

Differences Between the Current and Former Codes of Judicial Conduct February 2011

The current Code of Judicial Conduct took effect January 1, 2011. Please find below a summary of some of the major differences between the old Code of Judicial Conduct and the new Code. If you should have any questions about the new Code and whether any specific planned conduct is prohibited, please feel free to contact the *Committee on Judicial Ethics*.

A. Omnibus provisions

Domestic Partners

Various rules in the new Code specifically note that a judge's domestic partner is subject to the same rules as a judge's spouse. See, for example, Rules 2.11, 2.13 (Comment), 3.13 and 3.14. The former code did not include domestic partners.

Member of the judge's family

The term "member of the judge's family" has been changed from specified relatives to "any relative within the third degree as determined by the common law, a spouse or domestic partner or an individual related to a spouse or domestic partner within the third degree as so determined, including an individual in an adoptive relationship within the third degree." See, for example, Rules 3.5, 3.7, 3.8, 3.10 and 3.11.

Economic interest

The term "economic interest" used in the new Code excludes a de minimis legal or equitable interest, whereas the former Code stated that a "financial interest" meant the ownership of a legal or equitable interest "however small."

Family Support Magistrate Referees

Family support magistrate referees are specifically included in the scope of the code, which was not previously the case.

Senior Judges

Senior judges are now subject to provisions of the Code from which they were formerly exempted. The current Code exempts only state referees and family support magistrate referees from complying with Rules 3.4 (appointments to governmental positions) and 3.8 (appointments to fiduciary positions). The exemption provisions no longer include senior judges as they did in the past.

B. Rules Section One (Appearance of Impropriety)

Appearance of Impropriety

Rule 1.2: Sets forth the test to be used to determine an appearance of impropriety.

Rule 1.3: The comments contain information regarding when it is proper or improper to use official letterhead.

C. Rules Section Two (Bias or prejudice)

Bias or prejudice

Rule 2.3: Explicitly requires judges to perform their duties without bias or prejudice and not to engage in harassment, as well as to require lawyers in proceedings before the court to refrain from manifesting bias or prejudice or engaging in harassment.

The former Code required judges to avoid impropriety and the appearance of impropriety in all their activities, to maintain order and decorum in proceedings, to be patient, dignified and courteous, and to require staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

Settlements

Rule 2.6 (B): States that a judge may encourage parties to settle matters but shall not act in a manner that coerces a party into settlement. There is no comparable provision in the former Code although the principle is not new.

Obligation to hear and decide matters

Rule 2.7: Sets forth an explicit duty to hear and decide matters. The former Code had noted in the Comment to Canon 3(a)(3) that the duty to hear all matters fairly and with patience was not inconsistent with the duty to promptly dispose of the business of the court.

Permissible Conduct with jurors

Rule 2.8 (c): Authorizes judges to thank jurors but prohibits commending or criticizing them for the verdict other than as part of an instruction, order or opinion, if appropriate. Comment (2) notes that commending or criticizing jurors "may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case." Canon 3(a)(3) of the former Code noted that judges should be courteous to jurors.

Ex Parte Communications

Rule 2.9(A)(1)(a): Adds to the requirements for a permissible ex parte communication that the judge reasonably believes that no party will gain a substantive advantage (both Codes contain a prohibition when there is a procedural or tactical advantage as a result of the ex parte communication).

When seeking expert advice

Rule 2.9(A)(2): The new Code requires that when a judge seeks the written advice of an expert, the judge give advance notice to the parties of the person to be consulted, the subject matter of the advice sought and an opportunity for the parties to object and respond to the notice and to the written advice received.

The former Code only required notice of the person consulted, the substance of the advice received and a reasonable opportunity to respond.

Dealing with court staff

Rule 2.9(A)(3): The new Code states that in consulting with court staff and court officials whose function it is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, the judge must make reasonable efforts to avoid receiving factual information that is not part of the record and not to abrogate the responsibility to personally decide the matter.

The former Code, while permitting the consultations noted above, did not include the explicit prohibition of receipt of factual information but rather noted in the commentary to Canon 3(a)(4) that a judge must not independently investigate facts and must consider only the evidence presented.

Inadvertent Ex parte Communications

Rule 2.9(B): The new Code requires that if a judge inadvertently receives an ex parte communication bearing on the substance of a matter, the judge must make provision to promptly notify the parties of the substance of the communication and provide the parties an opportunity to respond. No comparable provision was found in the former Code.

Rule 2.9 Comment (5): The explicit prohibition on avoiding ex parte communications with judges who are disqualified from hearing a matter and with judges who exercise appellate jurisdiction does not appear in the former Code.

Public Statements

Rule 2.10: The new Code prohibits a judge from making any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court. The rule specifically allows a judge to make public statements in the course of official duties, to explain court procedures and to comment on any proceeding in which the judge is a litigant in a personal capacity.

1. The old rule prohibited judges and court personnel from commenting publicly on any pending or impending proceeding in any court. Judges were allowed under the old rule to explain the procedures of the court and to correct factual misrepresentations in the reporting of a case.
2. The current rule does not specifically allow a judge to comment on a pending case to correct a factual misrepresentation in the reporting of the case, but it does give judges more flexibility to publicly comment on a pending case if such a comment would not reasonably be expected to affect the outcome or impair the fairness of the matter.

Disqualification

Rule 2.11(A)(1): The new Code added bias or prejudice toward a party's lawyer as grounds for disqualification.

Rule 2.11(A)(2)(c): The new Code added an exception to disqualification when a judge, judge's spouse, domestic partner, etc. has only a de minimis interest that could be substantially affected by a proceeding.

Rule 2.11(A)(4): The new Code requires a judge to disqualify him/herself when the judge has made a public statement, other than in a court proceeding, decision or opinion that commits or appears to commit the judge to reach a particular result.

1. The old rule prohibited a judge from publicly commenting on a pending or impending case, except to correct factual misrepresentations in the reporting of the case.
2. The old rule did not specifically require a judge to disqualify him/herself from hearing a case because of a prior public statement that the judge made that could appear to commit the judge to reach a particular result.

Rule 2.11(A)(5)(a): The new Code limits the disqualification of a judge based upon the judge having previously served as a lawyer in the controversy or who was associated with a lawyer who "participated substantially" in the controversy.

Rule 2.11(A)(5)(b): The new Code requires a judge to disqualify him/herself when the judge served in government employment and participated personally and substantially as a lawyer or public official concerning the proceeding, or publicly expressed an opinion in that capacity concerning the merits of the particular matter in controversy.

1. The former Code did not specifically address this aspect of service as a government attorney but did require a judge to disqualify him/herself in a proceeding in which the judge served as a lawyer in the matter in controversy or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.
2. The former Code did note, in the Commentary to Canon 3(c)(B), that a lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency, but the judge should disqualify him/herself in a proceeding in which the judge's impartiality might reasonably be questioned because of the association.

Rule 2.11(C): The new Code explicitly permits waiver of disqualification to be made on the record or in writing, whereas the former Code required it to be in writing.

Rule 2.11(E): Both the new Code and the former Code state that a judge is not automatically disqualified from sitting on a proceeding because a lawyer or party has

filed a lawsuit or filed a complaint against the judge with the Judicial Review Council and that when a judge becomes aware of such an action, the judge shall on the record disclose that fact to the lawyers and parties. The new Code thereafter specifically incorporates the requirement that the judge proceed in accordance with Practice Book § 1-22(b). While the Practice Book provision is not new, the requirement to comply with it as an ethical obligation is new.

Rule 2.11(F): The new Code contains an explicit provision noting that representation by the attorney general in a lawsuit that arises out of the judge's judicial duties shall not be the sole basis for recusal by the judge in lawsuits where the attorney general appears. There is no comparable provision in the former Code.

Management Obligations and Responsibilities

Rule 2.12(B): The new Code contains a provision that 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," whereas the former Code merely required such judges with supervisory authority to diligently discharge their administrative responsibilities.

Rule 2.13 Comment (1): The new Code explicitly includes "assigned counsel" as an appointee of the judge.

Impairment of lawyer or another judge

Rule 2.14: The new Code requires a judge to take appropriate action when a judge has a reasonable belief that a lawyer or another judge is impaired by drugs or alcohol or by a mental, emotional or physical condition.

1. The old rule required a judge to take appropriate disciplinary measures against judge or lawyer for unprofessional conduct.

Obligations when another lawyer or judge engages in misconduct

Rule 2.15: The new Code requires a judge to take appropriate action, including informing the appropriate disciplinary body, of judicial and lawyer misconduct when a judge has knowledge (defined in the Code as actual knowledge, which may be inferred from the circumstances) that another judge has committed a violation of the Code of Judicial Conduct or when a lawyer has violated the Rules of Professional Conduct and the violation raises a substantial question regarding the judge's or lawyer's honesty, trustworthiness or fitness.

1. In addition, the new rule requires a judge who does not have actual knowledge that another judge or lawyer violated the Code of Judicial Conduct or the Rules of Professional Responsibility to take appropriate action, which does not necessarily have to be disciplinary action, if the judge receives information indicating a substantial likelihood that the judge or lawyer committed a violation of the applicable rules.

2. The new rule limits the reporting obligation to only those offenses involving honesty, trustworthiness or fitness. This is different from the old rule, which required judges to take or initiate disciplinary measures when the judge became aware of unprofessional conduct but left to the judge discretion whether to report a violation based upon the seriousness of the conduct and the circumstances involved.
3. The old rule required judges to take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which a judge becomes aware. It did not define “unprofessional conduct.”

Obligations to disciplinary bodies and retaliation

Rule 2.16: The new Code requires judges to cooperate and to be honest with judicial and lawyer disciplinary bodies and prohibits judges from retaliating against a person who cooperates with an investigation involving misconduct of a judge or lawyer.

1. The old code did not contain this specific requirement and prohibition, but did require judges to act in a manner to promote public confidence.

D. Code Section Three (Extrajudicial Activities)

Coercive activities and use of court property and staff

Rule 3.1(D) & (E): The new Code contains explicit prohibitions on participating in extrajudicial activities that would appear to a reasonable person to be coercive or to use court premises, staff, stationery, etc. except for incidental use or for activities that concern the law, the legal system or the administration of justice, unless the use is permitted by law. The former Code did not have such provisions.

Prohibition of appearances with government official and exceptions

Rule 3.2: The new Code prohibits appearances and consultations with governmental officials except (1) in connection with matters concerning the law, the legal system or the administration of justice, (2) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties, or (3) when the judge is acting in a matter involving the judge’s legal or economic interests or in a fiduciary capacity. Under the former Code, a judge was permitted to appear at a public hearing with respect to a matter concerning the law, the legal system or the administration of justice and could otherwise consult with a governmental body “only on matters concerning the administration of justice.”

Exception for disclosure of confidential information

Rule 3.5: The new Code contains an explicit exception permitting the disclosure or use of confidential information acquired in a judicial capacity when necessary to protect the health or safety of the judge or other persons “if consistent with other provisions of this Code.” The former Code only permitted disclosures for purposes related to judicial duties. See Canon 5(c)(7).

Membership in discriminatory organizations

Rule 3.6: The new Code contains a prohibition on affiliation with discriminatory organizations whereas the former Code merely directed judges to act at all times in a manner that promoted public confidence in the integrity and impartiality of the judiciary.

Membership in educational, religious, charitable and civic organizations

Rule 3.7(A): The new Code, in Rule 3.7(A), sets forth specific rules regarding participation in educational, religious, charitable, fraternal, or civic organizations, as well as those concerned with the law, the legal system and the administration of justice, many of which do not appear or differ from the former Code.

For example, under the new Code, a judge may solicit contributions for such an organization or entity, but only from family members and judges over whom the judge does not exercise supervisory or appellate jurisdiction. In addition, a judge may solicit membership for such an organization, but only if the organization or entity is concerned with the law, the legal system or the administration of justice.

Similarly, under the new Code, a judge may receive an award at an organization's event but if the event is a fund-raising program, the judge may participate only if the event concerns the law, the legal system or the administration of justice.

Pro Bono Legal Services

Rule 3.7(B): The new Code allows a judge to encourage lawyers to provide pro bono legal services. No similar provision existed in the old code.

Serving in a Fiduciary Capacity

Rule 3.8(D): The new Code states that a person who is serving in a fiduciary capacity who becomes a judge must comply with the Rule as soon as practicable, but in no event later than one year. The former Code did not include the one year maximum period.

Exception to Prohibition against Practicing Law

Rule 3.10: The new Code creates an exception to the prohibition on practicing law set forth in the old Code. The exception permits a judge, without compensation, to give legal advice and to draft or review documents for a member of the judge's family.

Permitted Financial Activities

Rule 3.11: The new Code sets forth different provisions with respect to financial activities. For example, under the new Code a judge may not serve as an officer, director, manager, general partner or advisor of any business entity except for a business closely held by the judge or members of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

The former Code permitted a judge to engage in any financial or business dealings provided that they did not tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's position or involve the

judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

Reporting of Gifts

Rules 3.13 and 3.15: The new Code sets forth new rules regarding the receipt and reporting of gifts by judges and also makes those provisions applicable only to the judge.

The former Code's gift provisions stated that "Neither a judge nor a member of the judge's family residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows ..."

Under the old code the duty to report gifts applied when the value of a single gift exceeded \$100.

Under the new Code, the duty to report gifts applies when any one or more gifts from a single source exceeds \$250 in a calendar year. There also is now a duty to report bar-related functions that exceed \$250 in a calendar year and a prohibition on receiving gifts if the gift would appear to a reasonable person to undermine the judge's independence, integrity or impartiality.

E. Code Section Four (Prohibitions on political activities)

Prohibitions on political activities

Rule 4.1: The new Code contains more detailed prohibitions on political activities. For example, subsection (A)(6) prohibits a judge from seeking, accepting or using endorsements from a political organization, subsection (A)(7) prohibits a judge from knowingly, or with reckless disregard for the truth, making a false or misleading statement in connection with the appointment or reappointment process, and subsection (A)(8) prohibits a judge from making any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.

Rule 4.2: This is a new provision concerning judges who are candidates for reappointment or elevation to a higher court.

Rule 4.3(B): This is a new provision concerning judges who become candidates for an appointive public office. The new Code explicitly states that such a judge is not required to resign from his or her judicial office provided that the judge complies with the other provisions of the Code of Judicial Conduct.