinary action.

The Preamble makes clear that the Code is to be interpreted reasonably in accordance with other laws and in light of the

circumstances and conditions in which judges must operate. The Preamble also sets out factors of seriousness, pattern, and effect that are to be weighed in determining whether discipline is appropriate and the sanction to be applied. These guidelines and factors should be viewed as giving definition to the requirement of paragraph 9(ii) of the Order Establishing the Committee on Judicial Responsibility and Disability, 385-388 A.2d LX, LXI, that a violation to be reported to the Court be “of a serious nature so as to warrant formal disciplinary action.”

Disciplinary decisions under the 1974 Code reflect the application of similar guidelines and factors and will continue to serve as authority. See, e.g., *Matter of Benoit*, 487 A.2d 1158, 1163-68 (Me. 1985) (unlawful use of bail and contempt power in civil cases and pre-trial detention of juvenile offender without counsel were “obviously and seriously wrong” under “reasonably prudent and competent judge” standard); *Matter of Benoit, supra*, 523 A.2d at 1383 (“difficult to conceive of a more egregious violation” of canon intended to protect individual rights and prevent public perception of unfairness than trial judge’s publication of letters critical of appellate court pending final disposition of matters); compare *Matter of Kellam, supra*, 503 A.2d at 1311 (more than 40 incidents “reveal a pattern of discourtesy to laypersons of such consistency and duration as to present a serious violation” of the Code), with *Matter of Hart*, 577 A.2d 351, 355 (Me. 1990) (no discipline for alleged discourteous treatment of lawyer occurring as isolated incident in chambers with no loud or undignified language in course of judge’s review of perceived attorney misconduct).

In *Hart, supra*, the Court asserted that disciplinary proceedings are appropriate “only in those instances of judicial misconduct that exceed in seriousness the mistakes and frailties of the ordinary judge.” Nevertheless, the Court has proscribed “Lawless judicial conduct—the administration, in disregard of the law, of a personal brand of justice in which the judge becomes a law unto himself and has recognized that “To the end that a courtroom may truly be a temple of justice and not the personal domain of the man or woman who happens to be presiding, any differences in style [of judicial behavior] must always result in justice administered according to law and must be in accord with” the Code of Judicial Conduct. *Matter of Ross, supra*, 428 A.2d at 861. Departures from this standard are not justified by the admittedly difficult working conditions of the District Court, which “projects to the mass of our citizens their image of the

administration of justice.” *Id.* at 866. See also *id.* at 867; *Matter of Kellam, supra*, 503 A.2d at 1311; but see *Matter of Hart, supra*.

In assessing sanctions, the Court has repeatedly relied upon its statement in *Matter of Ross, supra*, 428 A.2d at 868-69, ordering a disciplinary suspension, that “Any sanction must be designed to preserve the integrity and independence of the judiciary and to restore and reaffirm the public confidence in the administration of justice. Any sanction must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter the individual being sanctioned from again engaging in such conduct and to prevent others from engaging in similar misconduct in the future.” See, e.g., *Matter of Kellam, supra*, 503 A.2d at 1312 (censure, suspension, salary forfeiture); *Matter of Barrett, supra*, 512 A.2d at 1034 (reprimand); *Matter of Benoit, supra*, 523 A.2d at 1384 (censure, suspension, salary forfeiture, completion of Judicial Ethics course).

The Preamble also makes clear that the Code is not intended to set standards for the civil or criminal liability of judges. Existing law will govern such issues. See *Richards v. Ellis*, 233 A.2d 37 (Me. 1967) (absolute immunity from civil liability for adjudicative acts); *Forrester v. White*, 484 U.S. 219 (1988) (judge may be liable under 42 U.S.C. § 1983 for acts in administrative capacity); *Pulliam v. Allen*, 466 U.S. 522 (1984) (judicial immunity does not bar injunctive relief or award of attorney’s fees under 42 U.S.C. §§ 1983, 1988); but see *United States v. Anderson, supra* (in perjury prosecution of state judge, Code of Judicial Conduct held to have force of law); cf. *Ferrell v. Cox*, 617 A.2d 1003, 1007 (Me. 1992) (not error to allow inquiry concerning Canon 5C(4)(c) of 1974 Code directed to judge who was defendant in civil suit).

### **Textual Note to Preamble of 1993 Code**

The Preamble is new. It is based on ABA Model Code (1990), Preamble, adapted for Maine, with certain further modifications in the interests of clarity and simplicity.

## TERMINOLOGY

Unless the context requires otherwise, the following terms have the following meanings in interpreting and applying this Code:

**“Appropriate authority”** means the authority having responsibility for initiation of disciplinary process in conjunction with the violation to be reported.

**“Committee”** means the Committee on Judicial Responsibility and Disability established by order of the Maine Supreme Judicial Court.

**“Contribution”** includes 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.

**“Court staff”** means employees of the court, including full-time, part-time, temporary, or contract employees, interns, externs, volunteers, and employees of the several counties while engaged in support of a judge in the performance of judicial duties, but does not include lawyers advocating for or representing a party in a proceeding before a judge.

**“De minimis,”** in the context of interests pertaining to a disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality or integrity.

**“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.

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

- (1) An interest in the individual holdings within a mutual or common investment fund;
- (2) An interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse,



domestic partner, parent, or child serves as a director, officer, advisor, or other participant;

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

(4) Ownership of government securities.

**“Election”** includes primary, general, and special elections.

**“Fiduciary”** includes positions as personal representative, executor, administrator, trustee, or guardian.

**“Honorarium”** means a payment of money or any thing of significant value for an appearance, speech, or article, not including reimbursement or payment for actual and necessary expenses for travel, food, and lodging incident to an appearance or speech.

**“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 the judge.

**“Impending matter”** is a matter that is imminent or expected to occur in the near future.

**“Impropriety”** is conduct that violates the law, court rules, or provisions of this Code, and that undermines a judge’s independence, integrity, or impartiality.

**“Income”** includes, but is not limited to, compensation for services rendered (other than amounts paid by the State of Maine for performance of judicial duties), dividends, interest, rent, royalties, capital gains, and amounts received from a trade or business, trust, estate, pension (other than amounts paid under a pension plan administered by a state or by the federal government), or other financial arrangement. “Income” does not include honoraria, gifts, bequests, favors, reimbursement or payment of expenses, or payments of alimony, spousal support, child support, or separate maintenance.

**“Independence”** means a judge’s freedom from influence or controls other than those established by law.

**“Integrity”** means probity, fairness, honesty, uprightness, and soundness of character.

**“Judicial candidate”** means any person, including a sitting judge, who is seeking selection for or retention in a 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.

**“Knowingly,” “knowledge,” “known,” and “knows”** mean actual knowledge of the fact in question. Actual knowledge may be inferred from the circumstances.

**“Law”** encompasses court rules, statutes, administrative rules and regulations, constitutional provisions, and decisional law.

**“Member of the judge’s family”** means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or a person with whom the judge maintains a close familial relationship.

**“Member of a judge’s family residing in the judge’s household”** means any relative of a judge by blood, marriage, or adoption, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household.

**“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, impounded, or communicated in camera, and information offered in grand jury proceedings, presentencing reports, child protective cases, or psychiatric reports.

**“Pending matter”** is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.

**“Personally solicit”** means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or other means of communication.

**“Political organization”** means a political party or other group sponsored by or affiliated with a political party or candidate, or an independent political action committee, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate’s campaign committee.

**“Require.”** The rules prescribing that a judge “require” certain conduct of others are, like all of the rules in this Code, 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 while they are subject to the judge’s direction and control.

**“The 1993 Code.”** References to the 1993 Code, the 1993 Maine Code of Judicial Conduct, the 1993 Canons, or similar references to the 1993 Code or Canons, include any amendments adopted since 1993 and until the 2015 adoption of this revised Maine Code of Judicial Conduct, unless the context indicates that the reference is limited to actions taken in 1993.

**“Third degree of relationship”** includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.

### **Advisory Notes – 2015**

The “Terminology” section appears as “Definitions” in Part II, Section 3 of the 1993 Maine Code of Judicial Conduct. The 2010 Committee on Judicial Responsibility and Disability Report to the Court recommended that definitions of “domestic partner,” “impending matter,” “impropriety,” “independence,” “integrity,” “member of a judge’s family residing in the judge’s household,” “pending matter,” and “personally solicit” that appear in the ABA Model Code be added to this Code. The Committee also recommended that the definitions of “court personnel,” “election,” “honorarium,” and “income” from the 1993 Maine Code not be included in the revised Code because those terms were not included in the Committee draft. Because those terms appear in this draft, those definitions are retained. “Court personnel” is now referenced as “court staff,” and the definition is broadened to include the full range of persons who may be engaged by the Judicial Branch or the Probate Courts in support of judges in the performance of their judicial duties. In the definition of “Economic interest,” paragraph 4 is clarified to be “Ownership of government securities” rather than the more obscure “interest in an issuer of government securities.” The definitions of “Committee” referring to

the Committee on Judicial Responsibility and Disability, and of “the 1993 Code” are added.

The 2007 and 2011 editions of the ABA Model Code are organized so that an asterisk \* appears at each point when a defined word first appears in the Code. That designation has been eliminated in this draft.

The 1993 Advisory Committee’s Note to the Definitions in Part II of the Maine Code of Judicial Conduct, stated as follows:

The definition of “candidate” [now “Judicial candidate”] in Section 3B includes individuals seeking initial appointment or election as a judge, judges seeking reappointment or reelection as a judge, and judges seeking appointment or election to nonjudicial office. The language of the definition in ABA Model Code (1990), Terminology Section, has been changed to reflect the actualities of political activity in Maine. See Advisory Committee’s Note to Canon 5.

The definition of “court personnel” in Section 3C makes clear that lawyers are not “court personnel” as that term is used in the Code, regardless of their traditional status and obligations as “officers of the court.” Court officers and other support personnel are within the definition, however, even when technically employed by the county.

The definition of “de minimis” in Section 3D departs from that in ABA Model Code (1990), Terminology Section, with the substitution of “too trivial” for “insignificant.” The change is for consistency with the definition of de minimis offenses in the Maine Criminal Code, 17-A M.R.S.A. § 12.

The definition of “economic interest” in Section 3E, taken without change from the definition in ABA Model Code (1990), Terminology Section, is a modification of the definition of “financial interest” in ABA Code (1972), Section 3C(3)(c). That provision was not incorporated in Maine Code (1974), Section 3C. See Advisory Committee’s Note to Section 3E.

The definition of “election” in Section 3F is adapted from the definition of “public election” in ABA Model Code (1990),

Terminology Section, to reflect the operation of the Maine political system.

In the definition of “fiduciary” in Section 3G, the term “personal representative” has been added for consistency with the Maine Probate Code, 18-A M.R.S.A. § 1-201(13), (30). The definition is derived from ABA Code (1972), Section 3C(3)(b), not incorporated in Maine Code (1974), Section 3C. See Advisory Committee’s Note to Section 3E.

The definitions of “honorarium” in Section 3H and “income” in Section 31 are taken from Maine Code (1974), Canon 8B(l)(a) and (b), added in 1990. They have been eliminated from those paragraphs, which are Canons 6B(l)(a) and (b) in the revised Code. For discussion of these definitions, see Advisory Committee’s Note to August 15, 1990, promulgation of Canons 8B(l)(a) and (b), Me. Rptr., 576-588 A.2d LXXV-LXXVI.

In the definition of “law” in Section 3K, the phrase “administrative rules and regulations” has been added to the list of forms of law found in the definition in ABA Model Code (1990), Terminology Section.

In the definition of “nonpublic information” in Section 3M, the final sentence of the definition in ABA Model Code (1990), Terminology Section, listing types of nonpublic information, has been eliminated in favor of a generic reference to information rendered unavailable “by law or court order.”

In the definition of “political organization” in Section 3N, the word “public” was substituted for “political,” modifying “office” at the end of the sentence in the definition in ABA Model Code (1990), Terminology Section.

The definition of “third degree of relationship” in Section 3P, taken without change from the definition in ABA Model Code (1990), Terminology Section, is derived from ABA Code (1972), Section 3C(3)(a), Commentary. That provision was not incorporated in Maine Code (1974), Section 3C. See Advisory Committee’s Note to Section 3E.

## **CANON 1**

**A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary; shall avoid impropriety; and should avoid the appearance of impropriety.**

### **Advisory Notes – 2015**

Canon 1 is based on the ABA Model Code (2011 ed.) with the words “should avoid” added before the words “appearance of impropriety.” Canon 1 is similar to the first sentence of 1993 Canon 1. Because the 1993 Canons had no Rules subdivisions, Canon 1 of the 1993 Canons included three additional sentences that read as follows:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 1 and Rule 1.1 are not supported by any Comments in the 2011 ABA Model Code.

### **1993 Advisory Committee’s Note to Canon 1**

Canon 1 sets forth the substantive duty of each judge to observe “high standards of conduct . . . so that the integrity and independence of the judiciary will be maintained.” The latter purpose is also an interpretive principle to be observed in the construction and application of the Code. In addition, the Canon exhorts judges to “participate in establishing, maintaining, and enforcing” those standards. This provision is cast in aspirational rather than mandatory form because it is too general to admit of disciplinary enforcement.

The integrity and independence of judges is of fundamental importance, because public confidence in these attributes is essential to that “[d]eference to the judgments and rulings of courts” upon which “the system of government under law depends.” Public confidence is maintained or diminished accordingly as judges observe

or violate the Code. See ABA Model Code (1990), Commentary to Section 1A.

In a number of cases, the Supreme Judicial Court has held that the virtually identical provisions of Canon 1 of the 1974 Code were violated by conduct violative of one or more of the specific provisions of other canons. See, e.g., *Matter of Ross*, 428 A.2d 858, 867 (Me. 1981); *Matter of Benoit*, 523 A.2d 1381,1382 (Me. 1987); *Matter of Cox*, 553 A.2d 1255, 1256, 1258 (Me. 1989). A direct violation of Canon 1 was found in *Matter of Cox*, 532 A.2d 1017 (Me. 1987) (angry conversation with police officer concerning traffic violation by judge's son).

### **Textual Note to 1993 Code**

Canon 1 is identical to ABA Model Code (1990), Canon 1 and Section 1A. The language of Canon 1 is also virtually identical to the 1974 Maine Code. The only substantial changes are for the purpose of identifying those standards that are mandatory. Thus, the first "should" is retained in the second sentence, but "shall" has been substituted for the second "should." In the final sentence, "are to" has been used in lieu of "shall" or "should" because the sentence is a directive concerning interpretation, not conduct. See ABA Model Code (1990), Committee Note to Section 1A.

## **RULE 1.1**

### ***Compliance with the Law***

A judge shall comply with the law and the Maine Code of Judicial Conduct.

#### **Advisory Notes – 2015**

Rule 1.1 is similar to the first phrase in 1993 Canon 2(A), which stated, “A judge shall respect and comply with the law . . . .” The obligation to comply with the law is similar to the obligation stated in Rule 2.2 to “uphold and apply the law.” The meaning of the ethical obligation addressed in Rule 1.1, and the necessary prerequisites to raise a question about an ethical violation alleging failure to comply with the law or failure to be faithful to the law are addressed in detail in the Advisory Notes to Rule 2.2.

Reference to the 1993 Advisory Committee’s Note for 1993 Canon 2 follows the discussion of Rule 1.2.



## **RULE 1.2**

### ***Promotion of Confidence in the Judiciary***

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

#### **Advisory Notes – 2015**

Rule 1.2 is based on the language in ABA Model Code Rule 1.2.<sup>7</sup> This language expands the second phrase of 1993 Canon 2(A), which directed that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The reference that a judge “shall avoid impropriety and should avoid the appearance of impropriety” is new, although covered by other provisions in the 1993 Code.<sup>8</sup>

The Comments to Rule 1.2 of the ABA Model Code (2011 ed.) state:

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

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

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

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

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<sup>7</sup> The title in the ABA version is “Promoting” rather than “Promotion of” Confidence in the Judiciary.

<sup>8</sup> See 1993 Canons 1, 3(B)(6), 4(B), 4(C)(3), and 4(D)(2) addressing appearance issues with the directive “should” or “may” that are addressed to the reasonable exercise of a judge’s discretion.

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

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

The 1993 Advisory Committee's Note to Canon 2 and 2(A) stated:

Canon 2 requires judges to serve the basic purpose of maintaining public confidence in the judiciary by avoiding impropriety and the appearance of impropriety in all of their activities, both professional and personal. Because of the inevitability of "constant public scrutiny," a judge must "accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." ABA Model Code (1990), Commentary to Section 2A.

Canon 2A makes clear that the obligation includes both the duty of respect for and compliance with law and the avoidance of "irresponsible and improper conduct . . . that is harmful though not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Id.*

In a number of cases, the Supreme Judicial Court has held that the virtually identical provisions of Canon 2A of the 1974 Code were violated by conduct that violated one or more of the specific provisions of other canons. See, e.g., *Matter of Kellam*, 503 A.2d 1308, 1310 ([Me.] 1986); *Matter of Benoit*, 523 A.2d 1381, 1382 (Me. 1987). In *Matter of Cox*, 553 A.2d 1255, 1256, 1258 (Me. 1989), the Court articulated the reasoning for this conclusion, noting that the

purpose of former Canon 3A(1), (4), to assure “fairness in the administration of justice” was in furtherance of the goal of Canon 2 to sustain public confidence in the judiciary and holding that a trial judge’s violation of former Canon 3A(1), (4), by direct participation in plea negotiations “strikes at the heart of the public’s perception of impartiality.” The Court has also found particular conduct to be in direct violation of Canon 2A. See *Matter of Ross*, 428 A.2d 858 (Me. 1981) (imposing sentence without hearing, seeking to influence a witness in judicial disciplinary hearing); *Matter of Cox*, 532 A.2d 1017 (Me. 1987) (angry conversation with police officer concerning traffic violation by judge’s son was “appearance of impropriety”).

### **RULE 1.3**

#### ***Avoiding Abuse of the Prestige of Judicial Office***

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others; nor shall a judge convey or permit others to convey the impression that any person or organization is in a special position to influence the judge.

#### **Advisory Notes – 2015**

The language that appears after “judge or others” is much more detailed than the phrase “or allow others to do so” that appears in Rule 1.3 of the ABA Model Code. Rule 1.3 also incorporates the provision in ABA Model Code Rule 2.4(C) that prohibits a judge from allowing persons to suggest they have special influence with the judge.

A Comment to the 2011 ABA Model Code states that Rule 1.3 allows a judge to provide a reference or recommendation for an individual based upon a judge’s personal knowledge.

[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.

*See also* Advisory Committee on the Maine Code of Judicial Conduct Opinion 98-3 (concluding that under certain circumstances the Code does not prohibit the judge from writing a letter of recommendation on official court stationery).

Model Code Comment [3] to Rule 1.3 indicates that participation in a judicial selection process is not prohibited by the rule.

[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.

Participation in judicial selection and election processes is addressed in this Code in Canon 4 and its Rules and Advisory Notes.

Model Code Comment [4] to Rule 1.3 addresses judges writing for certain publications:

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

Rule 1.3 is the replacement for 1993 Canon 2(B), but it is more broadly worded. The 1993 Canon 2(B) states:

B. Preventing Improper Influence. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

The 1993 Advisory Committee's Note to Canon 2(B) states:

Canon 2B forbids a number of specific actions that are in effect *per se* improprieties because they diminish the prestige of the judicial office so essential to the proper functioning of an independent judiciary. Examples of improper activities offered in ABA Model Code (1990), Commentary to Section 2B, include alluding to judicial status in an effort to gain deferential treatment when stopped for a traffic offense, use of judicial letterhead for personal business, use of judicial status to gain advantage for a family member in a civil suit, and allowing exploitation of the judge's office in the advertising of published writings. Proper activities identified in the ABA Commentary include serving as a reference or writing a letter of recommendation based on personal knowledge, and supplying names and responding to official inquiries regarding judicial appointments.

In particular, the ABA Commentary notes, it would be improper for a judge voluntarily to supply information to a probation officer or sentencing judge, and Canon 2B specifically forbids formal testimony as a character witness because of the impact of the office and the effect on lawyers involved. A judge may, however, engage in such activities when formally requested or summoned, though the judge should ordinarily discourage a party from summoning the judge as a character witness.

The Supreme Judicial Court found violations of the similar provisions of Canon 2B of the 1974 Code in two decided cases. *Matter of Ross, supra*, 428 A.2d at 864-65 (causing traffic infraction complaints against personal acquaintances to be filed); *Matter of Cox, supra*, 532 A.2d at 1019 (angry conversation with police officer concerning traffic violation by judge's son).

A 1993 Textual Note to Canon 2, referencing Canon 2(A) and 2(B) observed:

Canon 2 adopts ABA Model Code (1990), Canon 2 and Sections 2A-2C, with variations appropriate to Maine. The principal change from the 1974 Maine Code is the addition of Canon 2C. Canons 2A and 2B are identical to the provisions of ABA Model Code (1990), Sections 2A, 2B. There are no substantial changes from Canon 2A of the 1974 Maine Code. Canon 2B departs from Canon 2B of the 1974 Maine Code in adding political relationships to those by which a judge must not be influenced and in including the judge's own private interests among those which the judge may not seek to benefit through the prestige of the judicial office. See ABA Model Code (1990), Committee Note to Section 2B.

## CANON 2

**A judge shall perform the duties of judicial office impartially, competently, and diligently.**

### Advisory Notes – 2015

Canon 2 is identical to ABA Model Code Canon 2. It is similar to 1993 Canon 3, but with the addition of the word “competently.”

This Canon and the Rules that follow are not intended to make the sole fact of a judge’s error of law or fact the basis for discipline. *See* Advisory Notes to Rule 2.2. To show lack of professional competence or diligence, either a pattern of decisions willfully or blatantly ignoring or misstating established legal principles, or a demonstration of fraud, corrupt motive, or bad faith on the judge’s part would be necessary. *See In re Complaint of Judicial Misconduct*, 631 F.3d 961, 962 (9th Cir. 2011).

The initial paragraph of the 1993 Advisory Committee’s Note for what was then Canon 3 and is now Canon 2 stated:

Canon 3 governs judges in the performance of their official duties—whether in an adjudicative or administrative role. The Canon also sets forth a judge’s responsibilities for the discipline of other judges and of lawyers and provides standards and procedures for judicial disqualification for interest.

## **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.

#### **Advisory Notes – 2015**

Rule 2.1 is identical to ABA Model Code Rule 2.1. It is more generally worded but has the same effect as 1993 Canon 3(A). The 1993 Advisory Committee's Note to Canon 3(A) stated: "Canon 3A emphasizes that the judge's official responsibilities have the first claim on the judge's time and supersede any personal or private interest." Canon 3(A) emphasized that the performance of the duties generally referenced in Canon 3(A) would be governed by "the standards set forth in sections B through E of this Canon."

The 2011 ABA Model Code Comments to Rule 2.1 state:

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

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



## **RULE 2.2**

### ***Impartiality and Fairness; Upholding the Law***

A judge shall uphold and apply the law, and shall perform all judicial and administrative duties promptly, fairly, and competently. An error of law in a judicial decision, whether recognized on appeal or not, shall not constitute a violation of this Code unless the judge's action demonstrates willful or repeated disregard of explicit requirements of the law.

### **Advisory Notes – 2015**

The title to ABA Model Code Rule 2.2 is amended to add “Upholding the Law” to reflect the dual purposes of the Rule articulated in its first sentence. The second sentence has no counterpart in Model Code Rule 2.2, but reflects precedent, discussed below, interpreting Model Code Rule 2.2 and similar ethical obligations to uphold the law.

The language of the first sentence of Rule 2.2 is broader than ABA Model Rule 2.2, which states: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” The first sentence of Rule 2.2 is drawn from (1) the first sentence of 1993 Canon 3(B)(2), specifying that a judge “shall be faithful to the law and maintain professional competence in it,” and (2) 1993 Canon 3(B)(8), specifying that a judge “shall dispose of all judicial matters promptly, efficiently, and fairly.”

2011 Model Code Comment [4] to Rule 2.2 indicates that Rule 2.2 is not violated when a judge makes reasonable accommodations to ensure that unrepresented litigants have their matters fairly heard. The issue of unrepresented litigants is also addressed in Rule 2.6(C).

### ***Upholding and Applying the Law***

This portion of the June 2015 Advisory Notes is equally applicable to the “comply with the law” portion of Rule 1.1. The terms of Rule 2.2 emphasize that to give rise to an ethical concern, the error of law or failure to be “faithful to the law” at issue must be much more serious and apparent than an error of law that may lead to a trial court action being vacated or criticized for an error of law on appeal. *See In re Hart*, 577 A.2d 351, 354-55 (Me. 1990) (single episode of intemperate behavior did not support finding of a violation of judicial ethics).

A judicial disciplinary review authority such as the Committee is not a court; it does not have the comprehensive record and advocacy that is available on an appeal, and thus does not determine whether a judge's rulings are erroneous as a matter of law. *See In re Complaint of Judicial Misconduct*, 631 F.3d 961, 962 (9th Cir. 2011); *In re Complaint of Judicial Misconduct*, 579 F.3d 1062, 1064 (9th Cir. 2009). The Committee's 2013 Annual Report states that the Committee does not engage in appellate-type review: "The Committee is not, however, an appellate court, it has no power to alter the decisions in the cases about which complaints are made. Similarly, simple disagreement with the merits of a judge's decision is not a basis for violation of the Code." Committee on Judicial Responsibility and Disability, *2014 Annual Report*, 3 (2015).

When there is appellate review of an issue that has also generated an ethics concern, that appellate consideration of the issue may obviate the need for judicial disciplinary review. *See In re Charge of Judicial Misconduct*, 47 F.3d 399, 400-401 (10th Cir. 1995); *Lauer v. Strang*, 788 F.2d 135, 138 (8th Cir. 1985).

Rule 2.2 states that, to find an ethical violation, the Committee must determine that "the judge's action demonstrates willful or repeated disregard of explicit requirements of the law."

To find an ethical violation: "The number of erroneous rulings must be large enough that it could constitute a pattern. And the [judicial disciplinary review authority] must also present 'clear and convincing evidence' that this series of erroneous rulings reflects the judge's 'virtually habitual,' 'arbitrary and intentional departure from prevailing law' based on the judge's 'disagreement with, or willful indifference to, that law.'" *In re Complaint of Judicial Misconduct*, 631 F.3d at 962-63 (citations omitted). "This can generally be done by pointing to a particular error the judge continued to commit even after having been repeatedly corrected on appeal." *Id.* at 963.

Maine opinions finding judicial misconduct based on a pattern or practice of violations of established law include *In re Kellam*, 503 A.2d 1308 (Me. 1986) (more than forty separate incidents of rude or discourteous conduct in court); *In re Benoit*, 487 A.2d 1158 (Me. 1985); and *In re Ross*, 428 A.2d 858 (Me. 1981).

### ***Impartiality and Fairness***

Application of the obligations of impartiality and fairness necessarily requires recognition that a judge may have to make or write statements critical or

disbelieving of counsel, a party, or a witness in resolving legal or factual issues presented for decision. Such statements, by themselves, do not establish ethical violations or warrant an ethics complaint or inquiry. “That a court has decided disputed issues of law and fact against a party is not, without more, evidence of lack of impartiality.” *Dalton v. Dalton*, 2014 ME 108, ¶ 25, 99 A.3d 723 (citing *Estate of Lipin*, 2008 ME 16, ¶ 6, 939 A.2d 107); *see also In re Martinez-Catalda*, 129 F.3d 213, 219 (1st Cir. 1997) (“A judge is ordinarily entitled to form a view of the parties that is favorable or unfavorable, so long as it derives from information in the case; there may be exceptions but they are ‘rare’ indeed.”). “And without a firm foundation upon which accusations of personal bias, prejudice, or impropriety can stand, baseless charges of misconduct are patently inappropriate.” *Dalton*, 2014 ME 108, ¶ 25, 99 A.3d 723.

Adverse information about a party that a judge may acquire in an earlier proceeding involving a party, or in an earlier stage of a pending proceeding, does not prevent a judge from presiding in a subsequent proceeding involving the same party. *See State v. Lewis*, 1998 ME 83, ¶ 3, 711 A.2d 119; *State v. Rameau*, 685 A.2d 761, 763 (Me. 1996) (stating that a judge is not required to recuse because of opinions based on information acquired in that proceeding or a prior proceeding, unless the judge’s opinions “display a deep-seated favoritism or antagonism that would make fair judgment impossible”).

The disqualification standards in the federal statutes are similar to standards in the ABA Model Code. *See United States v. Reynolds*, 646 F.3d 63, 74 (1st Cir. 2011) (stating that opinions based on evidence introduced during the course of a case are “properly and necessarily acquired in the course of the proceedings,” and are indeed sometimes, as in a bench trial, “necessary to completion of the judge’s task,” and are not a grounds for recusal); *Khor Chin Lim v. CourtCall, Inc.*, 683 F.3d 378, 380 (7th Cir. 2012) (stating that “adverse decisions do not establish [bias] or even hint at bias” and finding bias contention frivolous); 13D *Federal Practice and Procedure* § 3542, *Grounds for Disqualification – Bias and Prejudice* (3d ed. updated April 2015) (discussing ethical issues related to claims of bias and prejudice pursuant to the federal recusal statutes, 28 U.S.C. §§ 144, 455 (2014)).

Writing in *Liteky v. United States*, 510 U.S. 540 (1994), an important precedent addressing disqualification for partiality issues, Justice Scalia observed:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from

surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

*Id.* at 555-556 (citations omitted).

Concurring in *Liteky*, Justice Kennedy observed:

[The federal recusal statute] is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

*Id.* at 557-558.

For an example of a case demonstrating what Justice Scalia characterized as the “rarest circumstances” when reassignment on remand was ordered based on a finding of a high degree of favoritism or antagonism when no extrajudicial source was involved, see *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 897-98, 904-05 (8th Cir. 2009).

Partiality and fairness issues may also arise from a judge’s prior employment in relation to a pending case. This issue was discussed thoughtfully in a First Circuit opinion by Justice Souter, *In re Bulger*, 710 F.3d 42 (1st Cir. 2013), holding that a judge who had worked in the U.S. Attorney’s Office while events at issue in a case were under investigation would be required to recuse from hearing the case. In so holding the court looked not to evidence of actual bias, but to “the existence of facts that would prompt a reasonable question in the mind of a well-informed person about the judge’s capacity for impartiality in the course of the trial and its preliminaries.” *Id.* at 46.

In his ruling, Justice Souter cautioned that disqualification motion practice does not “confer a veto power on the assignment of his trial judge to any heckling defendant who merely levels a charge that implicates a judge’s defensive or vicariously defensive reaction. The recusal standard must be more demanding because ‘the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.’” *Id.* at 47 (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989)).

Addressing a similar issue, a U.S. District Court Judge observed that a party’s criticism of a judge should not require recusal:

Newspaper articles criticizing a judge’s performance are not unusual. More important, a party cannot create a basis for recusal by first criticizing a judge and then claiming the judge is biased as a result. It is well settled that prior written attacks upon a judge are legally insufficient to support a charge of bias or prejudice on the part of the judge toward the author of such a statement. Forcing judges to recuse because a litigant has criticized the judge would give litigants veto power over judges and allow forum shopping. It would also stretch the recusal

statutes far beyond their intended purpose and potentially force disqualifications in a large number of cases.

*Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 353 F. Supp. 2d 1160, 1176 (D. Utah 2005) (footnotes omitted) (citations omitted). *See also* *Rodgers v. Knight*, 781 F.3d 932, 943 (8th Cir. 2015) (fact that plaintiff's counsel had filed judicial conduct complaint against judge in previous, unrelated litigation, or that federal district judge had formerly served as municipal judge in defendant city did not establish that the judge's impartiality in pending matter might reasonably be questioned).

The Law Court adopted a similar position in *State v. Murphy*, 2010 ME 140, ¶ 18, 10 A.3d 697, rejecting claims that a judge should have recused because the defendant had harshly criticized a judge in court and filed lawsuits against the judge. *See also* Advisory Committee on the Maine Code of Judicial Conduct, Opinion 91-1 (concluding that a judge is not required to recuse in a case when one of the parties has filed a complaint against the judge with the Committee).

In addition to these 2015 Advisory Notes, judicial ethics issues relating to disqualification claims and allegations of partiality are addressed in detail in Rules 2.11 and 3.11 and the Advisory Notes to those Rules.

### **1993 Advisory Committee's Notes**

The 1993 Advisory Committee's Notes to Canon 3(B) paragraphs (2) and (8) state:

#### **For 3(B)(2):**

Canon 3B(2) requires a judge both to observe the law and to be professionally competent. In *Matter of Ross*, 428 A.2d 858 (Me. 1981), the Supreme Judicial Court found violations of the identical provision of Maine Code (1974), Canon 3A(1), when "the respondent willfully disregarded the requirements of the law" by imprisoning a defendant for nonpayment of a civil forfeiture. In the same case, the Court found additional violations of former Canon 3A(1) where the judge had caused traffic infraction complaints against personal acquaintances to be "filed," personally lecturing the defendants instead of trying them, and had continued two OUI cases against an individual for six months, one before sentencing, the other

without hearing, then entered judgments of not guilty in both. The Court also cited the judge's oath under Article IX, § 1, of the Maine Constitution "to administer the law, not his personal philosophy." *Id.* at 865.

In *Matter of Benoit*, 487 A.2d 1158 (Me. 1985), the Court established the standard of the "reasonably prudent and competent judge." Conduct violates former Canon 3A(1) if such a judge "would consider that conduct obviously and seriously wrong in all the circumstances." *Id.* at 1163. Applying this standard, the Court found that incarceration and imposition of public service obligations in civil OUI cases and pretrial detention of an unrepresented juvenile without hearing were violations of the Canon because there was no legal authority or the actions were plainly contrary to existing law. Incarceration of a civil debtor for nonpayment under a payment order and denials of stays of sentence pending appeal were found to be errors of law but not Code violations, where the law was unclear or unsettled. *Id.* at 1164-70. See also *Matter of Cox*, 553 A.2d 1255 (Me. 1989) (judge's involvement in plea negotiations contrary to explicit provision of M.R. Cr. P. 11(e) violated former Canon 3A(1)).

**For 3(B)(8):**

Canon 3B(8) is intended to assure that the "interests in fairness, efficiency and economy are properly balanced." ABA Model Code (1990), Committee Note to Section 3B(8). In attaining the proper balance, "a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. . . . A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts." ABA Model Code (1990), Commentary to Section 3B(8). Promptness requires diligence, punctuality, and expeditiousness on the part of the judge and that the judge "insist that court officials, litigants and their lawyers cooperate with the judge to that end." *Id.* In *Matter of Barrett, supra*, 512 A.2d at 1034, the Court found violations of the virtually identical provisions of former Canon 3A(5), where a probate judge deliberately delayed decision in two contested matters "out of a belief that he knew best what would advance harmony among the

litigating parties before his court,” thus administering “his own personal brand of justice.” In a third matter, a six-month delay without more, while not condoned by the Court, was held not to be a violation standing alone. *Id.*



## **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 for or against an individual or a party, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon, race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others, while subject to the judge's direction and control, to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, lawyers, court staff, or others.

(D) Sections B and C of this Rule do not preclude judges or lawyers from making legitimate reference to the listed factors or other similar factors when they are relevant to an issue in a proceeding.

### **Advisory Notes – 2015**

Rule 2.3 follows fairly closely the words of paragraphs (5) and (6) of 1993 Canon 3(B) but with the mandatory “shall” substituted for the aspirational “should” that appeared in 1993 Canon 3(B)(6), and with references to “gender” and “gender identity” added to recognize more current references to protected classes of individuals. Rule 2.3 also follows the language of ABA Model Code Rule 2.3, but with the addition of “for or against an individual or party” in the first sentence of (B). Also, recognizing that language barriers sometimes pose particular problems, judges must endeavor to ensure that all individuals understand and are allowed to participate fully in court proceedings, while ensuring that the judge's actions do not manifest any prejudice or bias.

Bias claims subjecting a judge to disciplinary complaints may arise from either judicial or administrative actions. Although administrative decisions such as hiring and discipline of court personnel are administrative functions, not judicial functions, a judge may commit judicial misconduct when performing administrative functions. *In re Complaint of Judicial Misconduct*, 726 F.3d 1060, 1061 (9th Cir. 2013). “But any such charges of misconduct must allege more than disagreement with the judge’s administrative decision. The complaint must document conduct by the judge that is wrongful, independent of whether the judge’s decision is correct. The misconduct process cannot be used to second-guess the judge’s administrative decision; nor can it result in a reversal of that decision.” *Id.*

The 1993 Advisory Committee’s Note to paragraphs (5) and (6) of Canon 3(B) stated:

Canons 3B(5) and (6) are intended “to emphasize the requirements of impartial decision-making and the appearance of fairness in the courtroom.” ABA Model Code (1990), Committee Note to Sections 3B(5), (6). The Commentary to ABA Model Code (1990), Section 3B(5), emphasizes that the purpose is to assure impartiality and fairness in the performance of judicial duties. Manifestation of bias may impair “the fairness of the proceeding” and bring “the judiciary into disrepute.” A judge “must be alert to avoid behavior that may be perceived as prejudicial.” The provision includes “[f]acial expression and body language, in addition to oral communication,” all of which can convey the appearance of bias “to parties or lawyers . . . , jurors, the media and others.” *Id.* As in Canon 3B(4), the duty to control the conduct of others is aspirational, rather than mandatory.

Canon 3B(6) is also aspirational in form. Judges “should require” lawyers to observe the standards imposed on judges and court personnel by Canon 3B(5). The provision is not mandatory, because judges have no line supervisory authority over lawyers and can control lawyers’ behavior only through the drastic sanctions of contempt or professional discipline. This section imposes no obligation upon judges to intervene in the exercise of peremptory challenges in the ordinary case. The decisions of the United States Supreme Court in *Georgia v. McCollum*, [505] U.S [42], 112 S.Ct.

2348 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. [614], 111 S. Ct. 2077 (1991); and *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibit discriminatory use of peremptory challenges to exclude jurors solely on account of their race. If the objecting party makes a prima facie showing that the challenge was based on race, the challenging party must offer a racially neutral explanation for the challenge. In light of the burdens placed upon the objecting party by these cases, the judge's only obligation is to follow the procedure there outlined. In the absence of objection, a peremptory challenge should be presumed to have been made without discriminatory intent as an act of "legitimate advocacy" permitted by the second sentence of section (6), unless other circumstances, such as the lawyer's demeanor in the *voir dire* or the absence of any apparent tactical reason for the challenge, manifest actual bias or prejudice.

## **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.

### **Advisory Notes – 2015**

Rule 2.4 follows Rules 2.4(A) and (B) of the ABA Model Code. Rule 2.4(A) is similar to the second sentence of 1993 Canon 3(B)(2) (“A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.”). Rule 2.4(B) is similar to the first sentence of 1993 Canon 2(B) (“A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment.”). Rule 2.4(B) adds “financial” to the list of interests or relationships that shall not influence judicial conduct. Issues relating to a judge's financial activities are addressed in Rule 3.11 and its Advisory Notes. Perhaps because the two provisions were short and specific, neither was subject to much comment in the 1993 Advisory Committee's Notes.

Rule 2.4(C) of the ABA Model Code, relating to others conveying the impression that they have special influence with the judge, is now part of Rule 1.3, as it was part of 1993 Canon 2(B). The 2011 ABA Model Code Comment to Rule 2.4 stated:

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.

Judges can be subject to discipline for conduct in private matters. In *In re Cox*, 658 A.2d 1056, 1057-58 (Me. 1995), the Court disciplined a former judge by disbarment from the practice of law for what the Court described as “avaricious and dishonest conduct” involving fraud committed in a private real estate transaction that occurred while sitting as a judge. The judge's private conduct had

led to complaints to the Committee following the trial described in *Ferrell v. Cox*, 617 A.2d 1003 (Me. 1992).

## **RULE 2.5**

### ***Competence, Diligence, and Cooperation***

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

#### **Advisory Notes – 2015**

Rule 2.5 is identical to Rule 2.5 in the 2011 ABA Model Code. The Comments to the ABA Model Code state:

[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.

Rule 2.5 is similar to 1993 Canon 3(C)(1), but with references to bias removed, as bias issues are covered in other Rules, including Rule 2.3 and Rule 3.6, in this redraft. In paragraph (B) “shall” is substituted for the 1993 Canon’s “should.” The 1993 Advisory Committee’s Note for Canon 3(C)(1) stated:

Canon 3C covers a judge's administrative responsibilities. Canon 3C(1) is intended "to prohibit a judge from manifesting bias or prejudice in the performance of administrative duties and to encourage, rather than to require, the more practicable duty of cooperation rather than facilitation" in dealings with other court personnel. ABA Model Code (1990), Committee Note to Section 3C(1). Thus, "should," rather than "shall," is used in the second sentence. See also Canons 2C, 3B(5), (6).

## **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 forces any party to settle. A judge may participate in case management conferences, judicial settlement conferences, and dispositional conferences, and such participation alone does not disqualify the judge from participating in later adjudicatory proceedings.

(C) A judge may take affirmative steps, consistent with the law, as the judge deems appropriate to enable an unrepresented litigant to be heard. A judge may explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented individuals of free or reduced cost legal or other assistance that is available in the courthouse or elsewhere.

### **Advisory Notes – 2015**

Rule 2.6(A) is identical to the first sentence of 1993 Canon 3(B)(7). Most of the remainder of 1993 Canon 3(B)(7), however, discusses *ex parte* communications. Section B(7)(d) of 1993 Canon 3 discusses approved judicial settlement promotion practices, but in terms different from new Rule 2.6(B). Thus, 1993 Canon 3(B)(7)(d) states: "A judge may, with the consent of the parties, confer separately with the parties with or without their lawyers present, or separately with their lawyers alone, in an effort to mediate or settle matters pending before the judge." Rule 2.6(B) indicates that judges who participate in trial management or settlement discussions or dispositional conferences may also preside at adjudicatory proceedings in the same case. However, a judge who participates in a formal settlement conference when there is an explicit understanding that another judge will conduct any trial or contested hearing, is disqualified from further participation in that case, other than placing any settlement reached on the record and, when necessary, enforcing a settlement that has been reached, unless the parties explicitly agree otherwise.

There is no Rule 2.6(C) in the ABA Model Code. Rule 2.6(C) is similar to 1993 Canon 3(B)(12) which states: "A Judge may explain the requirements of



applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented persons of free legal aid and similar assistance that is available in the courthouse or otherwise.” A change in the Rule adds the capacity to provide information about reduced cost assistance that may be available.

Rule 2.6 should be regarded as providing continuing ethical guidance for judges participating in case management and settlement discussions, and for judges providing appropriate support for unrepresented litigants to assure that the goals of fairness and equal access to the judicial process are supported.

## **RULE 2.7**

### ***Responsibility to Decide***

A judge shall hear and decide matters except when disqualification or recusal is required.

### **Advisory Notes – 2015**

The duty to hear and decide matters, except when disqualification or recusal is required, is also addressed in the Advisory Notes to Rule 2.11. Rule 2.7 somewhat duplicates the requirements of Rules 2.1 and 2.5 and is very similar to 1993 Canon 3(B)(1).

The only Model Code Comment to Rule 2.7 addresses the Rule as relevant to a duty not to disqualify except when disqualification is required. Such caution is necessary to support timely resolution of pending matters and efficient use of judicial and litigant resources. The extent of the duty not to disqualify is discussed in more detail in the Advisory Notes to Rule 2.11. Rule 2.7 also requires judges to give full attention to their judicial caseload and to avoid unnecessary repetition or delay in resolving pending matters. *See In re Barrett*, 512 A.2d 1030 (Me. 1986); *State v. Aubut*, 261 A.2d 48, 51 (Me. 1970) (stating that a judge should not heed a motion for disqualification that is frivolous).

## **RULE 2.8**

### ***Decorum, Demeanor, and Communication with Jurors***

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, law enforcement and corrections officers, members of the public, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officers, 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.

### **Advisory Notes – 2015**

Rule 2.8(A) is identical to 1993 Canon 3(B)(3), except for the substitution of the word “court” for the word “judge” at the end of the sentence. The 1993 Advisory Committee’s Note to Canon 3(B)(3) indicated that it stated “a rule of reason” for control of conduct of persons subject to the judge’s direction and control. Rule 2.8(B) is similar to 1993 Canon 3(B)(4) although it substitutes “shall” for “should” in addressing the judge’s responsibilities regarding the conduct of others. Rule 2.8(C) is identical to 1993 Canon 3(B)(10), though the language after “proceeding” does not appear in the ABA Model Code. The 1993 Advisory Committee’s Note to Canon 3(B)(10) indicated that it was

intended to protect jurors from improper influence by judges and “to preserve the appearance of fairness in judicial decision-making.” ABA Model Code (1990), Committee Note to Section 3B(10). The provision reflects the concern, found also in ABA *Standards of Juror Use and Management*, Standard 18(a), that commendation or criticism “may imply a judicial expectation in future cases and may impair a juror’s ability to be fair and impartial in a subsequent case.” ABA Model Code (1990), Commentary to Section 3B(10) and Committee Note to Commentary.

**RULE 2.9**

***Ex Parte Communications***

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

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

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

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

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

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties with or without their lawyers present, or separately with their lawyers alone.

(5) A judge may initiate or consider any ex parte communications when expressly authorized by law, court rule, or administrative order to do so, such as when serving in judicially assisted settlement conferences or on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, counsel, treatment providers, probation officers, social workers, and others.

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

(C) Except when receiving case-related information about events in or around the courthouse that is relevant to assuring a fair trial and protecting the integrity of the judicial process, a judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

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

### **Advisory Notes – 2015**

Rule 2.9 is developed from 1993 Canon 3(B)(7), but with significant changes, reflecting, among other things, the differences inherent in today's digital information age and the greater role judges are encouraged to play in discussions or negotiations promoting resolution of cases.

Addressing the proposed changes in Canon 3(B)(7) (Rule 2.9 in this revision), the 2010 Report from the Committee on Judicial Responsibility and Disability noted:

[T]he Maine Code exempts from the prohibition on ex parte communications those communications that are expressly authorized by law. The Model Code retains this exemption in Rule 2.9(A)(5), but adds, in comment [4], that the exemption includes service on various problem-solving courts. Because of the increasing prevalence of such courts in Maine, the Committee recommends including the

language in the ABA's comment relating to them in the Maine Canon itself, and adding a provision that the permitted ex parte communications may be authorized by court rule or administrative orders, a provision that the exemption also applies to judicially assisted settlement conferences, and a provision adding counsel to the list of persons with whom the permitted ex parte communications may occur.

The Model Code adds new Canons 3(B)(7)(f), (g), and (h) [Rule 2.9(B), (C), and (D)], concerning a judge's receipt of an inadvertent ex parte communication, a judge's ability to investigate relevant facts independently and a judge's responsibility to insure that the rules concerning ex parte communications are not violated by court staff or officials.

Rule 2.9(A)(2) does not in any way limit the long accepted judicial practice of referencing legal treatises, practice books, law review articles, and other legal writings in researching and preparing judicial decisions. Because parties should reasonably anticipate that judges may conduct such research in the course of their judicial duties, no advance notice of such research activities is required. The Rule likewise does not limit or require disclosure of a judge's communications with law clerks or other court employees.

Rule 2.9(C) is amended from the Model Code version to clarify that a judge may seek and receive information of events in or around the courthouse that relate to assuring a fair trial and protecting the integrity of the judicial process. Examples of such information include reports of a witnesses being intimidated, or of a juror improperly speaking or communicating about the case, or of a defendant in shackles potentially being seen by jurors. Receipt of such information is proper.

Comment [6] to Rule 2.9 in the 2011 ABA Model Code notes: "The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." A judge's independent investigation of the facts, in violation of Rule 2.9(C), can be a basis for ethics complaints and disqualification. *See In re United States*, 441 F.3d 44, 66-68 (1st Cir. 2006) (ordering recusal, pursuant to federal recusal statute, 28 U.S.C. § 455(a), of judge who had initiated and maintained investigation of grand jury process and information from grand jury). In its opinion, the First Circuit noted the heavily fact specific nature of each recusal review and ordered recusal after determining that the record did "establish a reasonable basis for questioning

the impartiality of the district court judge.” *Id.* at 68. The court then noted, “We do so with no criticism of the judge, who was faced with a series of difficult issues.” *Id.*

## **RULE 2.10**

### ***Judicial Statements on Pending and Impending Cases***

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might subsequently interfere with a fair trial or hearing.

(B) A judge shall require court staff and others subject to the judge's discretion and control to refrain from making statements that the judge would be prohibited from making.

(C) Notwithstanding the restrictions, a judge may make public statements in the course of official duties and may explain court procedures.

(D) Notwithstanding the restrictions, a judge may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to this rule, a judge may respond directly or through a third party to statements in the media or elsewhere concerning the judge's conduct in a matter.

(F) This rule is not violated by any statement a judge may make in the course of managing or deciding matters pending before the judge or in the course of fulfilling the judge's administrative responsibilities, provided that such statements are relevant to judicial proceedings or administrative matters within the judge's authority.

### **Advisory Notes – 2015**

Rule 2.10 is a revision of 1993 Canon 3(B)(9). Subpart (E) does not have any counterpart in the 1993 Code, though it is similar to Rule 2.10(E) in the ABA Model Code. Subpart (E) clarifies that present practice allowing public response to public complaints about a judge's conduct does not violate Rule 2.10 or Canon 3(B)(9). Subpart (F) is added, perhaps to state the obvious—that Rule 2.10 is not violated by any statement made by a judge in the course of fulfilling the judge's judicial or administrative responsibilities, when the statement is relevant to those responsibilities.



**RULE 2.11**

***Disqualification or Recusal***

(A) A judge shall disqualify or recuse 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 the judge has personal knowledge of facts that are in dispute in the proceeding when the personal knowledge that would form the basis for disqualification has been gained outside the regular course of present or prior judicial proceedings.

(2) The judge knows that the judge, individually or as a fiduciary, the judge's spouse, domestic partner, a person within the third degree of relationship to either of them, or any other member of the judge's family residing in the judge's household

(a) Is a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) Is acting as a lawyer in the proceeding;

(c) Is a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) Is likely to be a material witness in the proceeding.

(3) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, judicial opinion, or judicial administrative matter, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(4) 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 government employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding or has publicly expressed in such capacity an opinion concerning the merit of the particular matter in controversy; or

(c) Was a material witness concerning the matter.

A judge who disqualifies or recuses himself or herself in any proceeding need not state the grounds for disqualification or recusal.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household. However, the obligation to keep reasonably informed about personal economic interests does not extend to knowledge of each stock or other security or property interest held within a mutual fund, retirement account, deferred compensation plan, or other similar investment account in which the decision to purchase or sell particular investments is made by an individual or entity other than the judge or the judge's spouse or domestic partner.

(C) A judge subject to disqualification or recusal under this Rule, other than for bias or prejudice under section A of this Rule, may disclose on the record the basis of the judge's disqualification or recusal and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification or recusal. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified or recused, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(D) The filing of a complaint with the Committee on Judicial Responsibility and Disability by a party or attorney involved in litigation pending before the judge does not require the judge to disqualify or recuse himself or herself.

(E) A judge may decline to disqualify or recuse himself or herself in any proceeding in which disqualification or recusal might otherwise be required under section A of this Rule if no other judge or court is available and

disqualification or recusal will result in a failure of justice. In such a case, the judge shall disclose on the record the basis for disqualification or recusal and the reason why the judge is declining to disqualify or recuse himself or herself under this Rule, and the judge shall thereafter disqualify or recuse himself or herself if at any time it becomes possible to transfer the proceeding to another judge or court without a failure of justice.

### Advisory Notes – 2015

In discussion of this issue, the term “recusal” is used interchangeably with the term “disqualification,” which is why both terms are incorporated. See Comment [1] to ABA Model Rule 2.11. Rule 2.11 represents a substantial revision and reordering of 1993 Canon 3(E) addressing disqualification or recusal. It also differs from ABA Model Code Rule 2.11, which includes more references to issues relating to judicial elections and campaigns.

Generally, a judge must recuse on motion made by any party only if (i) the judge’s “impartiality might reasonably be questioned” or (ii) the judge has a “personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.” *Charette v. Charette*, 2013 ME 4, ¶ 21, 60 A.3d 1264; *Decambra v. Carson*, 2008 ME 127, ¶ 8, 953 A.2d 1163; see also *Hughes v. Black*, 156 Me. 69, 74-81, 160 A.2d 113, 116-19 (1960) (providing detailed discussion of recusal policy when a personal relationship or personal interest in a matter is an issue).<sup>9</sup>

Applying 1993 Canon 3(E), the Law Court has observed:

Maine Code of Judicial Conduct Canon 3(E) establishes two instances where a judge’s recusal or disqualification from a case is warranted. First, “[a] judge shall disqualify himself or herself on the judge’s own initiative in any proceeding in which the judge has reason to believe that he or she could not act with complete impartiality.” M. Code Jud. Conduct 3(E)(1). “This is a purely subjective test which the judge

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<sup>9</sup> A useful survey of developments and current practice regarding recusal has been provided by a Judge of the United States Court of Appeals for the Ninth Circuit in a presentation for a 2011 symposium on Review of Litigation at the University of Texas School of Law. See M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 Rev. Litig. 653 (2011). Review of that survey and several of the opinions cited in it demonstrate that close recusal questions tend to be highly fact specific, requiring significant investigation before a determination can be made that an ethical violation may have occurred and recusal is warranted.

should apply based on his or her own understanding of personal feelings or attitudes or factual matters involved in the proceeding.” Advisory Comm.’s Notes to the M. Code Jud. Conduct at 34 (effective Sept. 1, 1993) (hereinafter, “Advisory Notes”). “A judge acting under this subsection . . . need not state the grounds of disqualification.” M. Code Jud. Conduct 3(E)(1).

Second, “[a] judge may disqualify himself or herself on the judge’s own initiative without stating the grounds of disqualification, and shall disqualify himself or herself on a motion for recusal made by a party, in any proceeding in which the judge’s impartiality might reasonably be questioned.” M. Code Jud. Conduct 3(E)(2). Canon 3(E)(2) establishes an objective test that asks, “[r]egardless of the judge’s own belief about his or her ability to act impartially, [whether] the judge’s impartiality might reasonably be questioned by others.” Advisory Notes at 34-35. Canon 3(E)(2) also sets forth a nonexhaustive list of examples of when a judge’s impartiality might reasonably be questioned, such as when “the judge has a personal bias or prejudice concerning a party or a party’s lawyer.” M. Code Jud. Conduct 3(E)(2)(a).

*Samsara Mem’l Trust v. Kelly, Remmel & Zimmerman*, 2014 ME 107, ¶¶ 32-33, 102 A.3d 757 (alterations in original).

Recusal “is a matter within the broad discretion of [a] trial court.” *State v. Atwood*, 2010 ME 12, ¶ 20, 988 A.2d 981; *Johnson v. Amica Mut. Ins. Co.*, 1999 ME 106, 733 A.2d 977. “Accordingly, a decision by a trial judge not to recuse is reviewed [on appeal] for an abuse of discretion.” *Atwood*, 2010 ME 12, ¶ 20, 988 A.2d 981; *In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013); *Estate of Dineen*, 1998 ME 268, ¶ 8, 721 A.2d 185. Further, “[t]he mere belief that a judge might not be completely impartial is insufficient to warrant recusal.” *Samsara*, 2014 ME 107, ¶ 38, 102 A.3d 757 (quoting *Atwood*, 2010 ME 12, ¶ 21, 988 A.2d 981).

A claim of bias or a motion to recuse asserted only after an adverse ruling should be examined with caution, particularly if the basis for any objection was known, or could with reasonable diligence have been known, prior to the hearing leading to the questioned judicial action. *See Samsara*, 2014 ME 107, ¶¶ 25-27, 102 A.3d 757; *Charette*, 2013 ME 4, ¶ 22, 60 A.3d 1264; *In re Kaitlyn P.*, 2011 ME 19, ¶¶ 8-9, 12 A.3d 50. As the Second Circuit has noted, “First a prompt

application [to recuse] affords the district judge an opportunity to assess the merits of the application before taking further steps that may be inappropriate for the judge to take. Second, [it] avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters.” *In re International Business Machines Corporation*, 45 F.3d 641, 643 (2d Cir. 1995).

When recusal is warranted, “a judge is under no obligation to disclose the grounds for disqualification.” *Atwood*, 2010 ME 12, ¶¶ 22, 25, 988 A.2d 981. A judge need not disclose the grounds for disqualification because the reasons for a judge’s disqualification may be private and personal and/or unrelated to the proceedings.

### ***Prior Rulings, Information Gained in the Course of Judicial Proceedings***

The fact that a judge has ruled against a party or has learned of information adverse to a party in the proper course of judicial proceedings is not a basis for recusal. *Dalton v. Dalton*, 2014 ME 108, ¶ 25, 99 A.3d 723; *In re Michael M.*, 2000 ME 204, ¶¶ 11-14, 761 A.2d 865; *see also Stevenson v. Bank of America, N.A.*, 597 F. App’x 4 (2d Cir. 2015). “Without more, an adverse ruling does not support a claim for recusal . . . and the on-the-record hearing, of which Appellants had notice and neglected to attend, does not constitute an improper ex parte contact.” *Stevenson*, 597 F. App’x at 6; *Liteky v. United States*, 510 U.S. 540, 555-556 (1994); *Khor Chin Lim v. Courtcall, Inc.*, 683 F.3d 378, 380 (7th Cir. 2012); *State v. Lewis*, 1998 ME 83, ¶ 3, 711 A.2d 119.

When a judge has ruled against a party at an earlier stage of a proceeding and uses information gained in the earlier proceeding in decision-making at a later stage of the proceeding, use of that information does not make the judge a material witness in the proceeding, *see* Rule 2.11(A)(5)(c), or otherwise require recusal, as the judge’s knowledge of the facts was gained in the course of the proceeding. *In re C.M.*, 103 A.3d 1192 (N.H. 2014) (applying an identically worded Rule 2.11(A)(5)(c) in a child protective case when the judge who presided in an earlier neglect proceeding also presided at the termination of parental rights proceeding); *see also Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 78-81 (5th Cir. 2011) (magistrate judge who used information gained at settlement conference as a basis for later imposition of sanctions not required to recuse as material witness, and information was not from an “extrajudicial” source but was learned in the same or a related proceeding).

But in *State v. Rameau*, 685 A.2d 761, 763 (Me. 1996), the Law Court recognized an exception to this general rule and noted that a judge is required to recuse because of opinions based on information acquired in that proceeding or a prior judicial proceeding if the judge’s opinions “display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *See also Brown*, 664 F.3d at 81 (“[W]e have explained that ‘[o]pinions formed by the judge that are based on . . . events occurring during the proceedings do not constitute a basis for recusal unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.’” (citation omitted)).

The First Circuit has observed that “[r]ecusal is only required by a state of mind ‘so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge’s rulings or findings.’” *In re Lupron Marketing & Sales Practices Litig.*, 677 F.3d 21, 36 (1st Cir. 2012) (quoting *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998)); *see also Nickerson-Malpher v. Baldacci*, 522 F. Supp. 2d 293, 295 (D. Me. 2007).

### ***Prior Professional and Financial Relationships***

Judicial participation in matters involving former law firms, law partners, employees, or clients can raise disqualification issues. Prior professional relationships and related matters regarding financial issues and interests of family members are also addressed in Rule 3.11 and its Advisory Notes.

In *Allphin v. United States*, 758 F.3d 1336, 1343-1344 (Fed. Cir. 2014), the Federal Circuit addressed a recusal motion directed at a judge who from 1976 to 1996 had been an attorney for the Department of Justice and then the Navy, a party to the pending case. Although the plaintiffs asserted that they doubted the judge’s impartiality, the court held that the standard for whether the judge’s impartiality might reasonably be questioned

is an objective test that mandates recusal “when a reasonable person, knowing all the facts, would question the judge’s impartiality.” . . . Appellants’ subjective beliefs about the judge’s impartiality are irrelevant. The judge’s prior work for the Department of Justice and the Navy over seventeen years ago does not raise a reasonable question as to her impartiality. A “mere prior association [does not] form a reasonable basis for questioning a judge’s impartiality.”

*Id.* at 1344 (citations omitted).

In *In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1997), the First Circuit addressed judicial participation in cases in which former employees or former clients are involved:

It is common knowledge in the profession that former law clerks practice regularly before judges for whom they once clerked. Courts often have prophylactic rules that forbid a former law clerk from appearing in that court for a year or more after the clerkship, *see, e.g.*, 1st Cir. R. 46, but no such rule is claimed to have been violated in this case. And any lawyer who studies a judge's past rulings can make an informed guess as to how the judge is likely to approach an issue.

So, too, appointees to the bench have sometimes had a former active connection with a political party. But many judges also sit, usually after a self-imposed cooling off period, on cases involving former clients (assuming always no current financial ties and that the judge did not work on the same or a related matter while in practice).

Noting the highly fact specific nature of such questions, the Massachusetts Appeals Court ordered that a judge should be disqualified in a case when a party was represented by the judge's former law firm when, after leaving the firm, the judge had been involved in litigation of separation compensation issues with the firm. *Commonwealth v. Morgan RV Resorts, LLC*, 992 N.E.2d 369 (Mass. App. Ct. 2013).

The facts here do not present the ordinary situation of a judge who was affiliated with a firm before joining the bench, where recusal from that firm's cases may be warranted for a limited time. See generally Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 8.9, at 225–229 (2d ed. 2007), and authorities cited. Nor is it simply the case of a partner who left to start a competing firm, which may give rise to some discord. The judge's relationship with [the firm] was more difficult and is distinguishable from those that we have found in other recusal cases. As the recusal determination "is extremely fact driven," we must consider the totality of the circumstances to determine whether recusal was warranted.

*Id.* at 376.

Similarly, a judge presiding in matters that were pending or under investigation while the judge was employed in a prosecutor's office before becoming a judge can lead to disqualification issues. See *In re Bulger*, 710 F.3d 42, 45-47 (1st Cir. 2013), addressed in the Advisory Notes to Rule 2.2. Compare *Matson v. Board of Education of City School Dist. of N.Y.*, 631 F.3d 57, 63 n. 5 (2d Cir. 2011) (rejecting plaintiff's claim that judge should recuse because judge's niece was then employed by defendant Board of Education and judge had previously served as Corporation Counsel for the City).

### ***The Obligation Not to Recuse Except When Necessary***

Although the granting or denying of a motion to recuse is within the discretion of the court, the Law Court has noted that a judge who disqualifies himself or herself ““for no reason other than an unfounded and meritless claim of partiality, has abused the judge’s discretion.”” *Charette*, 2013 ME 4, ¶ 23, 60 A.3d 1264 (quoting *In re Michael M.*, 2000 ME 204, ¶ 15, 761 A.2d 865); *State v. Murphy*, 2010 ME 140, ¶ 18, 10 A.3d 697; *Atwood*, 2010 ME 12, ¶ 22, 988 A.2d 981; see also Rule 2.7. Thus, if there is no reasonable basis for recusal, a judge is obliged not to recuse to assure that the proceeding may have a timely conclusion for all parties. See *In re Michael M.*, 2000 ME 204, ¶¶ 14-15, 761 A.2d 865; Rule 2.7. “[J]udges must not allow litigants to utilize the process of a recusal motion to delay or thwart the judicial proceedings where there is no reasonable basis for the motion and it is obvious on its face that it was intended to halt or delay the litigation.” *In re Michael M.*, 2000 ME 204, ¶ 14, 761 A.2d 865 (citing *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)); see also *In re United States of America*, 441 F.3d 44, 67 (1st Cir. 2006) (“The trial judge has a duty not to recuse himself or herself if there is no objective basis for recusal.”); *Sensley v. Albritton*, 385 F.3d 591, 598 (5th Cir. 2004) (noting that “a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified,” in rejecting a litigant’s claim that a judge should not sit when the judge’s immediate family member was an at-will employee in the office representing a party in litigation before the court); *Nickerson-Malpher v. Worley*, 560 F. Supp. 2d 75, 76-77 (D. Me. 2008) (dismissing recusal demand as frivolous).

### ***Attempts to Provoke Recusal***

Attempts by a party to secure the recusal of a judge through the use of intentional disrespect or the strategic filing of a complaint with the Committee or a civil action against the judge are inappropriate and ordinarily should be rejected by



the judge. The Law Court addressed such an attempt to secure a recusal that included criticism of the judge in court and filing suits against the judge in *State v. Murphy*, 2010 ME 140, ¶ 18, 10 A.3d 697, stating:

Despite Murphy’s provocations and claims that the judge should have recused because of Murphy’s filing actions against the judge and criticism of the judge, the court appropriately maintained the proceedings to their completion. Recusal is discretionary and, as we have observed, judges should avoid recusal in situations when parties engage in actions seeking to cause recusal.

In Advisory Opinion 91-1, the Advisory Committee on the Maine Code of Judicial Conduct concluded that a judge is not required to recuse from a case on the sole ground that a party to that action has filed a complaint against the judge with the Committee. *See also Rodgers v. Knight*, 781 F.3d 932, 943 (8th Cir. 2015) (that plaintiff’s counsel had filed a judicial conduct complaint against judge in previous, unrelated litigation did not require recusal in pending litigation).

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The Advisory Notes to Rule 2.2 also discuss recusal-disqualification issues, particularly as they relate to the ethical obligation of impartiality, in some detail. The Advisory Notes to Rule 3.11 also discuss recusal-disqualification issues, particularly as they relate to financial interest and family relationship issues, in some detail.

The 1993 Advisory Committee’s Note addressing 1993 Canon 3(E) noted some differences between 1993 Canon 3(E) and the 1990 ABA Model Code:

Canon 3E establishes specific standards and procedures for disqualification in situations where a judge’s impartiality is or may be in question. The Canon is meant to apply at any time during a proceeding when potential grounds for disqualification become apparent to the judge or to the parties or their lawyers. In the context of this Canon, “proceeding” means an adjudicative proceeding. Under Canon 3C, a judge is bound to carry out administrative duties without bias or prejudice, but no formal procedure for disqualification in administrative matters is required because those duties are ordinarily carried out in an informal and nonadversarial setting.

Canon 3E(1) provides for self-disqualification on the judge's own motion whenever a judge believes that he or she cannot act impartially. This is a purely subjective test which the judge should apply based on his or her own understanding of personal feelings or attitudes or factual matters involved in the proceeding. The Court found a violation of the predecessor of this section, former Canon 3C(1), when a judge, far from disqualifying himself, caused speeding complaints to be filed in cases involving personal acquaintances. *Matter of Ross, supra*, at 864-65. Under Canon 3E(1), the judge is not required to state on the record the reasons for self-disqualification. As noted above in discussion of Canon 3B(1), however, a judge who self-disqualifies might have to state the grounds in response to a judicial conduct complaint under that subsection.

Canon 3E(2) embodies an objective test. Regardless of the judge's own belief about his or her ability to act impartially, if the judge's impartiality might reasonably be questioned by others, the judge may self-disqualify on her or his own motion and must disqualify himself or herself on a motion to recuse brought by one of the parties. When the judge self-disqualifies on the judge's own motion, the grounds need not be stated, except as noted above with regard to Canon 3B(1). The same standard applies to self-disqualification and to a motion to recuse, because the judge may take a different view of the appearance of partiality when it has been presented on motion and argued by counsel. The judge, of course, remains free to deny the motion if the moving party fails to establish a reasonable basis for questioning impartiality. *See Estate of Tingley*, 610 A.2d 266 (Me. 1992) (probate judge had broad discretion to refuse to disqualify himself where nephew was board member of creditor with claim against estate).

Canon 3E(2) sets forth specific instances where impartiality might be questioned. The list is not intended to be exclusive. As stated in the Commentary to the comparable provision of the ABA Model Code (1990), Section 3E(1), "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared."

Canon 3E(2)(a) requires disqualification on the basis of bias, prejudice, or personal knowledge of disputed facts. Although the text only specifies bias or prejudice against a party or lawyer, other situations, such as a judge's prejudice against a witness in a non-jury trial or extreme prejudice on the issues, could require disqualification under the non-exclusive terms of Canon 3E(2). When a party to a pending proceeding sues or files a disciplinary complaint against the judge, paragraph (a) does not require disqualification if the circumstances indicate that the suit or complaint has been brought solely as a tactic to obtain the judge's disqualification. Note that "personal knowledge" as used in paragraph (a) is not intended to include the kind of generalized knowledge that is the basis of judicial notice.

Canon 3E(2)(b) requires disqualification when the judge or a previous associate has been involved as a lawyer, or the judge is a material witness. Canon 3E(2)(c) requires disqualification when the judge or a family member has "an economic interest" in the controversy, or in a party, or has "any other more than de minimis interest" that could be substantially affected. The phrase "de minimis" is the key to this standard, because "economic interest" is defined in Part II, section 3E, as "ownership of a more than de minimis legal or equitable interest," or an active role in the affairs of a party. "De minimis" is defined in Part II, section 3D, as "an interest too trivial to raise reasonable question as to a judge's impartiality." The standard is consistent with prior Maine case law holding that a pecuniary interest must be "direct, definite and capable of demonstration; not remote, uncertain, unsubstantial, speculative, or theoretic." *Hughes v. Black*, 156 Me. 69, 75 [(1960)].

Canon 3E(2)(d) requires disqualification when the judge, a spouse, "a person within the third degree of relationship to either of them," or such a relation's spouse is a party, officer, or lawyer of a party, or, to the judge's knowledge, has "a more than de minimis interest that could be substantially affected by the proceeding, or is likely to be a material witness." The definition of "third degree of relationship" incorporates the civil law system and includes great-grandparents, great-grandchildren, nephews and nieces, but not first cousins. See Part n, Section 3P, and Advisory Committee's Note.

By statute a relationship in the sixth degree according to the civil law, which includes second cousins, is a ground for disqualification for interest. 1 M.R.S.A. § 71(6). The third degree is retained in the Code, however, despite a dictum in *Hughes v. Black, supra*, 156 Me. at 77, finding the statute applicable. The purpose of the Code is to limit the number of unnecessary mandatory disqualifications. The Code like the statute does incorporate the concept of affinity as well as kinship. Of course, a judge having any kind of significant personal or economic connection with a relative beyond the third degree should self-disqualify under Canon 3E(1) or (2).

Under Canon 3E(3), a judge who does not self-disqualify under Canon 3E(1) or (2) is required to disclose to the parties any factual connection to the proceeding that is relevant to a determination of impartiality. The purpose of the provision is to assure that parties trying to determine whether to seek recusal are aware of relevant information in more specific detail than is provided in the general judicial financial disclosures required under Canon 6. The relevance standard for disclosure is lower than that for disqualification or recusal. The test of relevance is that of M.R. Evid. 401: A fact that must be disclosed is one “having any tendency” to make the fact of impartiality “more probable or less probable than it would be without the” fact.

Canon 3E(4) sets forth a “rule of necessity” that may be a basis for a judge’s refusal to disqualify himself or herself even in the specific circumstances set forth in Canon 3E(2). Examples include situations in which, “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.” ABA Model Code (1990), Commentary to Section 3E(1). The rule adds the further requirement that disqualification would result in a failure of justice—that is, an inability of the parties to obtain any judicial determination of the issues which they have raised. If the rule of necessity is relied upon, the judge must disclose the grounds upon which disqualification might otherwise be appropriate and must step down at the earliest opportunity. The possibility of a rule of necessity has been recognized by the Law Court. See *Cunningham v. Long*, 125 Me. 494, 497, 135 A. 198 (1926).

The 1993 Textual Note to Canon 3, as it addresses Canon 3(E) further notes:

Proposed Canon 3E combines provisions of ABA Model Code (1990), Section 3E, with provisions intended to clarify and develop the original intent of Maine Code (1974), Canon 3C.

Canon 3C of the 1974 Maine Code did not incorporate the detailed provisions of ABA Code (1972), Canon 3C, defining specific instances in which a judge should disqualify himself or herself because the judge's "impartiality might reasonably be questioned." The 1974 Maine Code incorporated the ABA standard without the specific instances and added a provision for self-disqualification when the judge "has reason to believe that" the judge "could not act with complete impartiality." Additionally, under Maine Code (1974), Canon 3C(2), the judge must "promptly inform the parties . . . concerning any matter which might reasonably cause" the judge's "impartiality to be questioned." The provisions of ABA Code (1972), Canon 3D, for disclosure followed by remittal of disqualification on agreement of the parties were not adopted. The Maine provisions were intended to limit disqualification because substitute judges were deemed rarely readily available. Further proceedings upon disclosure or disqualification were the responsibility of counsel. See Maine Code (1974), Committee Note to Canon 3C, 8 *Me.Bar Bull*, No. 3, at 31.

Canon 3E(1) retains the test of Maine Code (1974), Canon 3C(1) for self-disqualification, with the addition of the final sentence. Canon 3E(2) carries forward the objective test of Maine Code (1974), Canon 3C(1), for either self-disqualification or disqualification on motion to recuse. The framework of self-disqualification and recusal is unique to Maine but paragraphs (a)-(e), new to Maine, are taken without change from ABA Model Code (1990), Section 3E(1), which was derived from ABA Code (1972), Canon 3C(1). The "de minimis" standard of paragraph (c) is substituted for the requirement of ABA Code (1972), Canons 3C(1)(c), (3)(c), that disqualification result from "ownership of a legal or equitable interest, however small."

Canon 3E(3) is unique to the Maine Code. It substitutes a requirement of disclosure of relevant information for the duty to

inform the parties of a potentially disqualifying matter in Maine Code (1974), Canon 3C(2). Canon 3E(4), also unique to Maine, is adopted from ABA Model Code (1990), Commentary to Section 3E(1).

ABA Model Code (1990), Section 3E(2), requiring a judge to keep informed about the judge's own interests and to make a reasonable effort to keep informed about the interests of the judge's spouse and minor children has not been adopted. The subsection is superfluous in light of the extensive disclosure requirements of proposed Canon 6.

**RULE 2.12**  
***Supervisory Duties***

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges should take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

**Advisory Notes – 2015**

Rule 2.12 is similar to 1993 Canon 3(C)(2) and (3). Rule 2.12(A) though more broadly stated, is somewhat duplicative of Rule 2.8(B) and 2.10(B). It is maintained here to keep consistency with organization and numbering of the 2011 ABA Model Code. References in 1993 Canon 3(C)(2) to a judge's responsibility to avoid bias or prejudice are now addressed in Rule 2.3. Maine 1993 Canon 3(C)(3) states: "A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities."

Rule 2.12(B) does not include the final phrase "and the proper performance of their other judicial responsibilities" that appears in 1993 Canon 3(C)(3) after the words "before them." Rule 2.12(B) uses the term "should" to recognize that supervisory judges have appropriately limited authority to mandate the conduct of other judges and cannot always assure that judges will follow suggested directions.

**RULE 2.13**

***Administrative Appointments***

- (A) In making administrative appointments, a judge
- (1) Shall exercise the power of appointment impartially and on the basis of merit; and
  - (2) Shall avoid nepotism, favoritism, and unnecessary appointments.
- (B) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer, or the lawyer's spouse or domestic partner, has contributed any amount within the past four years to the judge's election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless
- (1) The position is substantially uncompensated;
  - (2) The lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
  - (3) The judge or another presiding or administrative judge affirmatively finds that no other lawyer is competent for the position and is willing and able to accept the position.
- (C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

**Advisory Notes – 2015**

Rule 2.13 is drawn from 1993 Canon 3(C)(4), but with much more detail, particularly addressing (1) appointment of persons who have made contributions in Probate Judge elections, and (2) listing exceptions to the prohibitions on appointments. The appointments addressed in this Rule are those where the appointment is made and compensation, if any, is set or is subject to approval by the court for services to be performed in specific cases pending before the court. The Rule does not apply to appointments made and compensation approved or determined by the Maine Commission on Indigent Legal Services. The Rule also



does not apply to the hiring of employees of the Judicial Branch. Such hiring is governed by separate statutes, court rules, administrative orders, and collective bargaining agreements.

**RULE 2.14*****Disability and Impairment***

A judge who has actual knowledge that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to the Maine Assistance Program.

**Advisory Notes – 2015**

Rule 2.14 is derived from the 2011 ABA Model Code. There is no comparable provision in the 1993 Code of Judicial Conduct. The impairment issue as to both judges and lawyers is addressed in detail in the Rules for the Maine Assistance Program. When a disability or impairment issue arises, reference to those Rules for determination of possible appropriate action is a reasonable choice.

Rule 2.14 recognizes that the ethical obligation to take appropriate action arises only when a judge has “actual knowledge” that a lawyer’s or a judge’s performance is impaired by one or a combination of the described conditions. When a judge may have a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, the judge may take appropriate action, which may include a confidential referral to the Maine Assistance Program. Application of this Rule will require good judgment and flexibility because of the highly subjective nature of the evaluations and actions a judge is encouraged to take.

## **RULE 2.15**

### ***Disciplinary Responsibilities***

(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the Committee on Judicial Responsibility and Disability or the appropriate authority.

(B) A judge having knowledge that a lawyer has committed a violation of the Maine 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 Board of Overseers of the Bar and any other appropriate authority including disciplinary boards of other jurisdictions in which the lawyer is admitted to practice. The fact that a judge has referred an attorney to the Maine Assistance Program or has filed a disciplinary complaint against an attorney with the Board of Overseers of the Bar does not provide a good faith basis for recusal when the basis for the complaint would not otherwise require recusal.

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

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Maine Rules of Professional Conduct should take appropriate action.

(E) Acts or omissions of a judge, in the discharge of disciplinary responsibilities required or permitted by sections A through D of this rule, are a part of a judge's judicial duties and shall be absolutely privileged, and no civil actions predicated thereon may be instituted against the judge.

### **Advisory Notes – 2015**

Rule 2.15 is similar to 1993 Canon 3(D)(1)-(3), including the differing uses of the terms "shall" and "should," depending on the clarity of the information indicating an ethical violation has been committed. The importance of the distinction between "shall" and "should" in light of the subjective judgments that

must be made, often on less than complete information, is addressed in the 1993 Advisory Committee's Notes to Canon 3(D) as follows:

Canon 3D covers a judge's responsibilities to the disciplinary systems governing other judges and lawyers. Canon 3D(1) establishes a two-tiered approach to judicial misconduct. If a judge "receives information that there is "a substantial likelihood" of a violation of the Code of Judicial Conduct, the subsection merely states that the judge "should take appropriate action," which could include direct communication with the other judge, referral to a substance abuse treatment agency, or filing a complaint with the Committee on Judicial Responsibility and Disability. See ABA Model Code (1990), Committee Note and Commentary to Section 3D. If, however, the judge has knowledge of a Code violation by another judge "that raises a substantial question as to the other judge's fitness for office," the judge is required to report the violation to the Committee or to "other appropriate authority," such as the Board of Overseers of the Bar if the conduct also violates the Maine Bar Rules [now the Maine Rules of Professional Conduct].

The purpose of the two-tiered approach is to encourage remediation and rehabilitation by not requiring a formal disciplinary complaint in situations where the facts are uncertain or the violation is not serious. Where the violation is certain and substantial, however, a disciplinary complaint must be made. Thus, the second tier is not reached unless the judge has actual knowledge (see definition of "knowledge," Part II, Section 3J) of a violation, as opposed to "information" from other sources indicating that a violation is substantially likely.

Canon 3D(2) applies the same approach to lawyer misconduct. If the judge has information indicating that a violation of the Maine Bar Rules is substantially likely, the judge has the same range of options as with a fellow judge, as well as the further possibility of imposing sanctions in the proceeding. If the judge has actual knowledge of a Code violation "that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" (the language of the mandatory reporting requirement of M. Bar R. 3.2(e)(1)), the judge must report the violation to the Board of Overseers of the Bar, or, if appropriate, the disciplinary authorities of

another jurisdiction. The words “or take other appropriate action” make clear that the obligation to file a disciplinary complaint does not preclude the imposition of sanctions in the proceeding.

Canon 3D(3) makes provision for judicial immunity from civil actions predicated on the exercise of the obligation to report professional misconduct. This provision is declarative of existing substantive law. See, *e.g.*, *Forrester v. White*, 484 U.S. 219 (1988) (absolute immunity for judicial acts, such as acting to disbar a lawyer for contempt, but not for administrative acts, such as firing a court employee); see also *Richards v. Ellis*, 233 A.2d 37 (Me. 1967). The provision is not intended to confer immunity from judicial discipline proceedings for improper conduct under proposed Canon 3D, however, even though such proceedings may be deemed “civil” in nature.

**RULE 2.16*****A Judge Shall Comply 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 lawyer.

**Advisory Notes – 2015**

Rule 2.16 has no counterpart in the 1993 Canons. It is identical to Rule 2.16 in the 2011 ABA Model Code. Rule 2.16 does not preclude a judge from denying and sanctioning a frivolous motion to recuse or other tactic intended to delay or confuse litigation, even if the party sanctioned has filed a complaint with the Committee. In such an action, the judge would not be responding to the complaint that was made to the Committee but to the tactic of filing a motion to recuse or other similar action intended to delay or confuse the proceedings.

## **CANON 3**

**A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.**

### **Advisory Notes – 2015**

There is no Comment supporting Canon 3 in the ABA Model Code. Canon 3 is a nonsubstantive rewording of Canon 4 of the 1993 Code. Canon 4 of the 1993 Code states: “A Judge Shall so Conduct the Judge’s Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations.” The introductory paragraph of the 1993 Advisory Committee’s Note to Canon 4 stated:

Canon 4 governs all activities of judges conducted in other than a judicial capacity, including personal and private activity. Additional specific provisions covering political activity are set forth in Canon 5. Everything that a judge does is, of course, subject to the overriding provisions of Canon 2A that a judge “respect and comply with the law and . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

The differences between the subdivisions of 1993 Canon 4 and the Rules applying new Canon 3 are more significant than were the differences between 1993 Canon 3 and the Rules applying new Canon 2. Thus, the 1993 Advisory Committee’s Note for 1993 Canon 4 is not as easy to tie to particular Rules in new Canon 3. Accordingly, for each new Rule the most relevant subdivision of 1993 Canon 4 will be referred to in the Advisory Notes. To review the implementing Advisory Committee’s Note for the 1993 Canon 4 subdivision, one should consult the complete copy of the 1993 Canons and Advisory Committee’s Notes.

## **RULE 3.1**

### ***Extrajudicial Activities in General***

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

- (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;
- (E) Make use of court premises, staff, stationery, equipment, or other resources, except for incidental use and for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law; or
- (F) Demean the judicial office.

### **Advisory Notes – 2015**

Rule 3.1 appears to have the same general introductory purpose, and the same title, as 1993 Canon 4(A), but the wording of Rule 3.1 addressing extrajudicial activities is different and much more detailed. The wording of Rule 3.1 is identical to the 2011 ABA Model Code, with the addition of paragraph (F) indicating that a judge shall not “Demean the judicial office.” The 2011 ABA Model Code Comment to Rule 3.1 states, in part:

[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.

[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.

[Comments 3 and 4 address bias and solicitations addressed in more detail in Rules 2.3, 3.6, and 3.7.]

As noted in the 1993 Advisory Committee’s Note to Canon 4(A), the purpose of the Canons addressing extrajudicial activities “is to encourage appropriate extrajudicial activity, rather than to forbid all such activity.” As the 1990 ABA Model Code Commentary to Canon 4A noted: “Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.” *See Samsara Memorial Trust v. Kelly, Remmel & Zimmerman*, 2014 ME 107, ¶ 36, 102 A.3d 757 (citing precedent from other states to note that participation by a judge in community activities and knowing people in a community is not a basis for disqualification and “is not necessarily a bad thing” (citing *Medley v. State*, 600 So. 2d 957, 961 (Miss. 1992) and quoting *Tatham v. Rogers*, 283 P.3d 583, 603 (Wash. Ct. App. 2012))). Thus, new Canon 3, like 1993 Canon 4, is intended to give the maximum scope to personal freedom that is consistent with its overriding purposes.

The ABA Model Code Comment [3] to Rule 3.1 notes that judges must avoid discriminatory actions and expressions of bias or prejudice, even outside the judge’s official or judicial actions and must avoid connection or affiliation with organizations that practice “invidious discrimination.” This Maine Code revision, when addressing prohibited discrimination issues, uses the specific and definable term “unlawful discrimination” rather than the subjective and ambiguous term “invidious discrimination.” *See* new Rule 3.6. The 1993 Textual Note to Canon 2 indicates that a similar wording change substituting “unlawful discrimination” for “invidious discrimination” occurred in drafting 1993 Canon 2, altering the 1990 ABA Model Code.

## **RULE 3.2**

### ***Governmental, Civic, or Charitable Activities***

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

- (A) In connection with matters concerning the law, the legal system, or the administration of justice or the appointment or reappointment of the judge;
- (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 in a matter involving the judge's personal, legal, or economic interests, or when the judge is acting in a fiduciary capacity.

### **Advisory Notes – 2015**

Rule 3.2 is stated more broadly than 1993 Canon 4(C)(1) which has a similar purpose. Like Rule 3.1, the purpose of Rule 3.2 is to enable outreach in areas where judges may provide useful observations and advice without compromising judicial independence, integrity, or impartiality. Thus the 2011 ABA Model Code Comment to Rule 3.2 notes in part: "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 and legislative branch officials."

Judicial actions related to appointment and reappointment are also addressed in 1993 Canon 5, the Advisory Notes to Rule 1.3, and new Canon 4.

### **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.

#### **Advisory Notes – 2015**

Rule 3.3 is similar to 1993 Canon 2(B). The history of this provision and its reference to “in a legal proceeding” indicates that it is focused on proscribing testimony before adjudicatory fact-finding hearings as a character witness. This restriction is designed to prevent misuse of the prestige of the judicial office, and to help assure that no one can convey the impression that he or she is in a special position to influence the judge as addressed in Rule 1.3. *See* 1993 Canon 2(B) and its related Advisory Committee’s Notes.

Rule 3.3 does not prevent a judge from responding to an appropriate inquiry about the qualifications, skills, or integrity of an individual whose work the judge has observed in the course of performing his or her judicial duties. Such comments may be requested and responded to in the course of an investigation of an individual being considered for hiring or appointment to another position.

## **RULE 3.4**

### ***Appointments to Governmental Positions***

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position unless it is one that concerns the law, the legal system, or the administration of justice.

### **Advisory Notes – 2015**

Rule 3.4 is identical to Rule 3.4 in the 2011 ABA Model Code. Interpretation of Rule 3.4 must recognize the complete separation of powers required by Article III of the Maine Constitution and the limitation on judges holding office specified in Article VI, § 5 of the Maine Constitution. *See In re Dunleavy*, 2003 ME 124, ¶¶ 6, 18-19, 24, 838 A.2d 338 (holding that a Probate Judge could not run for the State Senate while holding the office of probate judge, and that a statute that purported to allow a sitting judge to seek an elective office would be violative of Article III of the Maine Constitution if so construed).

The prohibition on judges seeking other elected offices is stated in Rule 4.5(A). There is a similar ban on a judge holding other appointed offices, but a judge seeking an appointed office may remain a judge while seeking the appointed office. *See* Rule 4.5(B). A judge may remain a judge while seeking appointment to any executive, legislative, or other judicial office when securing the office does not require an election, respecting of course the directives of Rules 1.3 and 2.1.

## **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, except that disclosure of nonpublic information is allowed when reasonably necessary to protect public health and safety.

### **Advisory Notes – 2015**

Rule 3.5 is similar to Canon 3(B)(11) in the 1993 Code, and the first part of Rule 3.5 is identical to Rule 3.5 in the 2011 ABA Model Code. The ABA Model Code Comments note that in their official duties judges “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.” Comment [2] then notes an important exception: “The rule is not intended . . . 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 the judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.” Extending this health and safety exception to the bar and the general public reflects a modern understanding of the extent of the information presented to and/or statements made to courts. Rule 3.5 from the ABA Model Code is amended to include in the Rule such an exception for acts or disclosures reasonably necessary to protect public health and safety.

## **RULE 3.6**

### ***Affiliation with Discriminatory Organizations***

(A) A judge shall not hold membership in any organization that practices unlawful discrimination. A judge who is a member of such an organization at the effective date of this Rule, or who learns at a later time that an organization of which the judge is a member practices unlawful discrimination, may retain membership in the organization for a reasonable time not exceeding one year, but must resign if the organization does not discontinue its discriminatory practices within that time.

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

(C) A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

### **Advisory Notes – 2015**

Rule 3.6 is based on the 2011 ABA Model Code and is similar to 1993 Canon 2(C) which is supported by an extensive 1993 Advisory Committee's Note. Rule 3.6 differs in three ways from the 2011 Model Code.

First, it substitutes the term "unlawful discrimination" for the term "invidious discrimination" that appears in the Model Code. The change is made because the term "unlawful discrimination" is specific and definable by reference to anti-discrimination laws and judicial interpretations of those laws, while the term "invidious discrimination" is subjective and ambiguous and could invite many disputes about what acts are discriminatory based on an individual's perspective. *See* Advisory Notes to Rule 3.1.

Second, the redraft retains the current one-year window in 1993 Canon 2(C) for a judge, once he or she discovers that an organization is engaging in discriminatory practices, to withdraw from the organization if the discriminatory practices do not end. There is no similar window in the ABA Model Code.

Third, the redraft adds, as paragraph (C), a protection from complaint for a judge's membership in a religious organization. This addition is consistent with the purpose of Rule 3.6, as noted in Comment [4] to the 2011 Model Code.

**RULE 3.7**

***Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities***

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit as follows:

(1) A judge may assist such an organization or entity in planning related to fund-raising and participating in the management and investment of the organization's or entity's funds.

(2) A judge shall not personally participate in the solicitation of such funds or other fund-raising activities, except that a judge may:

(a) Solicit funds from members of the judge's family or from other judges over whom the judge does not exercise supervisory or appellate authority;

(b) Be listed as an officer, director, or trustee of such an organization on its fund-raising letters, but may not sign that letter or be listed as a judge or as honorable; and

(c) Work at a fund-raising event so long as the judge's participation could not be reasonably perceived by others as directly soliciting funds.

(3) A judge may solicit membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice.

(4) A judge may appear or speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may



participate only if the event concerns the law, the legal system, or the administration of justice.

(5) A judge may make recommendations to such a public or private fund-granting organization or entity in connection with its projects and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice.

(6) A judge may serve as an officer, director, trustee, or nonlegal advisor of such an organization or entity, or a governmental 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 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.

(7) A judge may speak, lecture, teach, write, and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice, and nonlegal subjects, subject to the requirements of this Code.

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

(C) A judge's donation to a not-for-profit organization that accepts donations for the purpose of distributing the money collected, after the payment of expenses, to not-for-profit entities providing legal services to low income or elderly persons does not disqualify the judge from presiding over matters in which legal services are provided by those entities.

### **Advisory Notes – 2015**

Rule 3.7 tracks the language and purpose of the 2011 ABA Model Code through Rule 3.7(B), with the terms restated to indicate affirmatively within each subsection what a judge “may” or “shall not” do. The result is much greater precision in articulating activities a judge may engage in relating to educational,

religious, charitable, fraternal, and civic organizations than appeared in 1993 Canons 4(B) and 4(C). The redraft also provides greater clarity about the actions a judge may take relating to organizations and entities concerned with the law, the legal system, and the administration of justice. This is consistent with the purpose of the Model Code, as articulated in the following ABA Model Code Comments to Rule 3.1:

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.

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.

An earlier draft of this Rule had recommended retaining Canon 4(C)(3)(b)(iii) of the 1993 Code, but with an exception added explicitly authorizing activities allowed by Rule 3.7(A)(4). This could have created confusion because some provisions in 1993 Canon 4(C)(3)(b)(iii) were potentially inconsistent with other provisions in proposed Rule 3.7. Importantly, the key sentence of 1993 Canon 4(C)(3)(b)(iii)—“A judge should not be a speaker or the guest of honor at an event . . . held primarily for fund-raising . . . .”—is aspirational, not mandatory. Pursuant to the fifth paragraph of the new Preamble, drawn from the 2011 Model Code, the sentence’s use of “should” indicates that the matter it addresses is “committed to the personal and professional discretion of the judge . . . , and no disciplinary action should be taken for action or inaction within the bounds of such discretion.” *See also* 1993 Code Preamble (“The use of ‘should’ or ‘should not’ is intended as a hortatory statement of what is appropriate or inappropriate conduct but not as a binding rule under which discipline may be imposed.”).

Rule 3.7 includes the amendment added as Canon 4(C)(3)(c) in 2009 relating to a judge’s donations to certain not-for-profit organizations. That amendment is added as new section (C) of Rule 3.7.

## **RULE 3.8**

### ***Fiduciary Activities***

(A) A judge shall not accept an appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate or trust of a member of the judge's family, 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 a fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this section as soon as reasonably practical, but in no event later than one year after becoming a judge.

### **Advisory Notes – 2015**

Rule 3.8 tracks the 2011 ABA Model Code. It is similar to 1993 Canon 4(E) but, with the addition of section (D), allows one who becomes a judge one year to withdraw from those fiduciary responsibilities that a judge cannot perform.

## **RULE 3.9**

### ***Service as Arbitrator or Mediator***

A 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. A judge conducting a case management conference, a judicial settlement conference, or a dispositional conference is not acting as an arbitrator or mediator.

### **Advisory Notes – 2015**

The first sentence of Rule 3.9 is the 2011 ABA Model Code's Rule 3.9. The second sentence is added to clarify, consistent with the Model Code comments, that a judge who presides over or participates in judicial settlement conferences, case management conferences, or dispositional conferences is not acting as an arbitrator or mediator. In Maine practice, active participation by judges in these conferences is encouraged. Judicial participation in settlement discussions is also addressed in Rules 2.6 and 2.9.

Rule 3.9 is similar to 1993 Canon 4(F). However, 1993 Canon 4(F) explicitly states that performing functions as an arbitrator or mediator "in a private capacity" is prohibited. That prohibition is implicit in the first sentence of Rule 3.9.

**RULE 3.10**  
***Practice of Law***

A judge shall not practice law. A judge may represent himself or herself in any proceeding and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer before any forum.

**Advisory Notes – 2015**

Rule 3.10 is similar to ABA Model Code Rule 3.10 and has the same purpose and effect as 1993 Canon 4(G).

### **RULE 3.11**

#### ***Financial Activities***

- (A) A judge may hold and manage investments of the judge and members of the judge's family.
- (B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage and participate in:
- (1) A business closely held by the judge or members of the judge's family; or
  - (2) A business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.
- (C) A judge shall not engage in financial activities permitted under sections A and B of this Rule if they will:
- (1) Interfere with the proper performance of judicial duties;
  - (2) Lead to frequent disqualification of the judge;
  - (3) Involve the judge in frequent transactions or continuing business relationships with lawyers of other persons likely to come before the court on which the judge serves; or
  - (4) Result in a violation of another provision of this Code.
- (D) Subject to any fiduciary obligations, a judge shall manage the judge's investments and other financial interests held or managed by the judge in a manner that will minimize the number of cases in which the judge is disqualified. If the judge can do so without serious financial detriment or violation of any fiduciary obligations, the judge shall divest himself or herself of investments and other financial interests held or managed by the judge that might require frequent disqualification.
- (E) A judge, after leaving practice and becoming a judge, may continue to receive fees and payments entirely earned while engaged in the

practice of law before becoming a judge, including fees for services rendered, payments from structured settlements and judgments to be paid over time, deferred compensation plans, retirement plans, payments to the judge for sale of his or her practice, payments to the judge for his or her equity upon leaving a firm, and any other fees or payments entirely earned while engaged in the practice of law before becoming a judge.

### **Advisory Notes – 2015**

Rule 3.11 is based on Rule 3.11 of the ABA Model Code, but with paragraphs (D) and (E) added. Paragraph (D) covers some matters addressed in 1993 Canon 4(D)(1)-(4). The terms of Rule 3.11 differ significantly from 1993 Canon 4(D). Paragraph (E) addresses payments that a judge may continue to receive after becoming a judge for services rendered and interest in a practice earned before becoming a judge. This clarification is important to assure individuals contemplating judicial service that they will not lose fees or payments already earned upon becoming a judge.

The Comments to Rule 3.11 of the 2011 Model Code are surprisingly brief, cautioning about the potential that financial interests could raise ethical issues with other Rules in the Model Code and advising that judges must divest of financial interests that could lead to frequent recusals. Thus, it may be important, when close questions arise, to look for guidance to other recent reviews of this issue such as 13D *Federal Practice and Procedure* § 3546, *Grounds for Disqualification – Financial Interest* (3d ed. updated April 2015) (reviewing judicial financial interest issues pursuant to the governing federal laws that may differ from some state practices).

That treatise notes that, under federal law, a judge is disqualified from presiding in a matter if the judge, the judge’s spouse, or a minor child residing in the household “has a financial interest in the subject matter in controversy or in a party to the proceeding.” *Id.* (quoting 28 U.S.C. § 455(b)(4)). However, the treatise then notes four categories of financial interests or activities that are not disqualifying under federal law:

First, ownership in a mutual or common investment fund that holds securities is not a “financial interest” in those securities unless the judge participates in the management of the fund. Second, an office in an educational, religious, charitable, fraternal, or civic organization

is not a “financial interest” in securities held by the organization. Third, the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, constitutes a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest. And fourth, ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

*Id.* (footnotes omitted).

The issue of stocks held in a retirement account or IRA, a frequent source of judicial ethics concerns, was thoughtfully addressed by the Fourth Circuit in *Central Telephone Co. of Virginia v. Sprint Communications of Virginia, Inc.*, 715 F.3d 501, 509-16 (4th Cir. 2013). There, as final judgment was being entered in May 2011, the trial judge discovered and reported to the parties that his IRA fund managers had purchased for his IRA eighty shares of stock in one of the parties between October 2009 and March 2010. *Id.* at 509-10. The judge promptly ordered the stock sold. *Id.* at 510. The opinion held that recusal was not required, in part because “[d]ecisions to buy and sell stocks in the IRA were made by the fund managers without input from the presiding judge.” *Id.* at 516 (quotation marks omitted). The court also held that the recusal proponent’s argument failed because it did not distinguish between direct ownership of securities and ownership of securities in a common investment fund over which the judge exercises no management responsibilities. *Id.* at 515. In its decision, the court discussed the “safe harbor” provided for federal judges, stating:

Sprint’s argument, however, fails to distinguish between direct ownership of securities and ownership of securities in a common investment fund over which a judge exercises no management responsibilities. The judicial recusal statute specifically carves out the latter situation from the definition of a “financial interest”: “Ownership in a mutual or common investment fund that holds securities is not a ‘financial interest’ in such securities unless the judge participates in the management of the fund.” § 455(d)(4)(i). Congress created this exception to enable judges to hold securities without risking recusal across a broad range of cases. *See New York City Dev. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986) (“When Congress amended § 455 in 1974, it designed § 455(d)(4)(i) as a safe harbor, a way for judges to hold securities without needing to make



fine calculations of the effect of a given suit on their wealth.”). Moreover, the operation of § 455(d)(4)(i) is “mechanical”: “Just as § 455(b)(4) requires disqualification when there is any financial interest, however small, so § 455(d)(4)(i) eliminates any inquiry into the size of the likely effect of a decision on the value of securities held through a mutual fund.” *Id.* (citation omitted).

*Id.* at 515-16.

The Fourth Circuit ruling appears consistent with the treatise, 13D *Federal Practice and Procedure* § 3546, which notes that by federal law, 28 U.S.C. § 455(b)(4), a judge is disqualified only if the judge “knows” of the financial interest. The treatise then observes that 28 U.S.C. § 455(c) provides that a judge should inform himself or herself about personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of a spouse and minor children residing in the household. 13D *Federal Practice and Procedure* § 3546. The terms relating to financial interest issues in 28 U.S.C. § 455 are similar to terms used in the ABA Model Code and state judicial ethics rules. *See* 28 U.S.C. § 455; Model Code Jud. Conduct 3.11 (2011); M. Code Jud. Conduct 3.11 (2015). Thus, federal precedent provides useful guidance for addressing state judicial ethics questions.

Opinions addressing financial interest disqualification questions regularly emphasize that the determinations courts must make are highly fact driven, thus it is difficult to identify any overarching legal principles that can guide new decision-making as disqualification issues related to financial interests arise. The following are a sample of some opinions that have addressed the question.

In *Exxon Mobil Corp. v. United States*, 110 Fed. Cl. 407, 409-415 (2013), after entering a final judgment in favor of four oil companies in related cases, a judge reported that the judge’s spouse had inherited a small amount of stock in the parent corporation of two of the oil companies. On appeal, the judgment was vacated and remanded on determination that, under federal law, recusal was mandatory. *See Shell Oil Co. v. United States*, 672 F.3d 1283, 1291 (Fed. Cir. 2012). In a related case, when the government did not argue that there was a financial conflict of interest, the Court of Claims held that the judge’s spouse had no interest in a party and the financial interests in non-parties were too remote to require recusal. *Exxon Mobil Corp.*, 110 Fed. Cl. at 413-15.

In *ClearOne Communications, Inc. v. Bowers*, 643 F.3d 735, 776-77 (10th Cir. 2011), where a judge's spouse was of counsel to a law firm that had done unrelated work for a party in the litigation but there was no evidence supporting an allegation that the spouse or judge had a financial interest in the outcome of the litigation, there was no conflict of interest requiring the judge to recuse.

In *In re Vazquez-Botet*, 464 F.3d 54, 56-58 (1st Cir. 2006), the fact that the judge's wife represented an unindicted co-conspirator of the defendant did not constitute a financial interest in the proceeding that would justify issuance of mandamus.

In *Sensley v. Albritton*, 385 F.3d 591, 600 (5th Cir. 2004), the fact that a judge's wife was an at-will employee of the office of the district attorney who was appearing in litigation before the judge did not constitute a direct financial interest requiring recusal under 28 U.S.C. § 455(b)(4) or a non-financial interest requiring recusal under 28 U.S.C. § 455(b)(5)(iii).

In *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127-29 (2d Cir. 2003), although the value of stock issued by a party that the district judge owned comprised not even one percent of judge's personal fortune, 28 U.S.C. § 455(b)(4) establishes a bright line test that requires disqualification whenever a judge has knowledge of a financial interest, no matter how small. Further, the Second Circuit held that, under some circumstances, recusal may be required by § 455(a) even if the judge lacks actual knowledge of the financial interest. *Chase Manhattan Bank*, 343 F.3d at 127-29.

In *Gordon v. Reliant Energy, Inc.*, 141 F. Supp. 2d 1041, 1043-45 (S.D. Cal. 2001), a judge was required to recuse in a class action pursuant to § 455(b)(4) because he and his family members had purchased electricity from one of the defendants. Although the plaintiffs amended their complaints to exclude the judge and his family from the class, the judge had a financial interest because he and his family had underlying interests (in the form of legal claims worth up to or in excess of \$7,200 that would be identical to the plaintiffs' claims) that were not extinguished by their exclusion from the class. *Gordon*, 141 F. Supp. 2d at 1043-45.

## **RULE 3.12**

### ***Compensation for Extrajudicial Activities***

A judge may receive income and honoraria attributable to the extrajudicial activities permitted by this Code, unless such acceptance would appear to undermine the judge's independence, integrity, or impartiality. Income and honoraria shall not exceed a reasonable amount nor shall they exceed what a person who is not a judge would receive as a result of the same activity. Expense reimbursement or payment shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse, domestic partner, guest, or dependent children. Any payment in excess of such an amount shall be treated as an honorarium.

### **Advisory Notes – 2015**

Rule 3.12 is similar to ABA Model Code Rule 3.12 and has the same purpose as 1993 Canon 4(H). The requirements of Rule 3.12 must be considered in relation to other requirements relating to speaking, appearances, and participation in extrajudicial activities addressed in Rules 3.1 and 3.7.

The second sentence of Rule 3.12, not in the ABA Model Code, is 1993 Canon 4(H)(1). The third sentence incorporates 1993 Canon 4(H)(2).

**RULE 3.13**

***Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value***

(A) A judge shall not accept, and shall urge the judge's spouse, domestic partner, or dependent children 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 this Rule, a judge may accept the following without publicly reporting such acceptance:

(1) Items with little intrinsic value, such as plaques, pens, mugs, 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 and awards offered on the same terms and based on the same criteria applied to other applicants;

(7) Books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; and

(8) Gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family members of a judge residing in the judge's household, but that incidentally benefit the judge.

(C) Unless otherwise prohibited by law or by section A of this Rule, a judge may accept the following items, and must report such acceptance to the extent required by Canon 6:

(1) Gifts incident to a public testimonial;

(2) Gifts, loans, bequests, or other things of value, if the source is a party or other person, including a lawyer, whose interests have come or are likely to come before the judge.

### **Advisory Notes – 2015**

Rule 3.13 is similar to the ABA Model Code language, and its requirements are similar to those in 1993 Canon 4(D)(5). The 2011 ABA Model Code provision relating to scholarships, Rule 3.13(B)(6), limits reporting exempt scholarships to those that are available to persons who are not judges. The new Rule 3.13, like 1993 Canon 4(D)(5)(g), permits acceptance, without reporting, of full or partial scholarships, offered on the same terms and conditions to other judges, to attend judicial education programs such as those presented by the National Judicial College. Such scholarships are appropriate to accept, although not available to persons who are not judges.

The ABA Model Rule 3.13(C)(2) requires reporting of every invitation received by a judge, judge's spouse, or domestic partner to attend an event without cost—whether the judge actually attends the event or not. The invitation reporting requirement of Model Rule 3.13(C)(2) is burdensome and unnecessary. It may have been drafted to address the issue that has arisen in some other jurisdictions of judges receiving invitations to attend all expenses paid programs offered by special interest groups at expensive resorts. All expenses paid attendance at such programs is covered by the reporting requirements of Rule 3.14 and Canon 6(B)(1)(d).

## **RULE 3.14**

### ***Reimbursement of Expenses and Waivers of Fees or Charges***

(A) Unless otherwise prohibited by Rule 3.1 or Rule 3.13 or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Canon 6.

### **Advisory Notes – 2015**

Rule 3.14 is similar to Rule 3.14 of the ABA Model Code and similar to 1993 Canon 4(H), but with the addition of the specific reporting obligation. Some of the Rule 3.14 provisions appear duplicative of Rule 3.12; however, both are recommended to follow the 2011 ABA Model Code organization.

## **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.**

### **Advisory Notes – 2015**

Canon 4 is a revision and reorganization of 1993 Canon 5, dividing subdivisions of 1993 Canon 5 into separate Rules. It addresses Probate Judge election campaigns and activities of persons seeking appointment or reappointment to any judicial office. Advisory Notes after each Rule will indicate the portions of 1993 Canon 5 from which the Rule is derived and reference the relevant 1993 Advisory Committee's Note to Canon 5, now applicable to Canon 4.

Canon 4 is not directly analogous to the ABA Model Code, Canon 4, as ABA Canon 4 generally addresses selection and election of judges in states that elect most of their judges.

## **RULE 4.1**

### ***Political Conduct of Incumbent Judges and Judicial Candidates in General***

(A) Except as permitted by law, or by the Rules of this Canon, a judge or a 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 political gatherings or purchase tickets for political party dinners or other events sponsored by a political organization or candidate for public office;
- (6) Engage in any other political activity except as authorized under any other section of this Code or on behalf of measures to improve the law, the legal system, or the administration of justice; or
- (7) Use court staff, facilities, or other court resources in a campaign for judicial office.

(B) **Applicability.** A successful candidate, whether or not an incumbent, or an unsuccessful candidate who is an incumbent, is subject to judicial discipline for conduct in the course of seeking appointment or election that violates the Rules of this Canon. An unsuccessful candidate who is a lawyer is subject to lawyer discipline for any conduct in the course of seeking appointment or election that violates the Rules of this Canon. A lawyer who is a candidate for judicial office is subject to Maine Rule of Professional Conduct 8.2.

### **Advisory Notes – 2015**

Rule 4.1(A) is the equivalent of 1993 Canon 5(A)(1)(a)-(f), with the addition of a new prohibition, in Rule 4.1(A)(7), on the use of court staff and facilities for campaigning. The solicitation prohibition in what is now Rule 4.1(A)(4) and was



formerly Canon 5(A)(1)(e) was affirmed against a constitutional challenge by a Probate Judge who solicited funds to run for a legislative office. *In re Dunleavy*, 2003 ME 124, ¶¶ 25-31, 838 A.2d 338.

The reference in Rule 4.1(B) to Rule 8.2 of the Maine Rules of Professional Conduct establishes that the Rule applies to any candidate for any elected or appointed judicial office.

Rule 4.1(B) is similar to 1993 Canon 5(D).

### **1993 Advisory Committee’s Note to Canon 5(A)(1) and (D)**

Canon 5A applies only to incumbent judges, setting standards for their political conduct in general, as well as their conduct when seeking reappointment, appointment, reelection, or election to any public office. Canon 5A(1) prohibits incumbent judges from engaging in political activity that involves organizational leadership, public appearances, or fundraising. Probate judges and candidates for that office are excepted from many of these limitations by Canon 5C and Part II, Section 1 B(1)(b), in reflection of their part-time status and the political nature of the office.

The provisions of Canon 5A(1) [Rule 4.1(A)] do not prevent a judge from participating in the political process as a voter or from privately expressing views on candidates for public office. ABA Model Code (1990), Commentary to Section 5A(1). Thus, a judge may attend and vote at a town meeting but should refrain from public advocacy of candidates or measures there. The prohibition against attendance at “political gatherings” precludes attendance at party caucuses. In the case of either town meeting advocacy or caucus attendance, undue weight might be given to the judge’s views. Canon 5A(1)(f) [Rule 4.1(A)(6)] is not intended to prohibit “a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government.” ABA Model Code (1990), Commentary to Section 5D. See Canons 4B, 4C(1), and Advisory Committee’s Notes. A judge may also appear pro se before a body such as a local planning board to advance the judge’s private interests. See Canon 4C(1).

Canons 5A(2) and (3) [Rule 4.3(D) and Rule 4.5(A)] govern candidacy for appointive or elective office. A person becomes subject to the provisions governing candidacy at the times specified in the definition of “candidate,” Part II, Section 3B. Canon 5A(2) makes clear that an incumbent judge seeking reappointment, or seeking appointment either to a different state or federal judgeship or to state or federal executive office, is subject to Canon 5B [Rule 4.3]. In particular, the requirement of Canon 5B(1) [Rule 4.3(A)] that a candidate “act in a manner consistent with the integrity and independence of the judiciary” means that an incumbent judge is subject to the provisions of Canons 1, 2, and 3 requiring a judge to treat the responsibilities of the office as paramount and not to allow the quest for another office to influence the judge’s conduct or judgment or become a distraction from judicial duties. Canons 4 and 6 also apply to incumbents. Under Canon 5A(3) [Rule 4.5(A)], an appointed judge who seeks election as judge of probate, or to any other office, must resign. “Elective office” is intended to include the office of Attorney General and other Constitutional offices filled by election in a joint convention of the Legislature. The exception for probate judges is necessary to allow incumbents to run for reelection without disrupting the probate courts.

Canon 5D [Rule 4.1(B)] makes clear that violations of the Code are subject to discipline whether or not the candidate succeeds. A successful candidate and an unsuccessful incumbent are subject to discipline on complaint to the Committee on Judicial Responsibility and Disability. A lawyer candidate who is unsuccessful is subject to discipline on complaint to the Board of Overseers of the Bar. A simultaneous amendment is being proposed to add Rule 3.2(c)(3) to the Maine Bar Rules [now Maine Rule of Professional Conduct 8.2], providing that “A lawyer who is a candidate for appointment or election to judicial office shall comply with the applicable provisions of the Maine Code of Judicial Conduct.”

## **RULE 4.2**

### ***Political Conduct of Candidates for Election as Judge of Probate***

- (A) A candidate for election or reelection as judge of probate shall comply with the applicable provisions of Rule 4.1, Rule 4.3, and Rule 4.4, except as provided in section B of this Rule.
- (B) A candidate for election or reelection as judge of probate may, while a candidate:
- (1) Appear in newspaper, television, and other media advertisements supporting his or her candidacy;
  - (2) Speak to gatherings on his or her own behalf;
  - (3) Publicly endorse or oppose any candidate for public office;
  - (4) Distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and
  - (5) Permit the candidate's name:
    - (a) To be listed on election materials along with the names of other candidates for elected office; and
    - (b) To appear in promotions of the ticket.
- (C) A candidate for election or reelection as judge of probate shall not:
- (1) Personally solicit or accept campaign contributions or personally solicit publicly stated support; or
  - (2) Use or permit the use of campaign contributions for the private benefit of the candidate or others.

### **Advisory Notes – 2015**

Rule 4.2 is the equivalent of most of 1993 Canon 5(C). Rule 4.2(B) replaces Canon 5(C)(2) and (4) but with some reordering and slight rewording of the numbered subsections. Rule 4.2(C) is equivalent to 1993 Canon 5(C)(3), but is

limited to the “shall not” prohibitions. The new Rule 4.2(C) does not list specific, approved campaign activities, out of concern for being under inclusive.

### **1993 Advisory Committee’s Note to Canon 5(C)**

Canon 5C applies to any candidate, whether an incumbent or not, for election or reelection as judge of probate—Maine’s only elective judicial office. Canon 5C(1) subjects a candidate for election to the limits on general political conduct imposed on judges by Canon 5A(1), with certain specific exceptions contained in sections (2)-(4). The effect of the exceptions is to level the field in a contest between an incumbent and a non-judge. Candidates for election are also subject to the general restrictions imposed on candidates for appointment by proposed Canon 5B. The exceptions supplement the general exception of probate judges from restrictions on political activity by making clear that specific campaign activities are permitted for incumbents and challengers alike. Activities other than those permitted are forbidden as “other political activity” under Canon 5A(1)(f). *Cf.* ABA Model Code (1990), Commentary to Section 5C(1).

In soliciting and managing campaign funds, committees should be instructed “to solicit or accept only contributions that are reasonable under the circumstances” and should avoid “deficits that might necessitate post-election fund-raising to the extent possible.” *Id.* Commentary to Section 5C(2). Canon 5C(3) prohibits personal solicitation “of publicly stated support.” This provision does not prevent a candidate from soliciting individual voters to secure their votes. The subsection also permits a campaign committee to solicit both “reasonable” contributions and public support from lawyers. Note that “campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.” *Id.* Canon 5C(4) is intended “to permit basic campaign publicity by judicial candidates in public elections.” ABA Model Code (1990), Committee Note to Section 5C(3).

### **RULE 4.3**

#### ***Political Conduct of Candidates Seeking Appointments to Judicial Office***

- (A) A candidate for appointment to judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary.
- (B) A candidate for appointment to judicial office may
- (1) Communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and
  - (2) Seek endorsements for the appointment from any person or organization other than a partisan political organization.
- (C) A candidate for appointment to judicial office shall not
- (1) Make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office;
  - (2) Make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in connection with cases, controversies, or issues that are likely to come before the court; or
  - (3) Knowingly or with reckless disregard for the truth make any false or misleading statement.
- (D) A judge who is a candidate for reappointment, or for appointment to another judicial or nonjudicial office, shall also comply with the Rules of this Canon.

#### **Advisory Notes – 2015**

Rule 4.3 is the replacement for 1993 Canon 5(B). Rule 4.3(A) is equivalent to 1993 Canon 5(B)(1). Rule 4.3(B) relating to solicitation of support is new, although it reflects long-standing practice. Rule 4.3(C) is equivalent to 1993 Canon 5(B)(2). Rule 4.3(D) is the equivalent of 1993 Canon 5(A)(2).

### **1993 Advisory Committee’s Note to Canon 5(B)**

Canon 5B governs the political conduct of all candidates for appointment (and, by virtue of Canon 5A(2), reappointment) to judicial office. The purpose of Canon 5B(1) is to require all candidates for judicial appointment to adhere to the basic principles of Canons 1 and 2 requiring judges to display high standards of conduct to maintain the integrity and independence of the judiciary. (A judge who is a candidate is, of course, subject to the entire Code in activities related to the candidacy. See discussion of Canon 5A(2) above.) The purposes of Canon 5B(2) are to protect candidates from public or legislative pressure to make inappropriate commitments on issues as a condition of appointment and to provide sanctions for actual false statements in the appointment process. The Commentary to ABA Model Code (1990), Section 5A(3)(d), the comparable provision, states, that as a corollary to the prohibition against commitments, “a candidate should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.” Note that Canon 5B(2) “does not prohibit a candidate from making pledges or promises respecting improvements in court administration.” *Id.* The provision also does not apply to private statements by judges to other judges or court personnel concerning judicial business, but it does apply “to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment.” Although there is no express provision governing actions by family members and employees, a judge is subject to a more general responsibility for assuring or encouraging conduct in accordance with the Code that would apply to at least some political activity. See Canons 2B, 3C(2), 4D(5).

## **RULE 4.4**

### ***Campaign Committees***

(A) A candidate for election or reelection as judge of probate may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums, and other means not prohibited by law.

(B) Such a campaign committee may

(1) Solicit and accept reasonable campaign contributions;

(2) Solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year;

(3) Manage the expenditure of funds for the candidate's campaign;

(4) Obtain public statements of support for the candidate's candidacy; and

(5) Solicit and accept reasonable campaign contributions and public support from lawyers.

### **Advisory Notes – 2015**

Rule 4.4 is the equivalent to, but changed from, the portion of 1993 Canon 5(C)(3) stating affirmatively what campaign activity is allowed.

## **RULE 4.5**

### ***Activities of Judges Who Become Candidates for Nonjudicial Office***

(A) A judge shall resign from judicial office upon becoming a candidate for any elective office, except that a judge of probate may be a candidate for reelection while holding that office, provided the judge complies with the provisions of Rule 4.2.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

#### **Advisory Notes – 2015**

Rule 4.5(A) is the equivalent of 1993 Canon 5(A)(3). Rule 4.5(B) is new although it reflects long-standing practice. Rule 3.4 addresses some issues that are also addressed in Rule 4.5.

The validity of 1993 Canon 5(A)(3), now Rule 4.5(A), was affirmed when its constitutionality was challenged by a Probate Judge who ran for a legislative office without resigning from the Probate Judge position. *In re Dunleavy*, 2003 ME 124, ¶¶ 15-24, 838 A.2d 338 (holding that Canon 5(A)(3) was constitutional and prohibited the judge from running for the State Senate while maintaining the judicial office).



**CANON 5 (Reserved)**

**Advisory Notes – 2015**

What was formerly Canon 5 is now incorporated, as amended, as Canon 4 and implementing Rules.

## CANON 6

### **A judge shall file annual financial disclosure reports.**

To avoid actual or apparent conflicts of interest, and to assure compliance with Rule 2.11 and the requirements of Canon 3, a judge is required to file initial and annual financial disclosure reports to which the public has access. This requirement is a rule of reason and should not be interpreted to intrude unnecessarily on the privacy of a judge or others, including spouses, domestic partners, or dependent children of judges. Nevertheless, the specific disclosure requirements of this Canon are minimum standards and are not intended to be all-inclusive. In case of doubt about whether a particular disclosure is necessary to serve the purposes of this Canon, the decision should be in favor of disclosure.

#### A. Filing Required.

(1) Upon initial appointment or election to the judiciary of the State of Maine, a judge shall make a financial disclosure report to the Chief Justice containing the information set forth in section B(1)(e)-(j) of this Canon, and any information respecting a spouse, domestic partner, or dependent child required under section B(2)(c)-(d) of this Canon, as of the date of the report. The report shall be filed with the Executive Clerk of the Supreme Judicial Court not more than 60 days after the date upon which the judge takes the oath of office.

(2) A judge who holds office for more than 60 days in any calendar year shall make a financial disclosure report to the Chief Justice containing the information required by section B of this Canon for the portion of that year in which the judge held office. The report shall be filed with the Executive Clerk of the Supreme Judicial Court on or before May 15 of the succeeding year.

(3) All reports required to be filed by this section shall be made on forms that the Supreme Judicial Court shall adopt, and may from time to time amend, by administrative order. The forms shall be distributed by the Executive Clerk of the Supreme Judicial Court.

(4) The Chief Justice may, for good cause shown, grant an extension of the time to file any report required by this section for a period not to exceed 90 days.

(5) Disclosure of a judge's income, investments, liabilities, or other financial interests is required only to the extent provided in this Canon and Rule 2.11.

B. Contents of the Report.

(1) Each report filed pursuant to subsection A(2) of this Canon shall contain the following information for the period for which the report is filed:

(a) The source and type of any income received in money or in kind having a value in excess of \$1,000 in the aggregate from any single source.

(b) The source and a brief description of any honoraria received.

(c) The source and a brief description of any gift, bequest, or favor received in money or in kind having a value in excess of \$300 in the aggregate from any single source, not including gifts, bequests, or favors that may be accepted pursuant to Rule 3.13(B)(2), (3), (4), (5), (6), (7), and (8).

(d) The source and a brief description of any reimbursement or payment received in money or in kind by the judge for the judge's own expenses or those of a spouse, domestic partner, or dependent child in excess of \$300 per person in the aggregate from any single source, not including reimbursement or payment of the judge's expenses by the State of Maine or a political subdivision thereof.

(e) A brief description of any interest in real property held at any time during the year.

(f) A brief description of any interest in tangible or intangible personal property exceeding \$1,000 in value and held at any time during the year in a trade or business or for investment or the production of income, provided that a personal indebtedness owed by a relative need not be reported.

(g) The identity and a brief description of any indebtedness or other liability exceeding \$1,000 in the aggregate owed at any time during the year to any single creditor, not including (i) alimony, child support, and separate maintenance obligations; (ii) any loan from a relative; (iii) any mortgage or other loan held by a lending institution and secured by real property that is a personal residence of the judge or by a personal motor vehicle or other tangible personal property, provided that the loan is one made in the regular course of business on the same terms generally available to persons who are not judges; and (iv) any credit card or revolving charge account, or similar credit arrangement, not in arrears on the final date of the reporting period.

(h) The identity of any position held at any time during the year as a fiduciary of a trust, estate, or person or as an officer, director, trustee, partner, proprietor, representative, employee, or consultant of a business or nonprofit enterprise.

(i) The title, court, and docket number of litigation pending at any time during the year in which the judge is a party-in-interest, not including suits against the judge for acts in an official capacity.

(j) The identity of any pension or other retirement or disability plan from which the judge has received at any time during the year, or may become eligible to receive, benefits, not including any plan administered by a state or the federal government.

(2) Each report filed as required by this Canon shall separately set forth, to the extent known by the judge or ascertainable by reasonable inquiry, the following information respecting the spouse, domestic partner, or any dependent child of the judge:

(a) Under section B(1)(a), the type of economic activity representing each source of income of \$1,000 or more received by a spouse, domestic partner, or dependent child.

(b) Under section B(1)(b), (c), and (d), honoraria, gifts, bequests, favors, and expense reimbursements or payments received by a spouse, domestic partner, or dependent child that are received jointly with the judge or solely as a result of the recipient's relationship to the judge.

(c) Under section B(1)(e), (f), (g), and (j), property interests; liabilities; and pension, retirement or disability plans of a spouse, domestic partner, or dependent child that

(i) are held jointly with the judge;

(ii) are derived or payable from the income, assets, or activities of the judge; or

(iii) provide, or are expected to provide, any substantial financial or economic benefit or detriment to the judge.

(d) Under section B(1)(h), the identity of any fiduciary or other position held jointly with the judge, or held in connection with an interest or enterprise from which the judge receives, or may be expected to receive, any substantial financial or economic benefit.

(3) Upon the request of a judge and a showing of good cause for nondisclosure, the Chief Justice may order that specific information required to be reported under this Canon shall be treated as confidential. Such information shall be omitted from the judge's report with a note stating that the omission is pursuant to the order of the Chief Justice. The omitted information shall be set forth in an appendix to the report. The request for nondisclosure and the appendix shall thereafter be retained by the Executive Clerk of the Supreme Judicial Court in a confidential file for the period for which the report is retained under section C(1) of this Canon. The request and appendix shall not be available for public inspection under section C(2).

(4) An item that is required to be described under subsection 1 of this section is sufficiently described if the report lists the type of any asset or liability and the name and principal type of economic activity of

any individual or entity that is (a) the source of any income or other benefit received, (b) a debtor or other party liable for satisfaction of the judge's interest in any intangible asset held, or (c) a creditor on any liability owed. The report need not specify the amount or value of any income, benefit, asset, or liability.

C. Public Access.

(1) The Executive Clerk of the Supreme Judicial Court shall retain all reports filed under this Canon on file for a period of six years from the date of filing.

(2) Except as provided in section B(3) of this Canon, the Executive Clerk shall permit any person to inspect a report on file and shall furnish a copy of such report to any person for a fee reflecting the actual cost of reproduction and mailing.

D. Failure to File. The Executive Clerk of the Supreme Judicial Court shall review all reports filed within 45 days of the filing deadline and shall promptly notify any judge who has failed to file a report or provide complete information. A copy of the notification shall be sent to the Chief Justice. If a judge does not, within 15 days of such notification, file the required report or information or receive an extension of the filing deadline under section A(4) of this Canon, the Executive Clerk shall refer the matter to the Committee on Judicial Responsibility and Disability for appropriate action.

E. Judges of Probate. A judge of probate shall make initial and annual financial disclosure reports to which the public has access as provided in this Canon, with the following exceptions:

(1) A report of self-employment income under section B(1)(a) need only specify the principal type of economic activity from which that income is derived and, if the judge is associated with a partnership, firm, professional association, or similar business entity, the name and major areas of economic activity of that entity; provided that, if the judge is a practicing lawyer, the major areas of practice of the judge and any firm or other professional entity with which the judge is associated shall also be reported.

(2) Honoraria, gifts, bequests, favors, and expense reimbursements or payments need be reported under section B(1)(b)-(d) of this Canon only if they are received by the judge in the course of, or as a result of, activities undertaken in an official capacity or are received from a party or other person whose interests have come or are likely to come before the judge.

(3) The identity of a position held in the ordinary course of the practice of law and reportable under section B(1)(h) need not be reported if to do so would breach a professional obligation of confidentiality concerning the affairs of a client of the judge, but the general fact of such activity shall be reported.

(4) Campaign contributions received and duly reported as required by law by a judge of probate as a candidate for that office need not be reported under this Canon.

#### **Advisory Notes – 2015**

Canon 6 is unchanged from Canon 6 in the 1993 Code, except to add references to domestic partners and to change cross-references to other Canons to reflect the new organization of Canons 1, 2, 3, and 4 of the new Code of Judicial Conduct.