

# Supreme Court of Colorado

101 WEST COLFAX AVENUE, SUITE 800  
DENVER, CO 80202-5315  
MICHAEL.BENDER@JUDICIAL.STATE.CO.US

MICHAEL L. BENDER  
JUSTICE

TELEPHONE: (303) 837-3741  
FACSIMILE: (303) 864-4538

May 11, 2010

Dear Judges,

After review of the proposed Colorado Code of Judicial Conduct, including consideration of written and oral arguments from the October 2009 hearing, the Colorado Supreme Court proposes a number of modifications to the draft circulated last spring.

These revisions appear in a changes-marked appendix to this letter, and will be posted on the supreme court's website at [http://www.courts.state.co.us/Courts/Supreme\\_Court/Rule\\_Changes.cfm](http://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm). They are:

- The Terminology section's definition of "appropriate authority," which now cites authority for the limits on the Judicial Discipline Commission's jurisdiction (page 3);
- the definition of "economic interest," whose language mirrors more closely that of Colorado's old rule and includes specific dollar and percentage amounts that qualify a judge's interest as an "economic interest" within the meaning of Rule 2.11 (page 3);
- Rule 1.1, which elevates the Code's new reporting requirements from the commentary to the black-letter of the rule (page 9);
- Rule 2.6, which modifies comment 2 regarding the steps that a judge may take in ensuring that a pro se litigant's right to be heard is protected; this change largely but not entirely reflects compromise language reached by two groups of judges who held opposing views on what the content of the comment should include (page 18);
- Rule 2.11, which more clearly articulates the "rule of necessity" and modified the description of it in the comment, and which reiterates the new definition of "economic interest" described above; also included is additional language in comment [6](1) intended to broaden the term "economic interest" (pages 22-25);
- Rule 3.6, which eliminates the words "knowingly" and "unlawful" that were inadvertently included in the previous draft and which now tracks the ABA Model Rule verbatim (page 36);
- Rule 3.10, which more clearly articulates the circumstances in which a judge may practice law and represent himself or herself (page 40).

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Typographical and scrivener's errors are corrected in the draft but not highlighted.

Please review the modified draft and submit any comments to me ([michael.bender@judicial.state.co.us](mailto:michael.bender@judicial.state.co.us)) or to Eileen Kiernan-Johnson ([eileen.kiernan-johnson@judicial.state.co.us](mailto:eileen.kiernan-johnson@judicial.state.co.us)) no later than May 25, 2010.

Thank you for your cooperation and attention.

Sincerely,

A handwritten signature in cursive script that reads "Michael L. Bender".

Justice Michael L. Bender

**[PROPOSED]**  
**COLORADO CODE OF JUDICIAL CONDUCT**  
**JULYANUARY 1, 2010**

**Preamble**

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

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

[3] The Colorado 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.

**Scope**

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

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

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore,

when a Comment contains the term “must,” it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

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

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

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

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

#### ANNOTATION

By expressing approval of the canons of ethics, the supreme court did not enact them into law. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Nevertheless, they are recognized as principles of exemplary conduct. Although the canons employing language of wide coverage cannot be given the effect of law, they nevertheless are recognized generally as a system of principles of exemplary conduct and character. In re Petition of the Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Neither the supreme court nor the grievance committee has the power or authority to institute or conduct disciplinary proceedings of any kind involving the conduct of a duly elected judge, he being responsible solely to the people, the constitution fixing the remedy at impeachment. In re Petition of Colo. Bas Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

## Terminology

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

**“Appropriate authority”** means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. In Colorado, the Commission on Judicial Discipline is the authority responsible for investigating judicial misconduct and disciplining judges, except with respect to Denver County court and municipal judges, over whom it has no jurisdiction pursuant to Colo. Const. Article VI § 26; § 13-10-105, C.R.S.; C.J.R.D. 4(a). See Rules 1.1, 2.14 and 2.15.

**“Contribution”** means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance which, if obtained by the recipient otherwise, would require a financial expenditure. See Rule 3.7.

**“De minimis,”** in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality. See Rule 2.11.

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

**“Economic interest”** means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding \$5,000, or a relationship as director, advisor, or other active participant in the affairs of a party, except that: 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) Ownership in an interest in the individual holdings within a mutual or common investment fund that holds securities, or of securities held in a managed fund, is not an “economic interest” in such securities unless the judge participates in the management of the fund;
- (2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant is not an “economic interest” in securities held by the organization;
- (3) the proprietary interest of a policy holder in a mutual insurance company, of a depositor 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 a similar proprietary interests is an “economic interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and; or

- (4) ownership of government securities is an “economic interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities of government securities held by the judge.

See Rules 1.3 and 2.11.

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

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

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

**“Impropriety”** includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality. See Canon 1 and Rule 1.2.

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

**“Integrity”** means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rule 1.2.

**“Judicial candidate”** means a sitting judge who is seeking selection for judicial office by appointment or retention. See Rules 2.11, 4.1, 4.2, and 4.3.

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

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

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

**“Member of a judge’s family residing in the judge’s household”** means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Rules 2.11 and 3.13.

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

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

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

**“Political organization”** means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate’s retention committee created as authorized by Rule 4.3. See Rule 4.1.

**“Public election”** includes primary and general elections, partisan elections, nonpartisan elections, and retention elections. See Rule 4.2.

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

## Application

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

### I. Applicability of This Code

(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to ~~three~~**four** distinct categories of part-time judges. The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. Canon 4 applies to judicial candidates.

(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a magistrate, referee, or member of the administrative law judiciary.

### Comment

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

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

[3] This code does not apply to a person appointed by the court to serve as a master in a particular case. This code does not apply to municipal judges except to the extent it is made applicable by statute, municipal charter or ordinance. However, reference to the code by all judicial officers, including municipal judges, is recommended to provide guidance concerning the proper conduct for judges.

### II. Senior and Retired Judges

Senior judges, while under contract pursuant to the senior judge program, and retired judges, while recalled and acting temporarily as a judge, not required to comply:

(A) with Rule 3.9 (Service as Arbitrator or Mediator); or

(B) with Rule 3.8 (Appointments to Fiduciary Positions).

### III. Part-Time Judges

A judge who serves on a part-time basis

(A) is not required to comply:

(1) with Rules 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (A) and (B) (Financial, Business, or Remunerative Activities); and

(B) shall not practice law in the court on which the judge serves or in any comparable level court in the same judicial district on which the judge serves or in



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

**(C) shall not practice law with respect to any controversies which will or appear likely to come before the court on which the judge serves or any court of the same or comparable jurisdiction within the same judicial district on which the judge serves.**

### **Comment**

[1] This Canon limits a part-time judge from practicing law in any comparable level court in the same judicial district as the judge serves. However, this prohibition shall not apply to any temporary assignment of a part-time judge to a comparable level court outside the judicial district as the judge serves. In addition, this prohibition shall not apply to a one-time assignment of a part-time judge to a court of higher jurisdiction (such as a one-time assignment under order in a district court case) either within, or outside of, the judicial district in which the Judge serves. A part-time judge serving on temporary assignment is not thereby precluded from practicing law in the court to which that judge may be temporarily assigned. During such period of temporary assignment, however, the judge shall not actively participate as counsel in any case pending before the court to which the judge is temporarily assigned.

[2] A part-time judge who practices law must avoid undertaking or continuing any relationship which precludes the judge from maintaining the integrity of the bench which he or she serves and at the same time providing the undivided loyalty to clients which the exercise of professional judgment on behalf of a client demands. Being “of counsel” is deemed to be the practice of law, whereas acting as a mediator or arbitrator is not deemed to be the practice of law. Necessarily, the professional responsibilities of a part-time judge who practices law limit the practice of law by the judge’s partners and associates.

### **ANNOTATION**

#### **Ethics Opinions**

A part-time county court judge with authority by chief judge order to preside over cases in the district court may not appear as a lawyer in the district court in the judicial district. In this case, the part-time judge had continuing authority to hear district court criminal cases, but never exercised his authority. The opinion precludes the judge from appearing in district court civil cases in the same judicial district. CJEAB Op. 07-06.

## **IV. Appointed Judges**

**An Appointed Judge who serves pursuant to C.R.C.P. 122 and section 13-3-111, C.R.S., for the period of the appointment, and in his or her capacity as Appointed Judge,**

**(A) is not required to comply with the following canons:**

**(1) 2.10 (A) (Judicial Statements on Pending and Impending Cases), except as to the case where he or she is appointed, and should require similar abstention from comment on the part of those personnel who are subject to the Appointed Judge’s direction and control;**

**(2) 3.2 (Appearances Before Governmental Bodies and Consultation with Governmental Officials); 3.3 (Testifying as a Character Witness); 3.4 (Appointments to Governmental Positions); 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities); 3.8 (Appointments to Fiduciary Positions); 3.9 (Service as Arbitrator or Mediator); 3.10 (Practice of Law); 3.11 (Financial, Business, or Remunerative Activities); 3.12 (Compensation for Extrajudicial Activities); 3.13 (C) (Reporting of Certain Gifts, Loans, Bequests, Benefits, or Other things of Value); 3.14 (Reimbursement of Expenses and Waivers of Fees or Charges); and 3.15 (Reporting Requirements);**  
**(3) 4.1 (A)(5, 12, 13) (Political and Campaign Activities of Judges in General); 4.2 (Political and Campaign Activities of a Judge Standing for Retention); and 4.4 (Campaign Committees).**

**(B) should refrain as follows:**

**(1) from financial and business dealings that relate directly to any issues in the case to which the Appointed Judge is appointed;**

**(2) from accepting any gift, bequest, favor or loan from any party to or the lawyer appearing in the case to which the appointed judge is appointed, and should require a spouse, domestic partner or family member residing in the judge's household to refrain from accepting gifts, bequests, favors, or loans in the same manner as the judge.**

## **VI. Time for Compliance**

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

### **Comment**

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

## Canon 1

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

### **Rule 1.1: Compliance with the Law**

**(A) A judge shall comply with the law,\* including the Code of Judicial Conduct.**

**(B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.**

**(C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority\* in writing of such conviction within ten days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the appropriate authority within ten days after the date of the conviction a certificate thereof. This obligation to self-report convictions is a parallel but independent obligation of judges admitted to the Colorado bar to report the same conduct to the Office of Attorney Regulation pursuant to C.R.C.P. 251.20.**

#### **Comment**

~~[1] Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.~~

~~[2] Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority\* in writing of such conviction within ten days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the appropriate authority within ten days after the date of the conviction a certificate thereof. This obligation to self-report convictions is a parallel but independent obligation of judges admitted to the Colorado bar to report the same conduct to the Office of Attorney Regulation pursuant to C.R.C.P. 251.20.~~

#### ANNOTATION

Violations by a judge of federal or state criminal law may constitute a violation of the requirement that a judge must comply with the law, unless the violation is trivial. Matter of Vandelinde, 366 S.E.2d 631, 633 (W. Va. 1988) (involving a magistrate judge's misconduct in the form of excess election contributions).

Violation of law, however trivial, harmless or isolated, is not necessarily a violation of the judicial canons. However, conduct that is grave, intentional and threatening, such as criminal mischief in third degree, falls on censurable side of line. In re Conduct of Roth, 645 P.2d 1064 (Or. 1982) (disciplining a judge for third degree criminal mischief).

Some violations of law (such as minor traffic infractions) may be of such a nature as to not come within the intended meaning of [this Rule]. In re Sawyer, 594 P.2d 805, 811 (Or. 1979) (concluding that a judge who is regularly-employed as a part-time teacher for pay by a state-funded college violates a state

constitutional prohibition against officials of one state department exercising functions of another).

### **Rule 1.2: Promoting Confidence in the Judiciary**

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

#### **Comment**

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

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

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

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

[5] Impropriety occurs when the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality and competence. 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.

#### **ANNOTATION**

Law reviews. For article, "From the Cloister of the Street: Judicial Ethics and Public Expression", see 64 Den. U. L. Rev. 549 (1988).

One meaning of impartiality in the judicial context is lack of bias for or against any party to a proceeding. Impartiality may also involve open-mindedness, not in the sense that judges should have no preconceptions on legal issues, but rather that judges should be willing to consider views that oppose those preconceptions and remain open to persuasion when those issues arise in a pending case. *Republican Party of Minn. v. White*, 536 U.S. 765, 775, 779 (2002).

The role of the judiciary, if its integrity is to be maintained, is one of impartiality. *People v. Martinez*, 185 Colo. 187, 523 P.2d 120, *aff'd*, 186 Colo. 225, 526 P.2d 1325 (1974).

Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. *Wood Bros. Homes v. City of Fort Collins*, 670 P.2d 9 (Colo. App. 1983).

The duty to be impartial cannot be fulfilled where, by his active role in the presentation of the prosecution's case, a trial judge calls witnesses, presents evidence, and cross-examines defense witnesses, because these are the acts of an advocate and not a judge. *People v. Martinez*, 185 Colo. 187, 523 P.2d 120, *aff'd*, 186 Colo. 225, 526 P.2d 1325 (1974).

Such conduct constitutes reversible error. The assumption by the court of the role of advocate for the prosecution is inconsistent with the proper function of the judiciary and constitutes reversible error. *People v. Martinez*, 185 Colo. 187, 523 P.2d 120, *aff'd*, 186 Colo. 225, 526 P.2d 1325 (1974).

Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. *Wood Bros. Homes v. City of Fort Collins*, 670 P.2d 9 (Colo. App. 1983).

Judge's advice to prosecution not error unless defendant denied fair trial. While it may be ill-advised for a trial judge to point out a possible deficiency in the prosecution's case, such conduct is not reversible error where it does not so depart from the required standard of impartiality as to deny the defendant a fair trial. *People v. Adler*, 629 P.2d 569 (Colo. 1981).

Judge is ill-advised to be expert witness and judge on same issue in two proceedings. The actions of a retired judge in becoming an expert witness in a case concerning the same issue – size of attorney fees in an estate proceeding – as in another dispute raises the specter of an appearance of impropriety. The judge is ill-advised to place himself in this position and then preside at the trial of the latter case. However, when the judge does not actually testify in the former case, and the record contains no indication that the judge acted with prejudice, the judge does not have such an interest as to require disqualification. *Colo. State Bd. Of Agriculture v. First Nat'l Bank*, 671 P.2d 1331 (Colo. App. 1983).

Actual bias arises where a prejudice in all probability prevents a judge from dealing fairly with a party. *People v. Julien*, 47 P.3d 1194 (Colo. 2002).

Disqualification requires more than mere relationship. Determining factors are closeness of the relationship and its bearing on the underlying case. *Schupper v. People*, 157 P.3d 516 (Colo. 2007).

Existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification even though no other facts call into question the judge's impartiality. *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984).

While a dissent may be written in a succeeding case or two, the code of judicial conduct should bury the idea of a judge dissenting on the same issue *ad infinitum*. *People v. Steed*, 189 Colo. 212, 540 p.2d 323 (1975).

Public reprimand ordered based upon appearance of impropriety arising from judge's conduct hiring the judicial district's coroner. Appointee did not apply during application period, selection was made on basis of criteria not stated in official announcement, including known friendship with the Chief Justice, and on terms significantly different from those advertised to general public. *In re Johnstone*, 2 P.3d 1226 (Alaska 2000).

## Ethics Opinions

A judge whose spouse is running for city council, which exercises supervisory responsibility over the chief of police and city manager, would not be required to disqualify himself in all cases charged by the police

department. The existence of this relationship would not, in the usual case, cause the judge's impartiality to be questioned. Colo. J.E.A.B. Op. 07-09

A part-time county judge who maintains a part-time civil practice may not exercise discretionary authority to sit as a district judge in criminal matters and also continue to appear in the same district court as a lawyer on civil matters. To allow a judge to preside over cases while practicing in the same court would erode confidence in the impartiality of the judiciary. Colo. J.E.A.B. Op. 07-06

A judge may not advertise her ability to perform wedding ceremonies by sending fliers to wedding planners and may not otherwise solicit business as a wedding officiant. Colo. J.E.A.B. Op. 07-05

A judge is not required to automatically disqualify himself when the parent of his estranged godchild or the parent's colleagues appear before the judge. Colo. J.E.A.B. Op. 07-04.

A judge need not automatically disqualify herself where an attorney who represented the judge's adult child, the costs of which were paid by the judge but reimbursed by the adult child, appears before the judge. Colo. J.E.A.B. Op. 07-01.

An active judge planning to retire in the near future should refrain from setting or hearing private mediations until the judge actually retires. Colo. J.E.A.B. Op. 06-09

A judge may serve on the board of an organization devoted to seeking funds to assist defendants in obtaining court-ordered substance abuse treatment, and the judge may make recommendations to a private foundation that it should fund programs to the same end, but it would be inappropriate for the judge to assist in determining which particular defendants receive the scholarship funds. Colo. J.E.A.B. Op. 06-06

A judge should disqualify himself sua sponte if an attorney or firm currently representing the judge, or the judge's adversary in a current matter, appears before the judge. A judge should also disqualify himself sua sponte for a reasonable period, typically for one year, after the representation has ended, when the judge's attorney, other members of that firm, the judge's adversary's attorneys, or members of that attorney's firm appear before the judge in order to avoid an appearance of impropriety. After the expiration of a reasonable period of time, disqualification is not required but may be appropriate under the circumstances. Disclosure should continue until the passage of time or circumstances make the prior representation irrelevant. Colo. J.E.A.B. No. 06-05.

To avoid an appearance of impropriety, when a judge's spouse contributes to a political candidate, the contribution should be made in the spouse's name alone and from the spouse's separate bank account, with no reference to the judge or the judge's position. Colo. J.E.A.B. Op. 06-04.

A judge may recommend a lawyer only in circumstances where the judge has a sufficiently close relationship with the requesting party that he would automatically recuse himself from the case due to the closeness of the relationship regardless of whether the judge had been asked to make the recommendation. Colo. J.E.A.B. Op. 06-01.

Service on the judge's homeowners' association board of directors would be inappropriate where the association is large and substantial. Maintains sizable cash reserves and operates under a large budget, and engages in outside transactions likely to result in litigation. Colo. J.E.A.B. Op. 05-3.

A judge should disqualify himself from cases in which a partner or associate in his brother-in-law's firm acts as counsel. Colo. J.E.A.B. Op. 05-02.

A judge need not recuse in every case involving a law enforcement agency for which the judge's spouse occasionally performs arson investigations. Colo. J.E.A.B. Op. 05-01.

A mentee judge may discuss pending or impending matters with his or her mentor judge but the mentee judge alone is responsible for making decisions in the matter. Colo. J.E.A.B. Op. 04-02.

A judge's report of an attorney's misconduct in a case pending before the judge requires the judge to disqualify himself or herself. Colo. J.E.A.B. Op. 04-01.

A judge who, immediately following a hearing, had lunch with one of the attorneys in the proceeding, violated Canon 2A by creating an appearance of impropriety. The closeness in time between the hearing and the social lunch could suggest to a reasonable observer that the attorney had influence over the judge based upon their social relationship. Alaska Formal Op. 021

A judge engages in improper political activity by moderating a partisan political debate. Despite all candidates being represented and no sponsorship by any political party, political debates by their nature engage the moderator in political discourse inappropriate to judicial office. Such a debate improperly lends the prestige of judicial office to the event in a state with a non-elected judiciary. Alaska Formal Op. 023

While a judge may "speak, write, lecture, and teach on both legal and non-legal subjects" and may accept compensation so long as the compensation does not exceed a reasonable amount nor exceed that which would be received by a person who is not a judge, it is not permissible for a judge to write a regular column in a for-profit publication in which the placement of the article, not within the judge's control, could be construed as endorsing other articles or advertisements that might demean the office. Md. Ethics Op. 2001-01

A judge should not participate on the advisory board of an arbitration association where it is likely that the judge's opinions on matters before the board could be construed as the giving of legal advice. Md. Ethics Op. 1995-06

A judge's introduction of keynote speaker at event that is primarily commemorative but which also is used to raise funds would create appearance of impropriety. Neb. Ad. Op. 07-01

No appearance of impropriety for judge who serves on board of directors of charitable organization to allow his name to appear on the organization's stationery provided judge's position is not identified and his name not selectively emphasized. U.S. Conf. Ad. Op. No. 35

No appearance of impropriety for judge to participate in a seminar in another country designed to improve relations with that country where judge's expenses are paid by organization unlikely to come before Utah courts. Utah Ad. Op. 88-10

No appearance of impropriety for judge to teach a course involving only one component of the bar. Utah Ad. Op. 99-6

### **Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office**

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

#### **Comment**

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

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

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

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

## ANNOTATION

### Ethics Opinions

Judicial officer may not advertise his or her availability to perform wedding ceremonies by sending fliers to wedding planners and may not otherwise solicit business as a wedding officiant. Colo. J.E.A.B. Op. 07-05.

Judge may not testify as a character witness on a voluntary basis, but he or she is obligated to comply with a subpoena if one is issued. Judge should consider attempting to discourage, to the extent reasonable, a party or lawyer from subpoenaing the judge as a character witness, unless the interests of justice require the judge's testimony. Colo. J.E.A.B. Op. No. 06-03.

Judge's spouse is not subject to the Code of Judicial Conduct and thus may freely pursue elected office. However, the judge should refrain from attending all political events in support of the spouse's candidacy and must avoid activities that could be perceived as constituting an endorsement of the candidate or using the prestige of the judicial office to benefit the spouse. Colo. J.E.A.B. Op. 05-05.

A judge should take appropriate steps to ensure that neither the content of the foreword to a book a judge was asked to write nor the advertising exploit the judicial office or advance the private interests of others. Utah Ad. Op. 90-8

Advising a judge to retain control over the advertising of his publications, including a veto right, to ensure that the judicial position is not exploited nor the private interests of others advanced by use of the prestige of the judge's office. U.S. Conf. Ad. Op. No. 55

A judge should not receive compensation for publication on how to practice before judge's court; for-profit publication on scholarly and legal topics permissible. U.S. Conf. Ad. Op. No. 87



## Canon 2

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

### **Rule 2.1: Giving Precedence to the Duties of Judicial Office**

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

#### **Comment**

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

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

#### ANNOTATION

Whether a judge may sit on the board of directors of his or her homeowner's association is to be determined on a case-by-case basis. Where the association is large and substantial, maintains significant cash reserves, operates under a sizeable budget and engages in substantial business-type contacts with the outside enterprises of the kind that might involve the association in litigation, it would be inappropriate for a judge to serve on the association's board. Colo. J.E.A.B. Op. 05-03.

### **Rule 2.2: Impartiality and Fairness**

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

#### **Comment**

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

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

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

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

### **Rule 2.3: Bias, Prejudice, and Harassment**

**(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.**

**(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.**

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

**(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.**

#### **Comment**

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

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

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

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

### **Rule 2.4: External Influences on Judicial Conduct**

**(A) A judge shall not be swayed by public clamor or fear of criticism.**

**(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.**

**(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.**

## Comment

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

## ANNOTATION

The judge may, at her discretion, meet with a special interest group, but the judge is not required to do so. In assessing whether to grant a request for a meeting, the judge should require the special interest group to submit a written request specifying the purpose of the meeting. If the purpose is not improper and the judge wishes to grant the request, she should send a written response laying out ground rules for the meeting. At the meeting itself, the judge should ensure that the group is not given any impression that it is in a special position to influence the judge, and the judge should not engage in any ex parte communications with the group regarding any pending or impending matters. Colo. J.E.A.B. Op. 08-01.

While a mentee judge may consult with his or her mentor judge or any other judge on "pending or impending matters," the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.A.B. Op. 04-02.

## **Rule 2.5: Competence, Diligence, and Cooperation**

**(A) A judge shall perform judicial and administrative duties, competently and diligently.**

**(B) A judge shall cooperate with other judges and court officials in the administration of court business.**

## Comment

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

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

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

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

## Rule 2.6: Ensuring the Right to Be Heard

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

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

### Comment

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

[2] ~~Notwithstanding Colorado caselaw to the contrary, t~~The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; ~~attempting to make legal concepts understandable using plain English rather than legal jargon~~; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

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

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

## Rule 2.7: Responsibility to Decide

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

### Comment

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

#### ANNOTATION

Unnecessary and unwarranted delay by district court judge in issuing a decision violates this Rule. In *Re Jones*, 728 P.2d 311 (Colo. 1986).

### **Rule 2.8: Decorum, Demeanor, and Communication with Jurors**

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

**(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.**

**(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.**

#### **Comment**

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

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

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

#### ANNOTATION

Judge who met with jurors after the trial to thank them for their service erred in using jurors' post-verdict statements to impeach the verdict. In *re Hall v. Levine*, 104 P. 3d 222 (Colo. 2005).

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

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

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

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

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

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

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

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

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

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

## **Comment**

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

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

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

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, and truancy courts. In

this capacity, judges may assume a more interactive role with the parties, treatment providers, probation officers, social workers, and others.

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

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

[7] As it applies to paragraph 5(C), the definition of judicially noticed facts is set forth in Rule 201 of the Colorado Rules of Evidence.

#### ANNOTATION

The initiation of an ex parte communication by a judge with a party in a dependency hearing regarding the adequacy of her attorney's representation was improper, but judge would not be disqualified where disqualification motion and affidavits failed to allege facts from which it might be inferred that the ex parte communication demonstrated a bias against the party or her attorney. *S.S. v. Wakefield*, 764 P.2d 70 (Colo. 1988).

Trial court's ex parte communication with defendant's counsel directing counsel to prepare the form of order was not improper and did not require the attorney fee order to be vacated, where the communication was made after court had reached its decision based on full briefing of the issues and a telephone hearing, where plaintiff's counsel was given an opportunity to object and did in fact object, and where there was no evidence of bias on the part of the judge or prejudice to plaintiff as a result of the court's action. *Aztec Minerals Corp. v. State*, 987 P.2d 895 (Colo. App. 1999). Applied in *People v. Wiegard*, 727 P.2d 383 (Colo. App. 1986).

Law reviews. For article, "Ex Parte Communications with a Tribunal: From Both Sides," see 29 Colo. Law. 55 (April 2000).

#### Ethics Opinions

A judge may, at her discretion, meet with a special interest group, but the judge is not required to do so. In assessing whether to grant a request for a meeting, the judge should require the special interest group to submit a written request specifying the purpose of the meeting. If the purpose is not improper and the judge wishes to grant the request, she should send a written response laying out ground rules for the meeting. At the meeting itself, the judge should ensure that the group is not given any impression that it is in a special position to influence the judge, and the judge should not engage in any ex parte communications with the group regarding any pending or impending matters. Colo. J.E.A.B. Op. 08-01.

While a mentee judge may consult with his or her mentor judge or any other judge on "pending or impending matters," the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.A.B. Op. 04-02.

## **Rule 2.10: Judicial Statements on Pending and Impending Cases**

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

**(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial\* performance of the adjudicative duties of judicial office.**

**(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).**

**(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity, subject to Canon 1.**

### **Comment**

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

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

### **ANNOTATION**

#### **Ethics Opinions**

While a mentee judge may consult with his or her mentor judge or any other judge on "pending or impending matters," the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.AB. Ad. Op. 2008-01.

## **Rule 2.11: Disqualification**

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

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



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

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis\* interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,\* or the judge's spouse, domestic partner, parent, ~~or~~ child, or ~~any~~ other member of the judge's family residing in the judge's household,\* has an economic interest\* in the subject matter in controversy or in a party to the proceeding.

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

(5) The judge:

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

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

**(D) In limited circumstances, the rule of necessity applies and allows judges to hear a case in which all other judges also would have a disqualifying interest or the case could not otherwise be heard.**

~~(D) A justice of the Supreme Court who is or may be disqualified under this Rule may:~~

~~(1) instead of withdrawing from the proceeding, disclose in writing the basis of the justice's disqualification, and ask the parties to consider whether they wish to waive the disqualification. The justice shall not participate in the parties'~~

~~discussions and shall require the parties to hold their discussions outside the presence of the justice. The justice shall not comment in any manner on the merits or advisability of waiver, other than to explain the right of disqualification or to further elucidate the ground or grounds of disqualification if requested by the parties. The justice is permitted to advise the parties that he or she is willing to participate in the case with the agreement of all the parties.~~

~~(2) ask the parties to affirmatively indicate their position on the justice's disqualification, or give the parties a reasonable length of time to waive disqualification by advising the parties either (a) that their failure to act will be construed as a decision to waive the potential disqualification, or (b) that their failure to act will be construed as a decision not to waive the potential disqualification. An attorney, on behalf of his or her client, may make the decision without consulting the client if the client is not present or readily available, or if the attorney decides that consultation is unnecessary.~~

~~(E) The rule of necessity is an exception to the principle that every litigant is entitled to be heard by a judge who is not subject to any disqualifications which might reasonably cause the judge's impartiality to be questioned. The rule of necessity has been invoked where disqualifications exist as to all or a majority of members of the court that would normally hear a matter. Rather than deny a party access to court, judicial disqualification yields to the demands of necessity.~~

## Comment

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. The term "recusal" is sometimes used interchangeably with the term "disqualification."

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

[3] The rule of necessity may override the rule of disqualification. The rule of necessity is an exception to the principle that every litigant is entitled to be heard by a judge who is not subject to disqualifications which might reasonably cause the judge's impartiality to be questioned. The rule of necessity has been invoked for trial court and court of appeals judges where disqualifications exist as to all members of the court and there is no other judge available. It has been invoked as to the supreme court when all or a majority of its members have a conflict of interest; the importance of having the court render a decision overrides the existence of the conflict, which might otherwise leave litigating parties in limbo. Under the rule of necessity, For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable. Rather than deny a party access to court, judicial disqualification yields to the demands of necessity.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the

judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

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

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding \$5,000, or a relationship as a director, advisor, or other active participant in the affairs of a party, except that de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) Ownership in an interest in the individual holdings within a mutual or common investment fund that holds securities, or of securities held in a managed fund, is not an "economic interest" in such securities unless the judge participates in the management of the 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 is not an "economic interest" in securities held by the organization;

(3) the proprietary interest of a policy holder in a mutual insurance company, of a depositor 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 a similar proprietary interests is an "economic interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and; or

(4) ownership of government securities is an "economic interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities. of government securities held by the judge.

## ANNOTATION

Law reviews. For article, Disqualification of Judges, see 13 Colo. Law. 54 (1984).

Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. Wood Bros. Homes v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).

Upon reasonable inference of a "bent of mind" that will prevent judge from dealing fairly with party seeking recusal, it is incumbent on trial judge to recuse himself. Wright v. District Court, 731 P.2d 661 (Colo. 1987).

At least an appearance of bias or prejudice existed due to a professional relationship between the trial judge and expert witness for defendants and the trial court erred in denying a motion for recusal. Hammons v. Birket, 759 P.2d 783 (Colo. App. 1988).

Not all ex parte communications are per se grounds for disqualification under C.R.C.P. 97. the critical test is whether the affidavits in support of the motion to disqualify, along with any other matters of record, establish facts from which it may reasonably be inferred that the judge is prejudiced or biased,

or appears to be prejudiced or biased, in favor of or against a party to the litigation. *Goebel v. Benton*, 830 P.2d 995 (Colo. 1992).

Not every connection between a judge and a participant in a case will require the judge to disqualify himself or herself. It is a judge's duty to sit on a case unless a reasonable person could infer that a judge would be prejudiced against a defendant. *People v. Crumb*, --- P.3d ---, 2008 WL 4330268 (Colo. App., Sept. 18, 2008).

Although judges hearing appeal from trial court's dismissal of antitrust action brought against software manufacturer used the operating system at issue in the lawsuit, raising the potential for a conflict of interest, the rule of necessity required those judges to proceed with the case. *Pomerantz v. Microsoft Corp.*, 50 P.3d 929 (Colo. App. 2002).

Successor judge erred in determining that the same circumstances that led the trial judge to recuse himself or herself from defendant's other cases also existed before the commencement of trial in this case. *People v. Schupper*, 124 P.3d 856 (Colo. App. 2005).

Applied in *People v. Mills*, 163 P.3d 1129 (Colo. 2007); *Spring Creek Ranchers Ass'n, Inc. v. McNichols*, 165 P.2d 244 (Colo. 2007); *Schupper v. People*, 157 P.3d 516 (Colo. 2007); *People v. Julien*, 47 P.3d 1194 (Colo. 2002); *People v. Harlan*, 8 P.3d 448 (Colo. 2000); *In re Estate of Elliott*, 993 P.2d 474 (Colo. 2000); *Office of State Court Adm'r v. Background Information Services, Inc.*, 994 P.2d 420 (Colo. 1999); *Comiskey v. District Court In and For County of Pueblo*, 926 P.2d 539 (Colo. 1996); *Wilkerson v. District Court In and For County of El Paso*, 925 P.2d 1373 (Colo. 1996); *People v. District Court, In and For Eagle County, State of Colo.*, 898 P.2d 1058 (Colo. 1995); *Klinck v. District Court of Eighteenth Judicial District*, 876 P.2d 1270 (Colo. 1994); *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993); *Goebel v. Benton*, 830 P.2d 995 (Colo. 1992); *Brewster v. District Court of the Seventh Judicial Dist.*, 811 P.2d 812 (Colo. 1991); *Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635 (Colo. 1987); *People ex rel. A.E.L.*, 181 P.3d 186 (Colo. App. 2008); *Kane v. County Court Jefferson County*, 192 P.3d 443 (Colo. App. 2008); *parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809 (Colo. App. 2006); *In re Marriage of McSoud*, 131 P.3d 685 (Colo. App. 2006); *Keith v. Kinney*, 140 P.3d 141 (Colo. App. 2005); *People v. Cambell*, 94 P.3d 1186 (Colo. App. 2004); *People ex rel S.G.*, 91 P.3d 443 (Colo. App. 2004); *Tripp v. Borchard*, 29 P.3d 345 (Colo. App. 2001); *Prefer v. PharmNetRx, LLC*, 18 P.3d 844 (Colo. App. 2000); *People v. Anderson*, 991 P.2d 319 (Colo. App. 1999); *People v. Lanari*, 926 P.2d 116 (Colo. App. 1996); *People v. Bowring*, 902 P.2d (Colo. App. 1995); *People v. McCarty*, 851 P.2d 181 (Colo. App. 1992); *Giralt v. Vail Vill. Inn Assocs.*, 759 P.2d 801 (Colo. App. 1988).

## **Ethics Opinions**

A judge who sits on the county bench in a small, rural district and whose spouse wishes to run for election to the city council, which oversees the chief of police, is not required to disqualify himself in cases charged by the police department. He should, however, consider whether the facts and circumstances make disqualification appropriate in a particular case, and, if his spouse is elected, he should disclose her role on the city council in cases charged by the police department. Colo. J.E.A.B. Op. 07-09.

A judge is not required to disqualify himself when the judge's estranged godchild's father appears before him, solely because of that relationship, but disqualification may nevertheless be appropriate depending on the judge's subjective and objective analysis of the circumstances. The judge should, however, disclose the godparent relationship to each party when his godchild's father appears in his court. Colo. J.E.A.B. Op. 07-04.

A judge need not disqualify herself sua sponte when the attorney who represented the judge's adult daughter appears before the judge. The judge should consult her own conscience to determine whether disqualification is warranted if the judge maintains a disabling prejudice for or against the attorney. If the judge concludes that disqualification is unnecessary, disclosure of the daughter's representation may still be appropriate until the passage of time, the limited consequences of the prior matter and the nature of the judge's relationship with the attorney have made the prior representation irrelevant. Colo. J.E.A.B. Op. 07-01.

A judge should disqualify himself or herself sua sponte if an attorney or firm currently representing the judge, or representing the judge's adversary in a current matter, appears before the judge. A judge should also continue to disqualify himself or herself sua sponte for a reasonable period of time after the representation has ended, typically one year, when the judge's attorney, other members of that firm, the judge's adversary's attorneys, or members of that attorney's firm appear before the judge. After the expiration of a reasonable period of time, continued disqualification is not required, but may be appropriate under the facts and circumstances of the case in which the judge was represented. Colo. J.E.A.B. 06-05

A judge who presides over a county court in a small rural jurisdiction should disqualify himself when any member of his brother-in-law's firm appear in the court on which he serves. Colo. J.E.A.B. Op. 05-02

A judge must disqualify in any case in which the judge's spouse, who is an officer employed by a fire protection district which assists the sheriff's department with arson investigations, or those he or she supervises, participated in the investigation of the case. The judge is not, however, required to disqualify from all cases involving a law enforcement agency for which the judge's spouse occasionally performs arson investigations. Colo. J.E.A.B. Op. 05-01.

A judge's report of an attorney's misconduct in a case pending before the judge requires the judge to disqualify himself or herself. Colo. J.E.A.B. Op. 04-01.

## **Rule 2.12: Supervisory Duties**

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

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

### **Comment**

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

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

### **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 approve compensation of appointees beyond the fair value of services rendered.**

#### **Comment**

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

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

[3].

### **Rule 2.14: Disability and Impairment**

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

#### **Comment**

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

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

### **Rule 2.15: Responding to Judicial and Lawyer Misconduct**

**(A) A judge having knowledge\* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.\***

**(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.**

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

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

#### **Comment**

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

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

### **Rule 2.16: Cooperation with Disciplinary Authorities**

**(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.**

**(B) A judge shall not retaliate, directly or indirectly, against a person known\* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.**

#### **Comment**

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



## 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.**

### **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; or**
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.**

### **Comment**

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

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

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge’s official or judicial actions, are likely to appear to a reasonable person to call into question the judge’s integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge’s extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

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

ANNOTATION

Judge's use of judicial chambers stationery for letters to opposing counsel in personal matter creates appearance of impropriety; objectively reasonable person would not know the difference between judicial chambers stationery and official court stationery. Judge privately reprimanded for this and other misconduct. *Inquiry Concerning a Judge*, 822 P.2d 1333, 1340 (Alaska 1991).

Public reprimand appropriate where judge was arrested for and plead guilty to drunk driving. *In re Weaver*, 691 N.W.2d 725 (Iowa 2004).

District court judge's two-month secret intimate relationship with assistant county attorney, who appeared before him on behalf of State on daily basis, was conduct that brought disrepute to judicial office, and warranted 60 day suspension without pay, despite lack of evidence that judge's relationship with county attorney prejudiced any defendant who appeared before him, where affair occurred with subordinate public servant, judge allowed affair to remain hidden from those who appeared before him against assistant county attorney, judge and county attorney engaged in intimate encounters in courthouse, and both parties were married to other people. *In re Gerard*, 631 N.W.2 271 (Iowa 2001).

Juvenile court judge's retaliation and intemperate statements directed at the attorneys required by law to appear on child welfare cases was at least negligent and ran afoul of duties to give precedence to his or her judicial duties over all other activities of the judge, to be patient and courteous to all persons dealt with in a judicial capacity, and to disqualify himself if impartiality could reasonably be questioned; the judge allowed his non-judicial activities, namely his federal action against the Director of the Office of the Guardian ad Litem, to take priority over his judicial duty to hear child welfare cases, and he did so by treating the Director, the attorneys in her office, and the attorneys of the Attorney General's office with considerable disrespect, creating a continuing situation where his impartiality could reasonably be, and was, repeatedly questioned. *In re Anderson*, 82 P.3d 1134 (Utah 2004).

## Ethics Opinions

The judge may speak at a CLE which is, in effect, limited to only one component of the bar, provided that the judge satisfies certain conditions. In addition, the judge should consider with care the topic on which he presents, and should avoid presenting on a topic such as trial strategy, which could raise questions regarding the judge's impartiality. *Colo. J.E.A.B. Op. 08-03*.

Judges are not permitted to be members of special bar association, as it would convey the appearance of a special relationship to one side in the adversarial process. Judges should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse or are dedicated to a particular legal philosophy or position. *AK Ad. Op. 99-4*.

A judge may not participate in an infomercial for a local surgeon, which would demean the judicial office and lend the prestige of the judge's office to advance the physician's private interests. *Md. Ad. Op. 2006-11*.

Judge may serve as a director of a non-profit corporation formed to solicit funds from the community to provide incentives for participants in a local Drug Court. *Md. Ad. Op. 2005-11*.

Judge may make presentations before groups representing single components of the judicial system as long as the judge is careful about the contents of the discussions and does not give legal advice, comment on pending cases, or offer opinions that would indicate biases or prejudgment of certain types of cases. The judge must also be willing to accept invitations from other components in the system. *Utah Ad. Op. 2006-06*.

Judge may maintain membership in a cycling club that is sponsored, in part, by a law firm. Utah Ad. Op. 03-01.

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

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

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

#### **Comment**

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

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others’ interests, Rule 2.10, governing public comment on pending and impending matters, Rule 2.11, outlining the circumstances under which a judge must disqualify himself or herself, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.

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

#### **ANNOTATION**

##### **Ethics Opinions**

A district court judge may not accept a voting or non-voting board position on a local community board that combines integrated services and legislative advocacy because such membership would involve legislative advocacy beyond matters to improve the law. Colo. J.E.A.B. Op. 2007-07.

The judge should not accept appointment to a blue ribbon panel of public and private leaders charged with “reducing the state’s contribution and vulnerability to a changed climate” by developing a set of recommendations and policy proposals addressing how Colorado can mitigate and adapt to climate change. The judge’s work on the panel would involve consulting with or providing recommendations to

the legislative and executive branches on climate control issues, which are unconnected with the law, the legal system, the administration of justice, or the role of the judiciary. Colo. J.E.A.B. Op. 06-08.

### **Rule 3.3: Testifying as a Character Witness**

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

#### **Comment**

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

#### **ANNOTATION**

##### **Ethics Opinions**

A judge may not testify as a character witness on a voluntary basis, but he is obligated to comply with a subpoena if one is issued. Where a judge has been asked to provide such testimony, the judge should consider whether the interests of justice require his or her testimony, and if not should then consider attempting to discourage the subpoenaing party or lawyer from requiring the testimony, because of the possibility that the testimony is being sought to trade on the judge's position. Colo. J.E.A.B. Op. 06-03.

A judge may not write a letter to the pardon board at the request of convicted felon sentenced by the judge, nor should the judge write such a letter of the judge's own initiative. AK Ad. Op. 2003-01.

A judge should not testify as a character witness for a criminal defendant in a trial unless the judge has been subpoenaed. The giving of such character testimony by judges should be discouraged, and is appropriate only where a subpoena makes it unavoidable. Utah Ad. Op. 88-09.

### **Rule 3.4: Appointments to Governmental Positions**

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

#### **Comment**

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

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

[3] 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. Every governmental board, committee and commission is different and must be evaluated independently to determine whether judicial participation is appropriate. In considering the appropriateness of accepting extrajudicial assignments, a judge should ensure that the mission and work of the board or commission relates to the law, the legal system, or the administration of justice. To effectuate the Code's goal of encouraging judges to participate in their communities, the relationship between the board's mission and the law, legal system, or the administration of justice should be construed broadly. Any judicial ethics advisory opinions issued before adoption of this Code requiring a narrow link or stringent nexus are no longer valid. A judge should avoid participating in governmental boards or commissions that might lead to the judge's frequent disqualification or that might call into question the judge's impartiality. The changing nature of some organizations and of their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated to determine if it is proper to continue the affiliation.

#### ANNOTATION

##### Ethics opinions

Judge's service on a state Children's Justice Act task force created by federal statute and requiring state judge membership should be limited to roles permitted by ethical limitations. "Fundamentally, whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge." Ak. Ad. Op. 2001-01.

### **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.**

#### **Comment**

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

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

### Rule 3.6: Affiliation with Discriminatory Organizations

(A) A judge shall not **knowingly** hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

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

#### Comment

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

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

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

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

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

### Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

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

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

- (2) **soliciting\* contributions\* for such an organization or entity, but only from members of the judge’s family,\* or from judges over whom the judge does not exercise supervisory or appellate authority;**
- (3) **soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;**
- (4) **appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;**
- (5) **making recommendations to such a public or private fund-granting ~~an~~ organization or entity ~~concerning~~ in connection with its ~~fund-granting~~ programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and**
- (6) **servicing as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:
  - (a) **will be engaged in proceedings that would ordinarily come before the judge; or**
  - (b) **will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.****

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

## **Comment**

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

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

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

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

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the

prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

## ANNOTATION

### Ethics opinions

A district court judge may not accept a voting or non-voting board position on a local community board that combines integrated services and legislative advocacy because such membership would involve legislative advocacy beyond matters to improve the law. Colo. J.E.A.B. Op. 07-07.

A judge may serve on a grant-making committee of a community foundation. Colo. J.E.A.B. Op. 07-03.

A judge may serve on the board of directors of a public charter school in a neighboring judicial district. Colo. J.E.A.B. Op. 07-02.

The judge should not accept appointment to a blue-ribbon panel of public and private leaders charged with “reducing the state’s contribution and vulnerability to a changed climate” by developing a set of recommendations and policy proposals addressing how Colorado can mitigate and adapt to climate change. Colo. J.E.A.B. Op. 06-08.

A judge may serve on the board of an organization devoted to seeking funds to assist defendants in obtaining court-ordered substance abuse treatment, and he may make recommendations to a private foundation that it should fund programs to the same end, but it would be inappropriate for the judge to assist in determining which particular defendants receive the scholarship funds. Colo. J.E.A.B. Op. 06-06.

A judge may make monetary contributions to further pro bono activities, but it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs. Acknowledging the *pro bono* activity of particular attorneys would be permissible if it were done in a manner that is public, but letters of congratulation sent directly to the attorney could be interpreted as evidence that the attorneys are in a special position of influence or that the judge’s ability to act impartially has been compromised. AK. Ad. Op. 2004-01.

Judge may as college trustee co-host outreach event for alumni who are lawyers. Md. Ad. Op. 2008-06.

Judge may serve as a director of a non-profit corporation formed to solicit funds from the community to provide incentives for participants in a local Drug Court. Md. Ad. Op. 2005-11.

A judge shall not be a director or officer of an organization if it is likely that the organization will be engaged regularly in adversary proceedings in any court. Md. Ad. Op. 2008-05.

A judge may not serve on the board of a mental health organization whose representatives frequently appear in the judge’s court. Utah Ad. Op. 07-04.

Judge may participate in a nationally renowned non-profit musical education and performance organization. Utah. Ad. Op. 97-3.

Part-time traffic referee may not practice criminal law. The referee also may not practice law at the court or courts which the referee serves. The judges of the district must enter disqualification in all cases in which the referee appears as counsel. Utah Ad. Op. 07-02.



### **Rule 3.8: Appointments to Fiduciary Positions**

**(A) A judge shall not accept appointment to serve in a fiduciary\* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family,\* and then only if such service will not interfere with the proper performance of judicial duties.**

**(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.**

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

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

#### **Comment**

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

### **Rule 3.9: Service as Arbitrator or Mediator**

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

#### **Comment**

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

#### **ANNOTATION**

##### **Ethics Opinions**

Active judge soon to retire and participate in the Senior Judge Program should refrain from setting or hearing private mediations until after he retires. Colo. J.E.A.B. Op. 06-09.

A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Trial judges conducting settlement

conferences in their own cases must, however, have a heightened awareness of the appearance that the parties might feel improper pressure to settle or that the judge will no longer be impartial if the case fails to settle. Ak. Ad. Op. 2006-01.

### Rule 3.10: Practice of Law

A judge shall not practice law ~~unless expressly authorized by law to do so except as permitted by law or this Code~~. A judge may act pro se ~~in any proceeding in which the judge is a litigant in a personal capacity~~ but should not defend himself or herself when sued in an official capacity. The judge~~and~~ may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,\* but is prohibited from serving as the family member's lawyer in any forum.

#### Comment

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

[2] A judge who drafts or reviews documents as permitted by this rule must comply with C.R.C.P. 11(b).

#### ANNOTATION

##### Ethics Opinions

Judge may not participate in a local legal service's call-a-lawyer program by providing advice to callers, anonymous or otherwise, because doing so would constitute the practice of law. The judge may, however, engage in activities intended to encourage attorneys to perform pro bono services or act in an advisory capacity to the legal services pro bono program. Colo. J.E.A.B. Op. 06-02.

A judge may serve as a National Guard judge advocate if the judge's role is limited to performing only those duties that do not resemble services provided by civilian attorneys for members of the military. Judges may not take any actions while serving as a National Guard judge advocate that would give the impression that the judge is an advocate on matters that concern the civilian justice system. Ak. Ad. Op. 2007-01.

### Rule 3.11: Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.\*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

**(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.**

**(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:**

**(1) interfere with the proper performance of judicial duties;**

**(2) lead to frequent disqualification of the judge;**

**(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or**

**(4) result in violation of other provisions of this Code.**

### **Comment**

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

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

### **ANNOTATION**

Judge's conduct in assuming command responsibility in furtherance of speculative real estate development project which depends for success upon official action of city and which results in substantial profit to judge violates canon requiring judge to avoid giving grounds for any reasonable suspicion that he is using power or prestige or his office to persuade others to contribute to the success of private business ventures and rule that judge shall not directly or indirectly lend the influence of his name or prestige of his office to aid or advance the welfare of a private business and such conduct warrants censure. In re Foster, 318 A.2d 523 (Md. 1974).

### **Ethics Opinions**

A judge may not serve as president of a corporation which markets products to correctional facilities. As a company officer, the judge would be engaged in financial dealings. A judge's service to an organization that markets product to correctional facilities may reasonably be perceived to exploit the judge's judicial position, and may cast reasonable doubt on the judge's capacity to act impartially as a judge. Utah Ad. Op. 05-01.

## **Rule 3.12: Compensation for Extrajudicial Activities**

**A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law\* unless such acceptance would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\***

### **Comment**

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

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

### **ANNOTATION**

Statutory disclosure and reporting requirements are contained in § 24-6-202 and -203, C.R.S.

### **Ethics Opinions**

Judge may not charge a fee for performing ceremonies at the court conducted during normal business hours. Utah Ad. Op. 98-8.

### **Rule 3.13: Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value**

**(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law\* or would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\***

**(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:**

- (1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;**
- (2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending\* or impending\* before the judge would in any event require disqualification of the judge under Rule 2.11;**
- (3) ordinary social hospitality;**
- (4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;**
- (5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;**

**(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;**

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

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

**(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:**

**(1) gifts incident to a public testimonial;**

**(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:**

**(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or**

**(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and**

**(3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.**

## **Comment**

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

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

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

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

#### ANNOTATION

Statutory disclosure and reporting requirements are contained in § 24-6-202 and -203, C.R.S.

#### Ethics Opinions

Judge may not receive free travel to conference sponsored by The Roscoe Pound Foundation of Trial Lawyers of America because it could convey a special relationship to one side in the adversarial process. AK. Ad. Op. 99-5.

Judge may not allow law firm to pay for function following investiture. Md. Ad. Op. 2005-16.

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

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

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

**(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.**

## Comment

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

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

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

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

## ANNOTATION

Statutory disclosure and reporting requirements are contained in § 24-6-202 and -203, C.R.S.

### **Rule 3.15: Reporting Requirements**

- (A) A judge shall publicly report the source and amount or value of:**
- (1) compensation received for extrajudicial activities as permitted by Rule 3.12;**
  - (2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items does not exceed the statutory amount specified in Title 24, Article VI of the Colorado Revised Statutes; and**
  - (3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A).**
- (B) When public reporting is required by paragraph (A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation; ~~and~~ the description of any gift, loan, bequest, benefit, or other thing of value accepted; and the source of reimbursement of expenses or waiver or partial waiver of fees or charges.**
- (C) The public report required by paragraph (A)(1) shall be made at least annually. Public reports required by paragraph (A)(2) and (3) shall be made quarterly.**
- (D) Reports made in compliance with this Rule shall be filed as public documents in the office of the clerk of the court on which the judge serves or other office designated by law\*.**
- (E) Full time magistrates shall file reports required by paragraph A in the office of the clerk of the court on which the magistrate serves annually on or before January 15.**

## **Comment**

[1] In Colorado, judges' public reporting requirements are governed both by this Code and by statute. See § 24-6-202 and -203, C.R.S.

[2] Pursuant to section 24-6-202, all judges are required to file an annual disclosure with the secretary of state.

[3] Pursuant to section 24-6-203, judges are required to file quarterly disclosures reporting gifts, loans, tickets to events, and reimbursement for travel and lodging expenses.

[a] Money, including a loan, pledge, or advance of money or a guarantee of a loan of money with a value of \$25 or more must be reported. § 24-6-203(3)(a), C.R.S.

[b] Any gift of any item of real or personal property, other than money, with a value of \$50 or more must be reported. § 24-6-203(3)(b).

[c] Any loan of any item of real or personal property, other than money, if the value of the loan is \$50 or more. § 24-6-203(3)(c).

[d] Waiver or partial waiver of the cost of attending CLEs or other educational conferences or seminars is included within the statutory requirement that judges report tickets to sporting, recreational, educational or cultural events with a value of \$50 or more, or a series of tickets with a value of \$100 or more, must be reported. § 24-6-203(3)(e), C.R.S.

[e] Payment of or reimbursement for actual and necessary expenditures for travel and lodging at a convention or meeting at which the judge is scheduled to participate must be reported unless the payment or reimbursement is made from public funds, a joint



governmental agency, an association of judges, or the judicial branch. § 24-6-203(3)(f), C.R.S.

[4] The disclosure reports filed with the secretary of state's office may be posted electronically on its website when technically feasible.

## Canon 4

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

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

(A) Except as permitted by law,\* or by 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 or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
- (6) publicly identify himself or herself as a candidate of a political organization;
- (7) seek, accept, or use endorsements from a political organization;
- (8) personally solicit\* or accept campaign contributions;
- (9) use or permit the use of campaign contributions for the private benefit of the judge or others;
- (10) use court staff, facilities, or other court resources as a judicial candidate ;
- (11) knowingly,\* or with reckless disregard for the truth, make any false or misleading statement;
- (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending\* or impending\* in any court; or
- (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial\* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A), except as permitted by Rule 4.3.

### Comment

#### *General Considerations*

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

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

### *Participation in Political Activities*

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

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3.

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

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

### *Statements and Comments Made during a Campaign for Judicial Office*

[7] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their retention committees. Paragraph (A)(11) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[8] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate’s integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In making any such response, the judge should maintain the dignity appropriate to judicial office.

[9] Paragraph (A)(12) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

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

[10] The role of a judge is different from that of a legislator or executive branch official. Campaigns for retention to judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 are intended to help preserve the integrity and independence of the judiciary, and to honor Colorado's merit-based system of selecting and retaining judges.

[11] Paragraph (A)(13) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

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

#### ANNOTATION

Judge who allowed candidate for public office to place a sign in support of candidate outside judge's home publicly endorsed candidate for public office, thereby engaging in a prohibited political activity and improperly lending the prestige of his office to advance the private interests of another. In re Inquiry Concerning McCormick, 639 N.W.2d 12 (Iowa 2002).

#### Ethics Opinions

To make clear that any contribution by the judge's spouse to a political candidate is not from the judge, that contribution should be made in the spouse's name alone from the spouse's separate bank account with no reference to the judge or judicial position. Colo. J.E.A.B. Op. 06-04.

A judge may not contribute to another judge's retention campaign fund. Although a judge standing for retention is not necessarily a candidate for "public" office, judicial contributions to retention elections necessarily politicizes them, in contravention to the Code. Ak. Op. 98-3.

A judge may not attend a political party caucus. A judge may vote in a primary election, even when participation is conditioned on party affiliation. Utah. Ad. Op. 2002-1.

A judge may not act as a master of ceremonies at a "Meet the Candidates Night" sponsored by a local PTA, because the meeting is a political gathering. Utah Ad. Op. 98-15.

#### **Rule 4.2: Political and Campaign Activities of a Judge Who is a Candidate for Retention**

**(A) A judicial candidate\* in a retention public election\* shall:**

- (1) act at all times in a manner consistent with the independence,\* integrity,\* and impartiality\* of the judiciary;**
- (2) comply with all applicable federal and state election, election campaign, and election campaign fund-raising laws and regulations ;**
- (3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.3, before their dissemination; and**
- (4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.3, that the candidate is prohibited from doing by Rule 4.1.**

#### **ANNOTATIONS**

##### **Ethics Opinions**

Judges standing for retention may not appear on a television program in which a representative of the League of Women Voters would ask them questions to help provider viewers with more information about whether or not the judges should be retained. Viewers might reasonably expect that the judge was seeking an approval vote and might therefore understand that the judge is engaging in campaign activity. Colo. J.E.A.B. Op. 08-04.

#### **Rule 4.3: Retention Campaign Committees**

**(A) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:**

- (1) The judge may speak at public meetings;**
- (2) the judge may use advertising media, provided that the advertising is within the bounds of proper judicial decorum;**
- (3) a nonpartisan citizens' committee or committees advocating a judge's retention in office may be organized by others, either on their own initiative or at the request of the judge;**
- (4) any committee organized pursuant to subsection (A)(3) may raise funds for the judge's campaign, but the judge should not solicit funds personally or accept any funds except those paid to the judge by a committee for reimbursement of the judge's campaign expenses;**

**(5) the judge should not be advised of the source of funds raised by the committee or committees;**

**(6) the judge should review and approve the content of all statements and materials produced by the committee or committees before their dissemination.**

## Comment

[1] Judicial candidates are prohibited from personally soliciting funds in support of their retention or personally accepting retention campaign contributions. See Rule 4.1(A)(8).

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

[3] At the start of a retention campaign, the candidate must instruct the retention campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a judge who is retained are permitted to make campaign contributions, the judge should not be informed of the source of any funds.

## ANNOTATION

The Fair Campaign Practice Act, §§1-45-101 et. seq., C.R.S. applies to campaigns for and against retention in office.

## Ethics Opinions

A great deal of media attention to a judge's ruling, even if it is critical of the ruling, does not, in itself, constitute active opposition to the judge's retention. However, if there is an organized campaign in opposition to the judge's retention or if there are individual comments opposed to the judge's retention that have been broadcast to a public audience, the judge may safely conclude that there is active opposition to the judge's retention. Here, the Board concludes that the numerous comments posted on the local newspaper's website recommending non-retention of the judge amount to active opposition. Nevertheless, the Board cautions the judge that even though he may, ethically, campaign for retention, he should begin a campaign with great care, bearing in mind that our system strongly disfavors judicial campaigns. Colo. J.E.A.B. Op. 08-05.

Judges standing for retention may not appear on a television program in which a representative of the League of Women Voters would ask them questions to help provide viewers with more information about whether or not the judges should be retained. Viewers might reasonably expect that the judge was seeking an approval vote and might therefore understand that the judge is engaging in campaign activity. Colo. J.E.A.B. 08-04.

A judge may operate a retention campaign if there is active opposition to the judge's retention. Active opposition does not include a below-average performance rating by the Judicial Conduct Commission or casual, water-cooler type discussions in opposition to the judge's retention, but can include scenarios where an anti-retention message is broadcast to a large audience of potential voters, such as through a letter to the editor, lawn signs, or paid advertisements in a publication. Active opposition may also be found in news stories, timed to a judge's retention election, that raise negative facts and qualification issues not immediately relevant to a news-making case. Utah Ad. Op. 2000-05.

#### **Rule 4.4: Activities of Judges Who Become Candidates for Nonjudicial Office**

**(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law\* to continue to hold judicial office.**

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

#### **Comment**

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

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