

SUMMARY OF REVISIONS CONTAINED IN THE 2009 CODE OF JUDICIAL CONDUCT

Effective March 1, 2009

In August 2008, the Supreme Court published for comment a proposed Code of Judicial Conduct to replace the Code initially adopted by the Court in 1973 and last modified extensively in the late 1990s. The proposed Code was developed by the Supreme Court Task Force on the Code of Judicial Conduct following a review of the 2008 Model Code of Judicial Conduct adopted by the American Bar Association. Following the public comment period, the Task Force reviewed 22 written comments and recommended revisions to the published Code to the Supreme Court. The Supreme Court reviewed the written comments and Task Force recommendations, made additional revisions to the proposed Code, and adopted a new Ohio Code of Judicial Conduct, effective March 1, 2009.

This document highlights the significant revisions contained in the 2009 Ohio Code to the standards governing the conduct of Ohio judges. A comprehensive description of the substantive changes to the Code may be found in the comparisons that follow each rule. Additional information regarding the new Code may be found on the Supreme Court web site at: <http://www.sconet.state.oh.us/boards/JudConductTF/default.asp>.

Format

The 2009 Ohio Code is reformatted to correspond to the format employed by the Rules of Professional Conduct, and the result is a better organized and more user friendly set of guidelines. The Code contains four broadly worded canons that address a judge's overarching responsibilities (Canon 1), the performance of judicial duties (Canon 2), involvement in extrajudicial activities (Canon 3), and conduct in relation to political and campaign activities (Canon 4). The canons are followed by individually numbered rules, each of which addresses a specific topic under the applicable canon. The Code also contains sections that address the scope of the Code and a preamble, detail when and to whom the Code applies, define terms used in Canons 1 through 3, and set forth the form of citation and effective date.

Canon 1—Overarching Responsibilities

The rules in Canon 1 of the 2009 Ohio Code represent a restatement of the provisions found in Canons 1, 2, and 4(A) of the former Code. The comments to Rule 1.3 carry forward standards announced in advisory opinions and provide additional guidance regarding the provision of personal and professional references and the manner in which a judge's title and judicial experience may be used in relation to publications authored by or contributed to by the judge. The comments also indicate that although a judge may cooperate with judicial appointing authorities and screening committees, service on a judicial appointment screening committee is not permissible.

Canon 2—Performance of Judicial Duties

The rules in Canon 2 of the 2009 Code recast and expand on matters regarding the performance of judicial duties that were addressed in Canon 3 of the former Code.

Self-Represented Litigants—Rules 2.2 and 2.6

Together, the comments to Rules 2.2 and 2.6 permit a judge to make reasonable accommodations to self-represented litigants to ensure fundamental fairness and a party's right to be heard, provided such accommodations are consistent with the law. A nonexclusive list of permissible accommodations is provided to give judges further guidance.

Facilitating Settlement—Rules 2.6 and 2.9

Rules 2.6 and 2.9 recognize the role that judges play in facilitating the settlement of civil and criminal disputes prior to trial. Rule 2.6(B) states that a judge should encourage settlement, but not employ coercion to compel resolution, and Comments [2] and [3] amplify on the rule. Rule 2.9(A)(4) contains an exception to the general ban on *ex parte* communications for settlement-related communications.

Specialized Dockets—Rule 2.9

Another exception to the prohibition on *ex parte* communication relates to a judge's administration of a specialized docket, a term defined in the Terminology section of the 2009 Ohio Code. Rule 2.9(A)(6) and Comment [4A] allow a specialized docket judge to engage in certain *ex parte* communications related to administration of the docket.

Response to Public Criticism—Rule 2.10

Rule 2.10(E) and Comment [3] allow judges to respond, directly or indirectly, to public criticism. Such a response may be made, unless the response would affect the outcome or impair the fairness of a pending or impending case. In some instances, the comment suggests that a response from a third-party, such as a bar association, may be preferable.

Disqualification—Rule 2.11

Rule 2.11 and the comments reflect the standards relating to judicial disqualification found in former Canon 3(E). Rule 2.11(A)(5) is a new provision that requires a judge to disqualify himself or herself from a case where the judge, while either a judge or candidate for judicial office, made a public statement that commits or appears to commit the judge to reach a particular result or rule in a particular way in a pending matter. Excepted from this rule are statements made as an advocate in a court proceeding or in a judicial decision or opinion. Comment [1] states that the mere receipt by a judge of a campaign contribution, within the limits set forth in Rule 4.4, does not require the judge's disqualification from a case involving the contributor.

Disciplinary Responsibilities—Rules 2.14 – 2.16

Rule 2.14 is a new rule that outlines the responsibility of a judge, who is faced with the possible disability or impairment of another judge or a lawyer, to take appropriate action, including referral to an assistance program. Rule 2.15 addresses the duty of a judge to report known instances of professional misconduct that relate to the honesty, trustworthiness, and fitness of another judge or a lawyer; this rule corresponds to a lawyer’s reporting obligation in Rule 8.3 of the Ohio Rules of Professional Conduct. Rule 2.16 requires a judge to cooperate and be candid and honest with disciplinary authorities, whereas the former rule imposed only a duty to respond to disciplinary inquiries. The rule also prohibits direct or indirect retaliation against any person who cooperates or assists in a disciplinary investigation.

Canon 3—Extrajudicial Activities

Canon 3 of the 2009 Ohio Code governs a judge’s participation in personal and extrajudicial activities. The rules in Canon 3 correspond to portions of Canons 2 and 4 of the former code, although there are several new and modified provisions.

Rule 3.1—Extrajudicial Activities in General

The former code authorized participation in a broad range of extrajudicial activities, provided involvement in a specific activity was not prohibited by law, did not lead to frequent disqualification, or did not appear to compromise the judge’s impartiality. Rule 3.1 incorporates these provisions, but adds two additional standards that may prevent a judge from engaging in an otherwise permissible activity: (1) will the activity interfere with the proper performance of judicial duties; or (2) will the activity involve conduct that appears to a reasonable person to be coercive? In addition, a judge who participates in an extrajudicial activity may not make more than incidental use of court property or personnel in relation to that activity, such as the limited receipt of telephone calls or emails.

Rule 3.5—Confidentiality

Rule 3.5 prohibits a judge from knowingly disclosing or using nonpublic information, acquired in the judge’s official capacity, for any purpose unrelated to judicial duties. Although new to the Ohio Code, this rule restates a prohibition contained in the Ohio Ethics Law [R.C. 102.03(B)] applicable to all public officials. Comments [1A], [3], and [4] are added to elaborate on the prohibition and are taken from former Canon 3(B)(11).

Rule 3.6—Affiliation with Discriminatory Organizations

Rule 3.6 continues the long-standing prohibition against judicial membership in an organization that practices invidious discrimination. Sex, ethnicity, and sexual orientation are added to the list of prohibited bases of discrimination. Rule 3.6(B), which prohibits a judge from using the benefits or facilities of a discriminatory organization except in certain isolated instances, is a new standard added to the 2009 Ohio Code.

Rule 3.7—Religious, Charitable, and other Civic Activities

Rule 3.7 contains many of the same standards found in former Canon 2(B) that govern a judge's participation in educational, religious, charitable, fraternal, or civic organizations and activities. Although both the former and new rules authorize participation in such activities, a judge is barred from being involved in most forms of fundraising on behalf of the organization.

The former code prevented a judge from participating as a guest of honor, keynote speaker, or award recipient at a function that has a fundraising component. Rule 3.7(A)(5) continues this prohibition, but in a modified fashion. Under the new rule, a judge may appear, speak, or be honored at an organization's fundraising event, provided the judge's participation does not reflect adversely on the judge's independence, integrity, or impartiality. By way of example, this standard would allow a judge to be honored as a distinguished alumnus at an annual fundraising dinner for an educational institution, but would preclude the judge from being a featured speaker at a fundraising event sponsored by an organization whose members frequently appear before the judge in a representative or advocacy capacity.

Rule 3.7(B) is a provision new to Ohio that expressly allows a judge to encourage lawyers to provide pro bono legal services to low income individuals who may otherwise go unrepresented. The rule and accompanying Comment [5] clarifies a matter that was unclear to some judges under the former code.

Rules 3.11 – 3.15—Compensation, Gifts, and Financial Disclosure

Many of the provisions contained in the 2009 Ohio Code parallel the former code rules governing the receipt and reporting of extrajudicial income, gifts, and other things of value. To ensure the Code standards remain consistent with Ohio law applicable to all public officials, the provisions of the 2009 Ohio Code vary significantly from those found in the ABA Model Code.

Rule 3.11 continues to prohibit judicial involvement in many forms of outside financial and business activities, except for family investment and business activities. A new exception is added for writing and teaching activities, recognizing that some judges enter into business relationships to teach undergraduate courses or author law-related publications. These activities remain subject to the standards set forth in Rule 3.11(C).

Rule 3.12 allows a judge to receive compensation for extrajudicial activities, provided the compensation is reasonable, commensurate to the task performed, and does not appear to undermine the judge's independence, integrity, or impartiality. Comment [2] reminds judges that the solicitation or receipt of an honorarium is prohibited by the Ohio Ethics Law [R.C. 102.03(H)].

Rule 3.13 continues the prohibition contained in the former code on the receipt of gifts and other things of value, other than items specifically enumerated in Rule 3.13(A)(1) to (12) that do not tend to create an appearance of impropriety or otherwise case doubt on a judge's independence, integrity, or impartiality. These exceptions correspond to those found in the former code, but added to the list of exceptions are items with little intrinsic value such as

plaques, certificates, trophies, and greeting cards, rewards and prizes given as a result of random drawings or contests open to the public, and certain complementary invitations to law-related, charitable, and civic events.

Rule 3.14 addresses the receipt of expense reimbursements in a manner consistent with the former code, but now includes specific reference governing the receipt of waivers of fees or other charges associated with an event.

Rule 3.15 reminds judges of the obligation to file annual financial disclosure statements as required by the Ohio Ethics Law [R.C. 102.02]. Deleted from the 2009 Ohio Code is the requirement that judges file a separate statement of extrajudicial income. This statement, which may have predated the statutorily mandated financial disclosure statement, duplicated information reported on the statutory statement, and its elimination streamlines the financial disclosure requirements while ensuring the public continues to have access to reportable financial information.

Canon 4—Political and Campaign Activity

Canon 4 of the 2009 Ohio Code includes many of the same standards regulating the political and campaign activity of judges and judicial candidates that were contained in Canon 7 of the former code. There are four significant differences between the former code and 2009 Code.

Rule 4.1(A)(7)—Pledges, Promises, and Commitments

Canon 7(B) of the former code prevented a judge or judicial candidate from making a pledge or promise of conduct in office, other than the faithful and impartial performance of judicial duties, or any statement that commits or appears to commit the judge or judicial candidate with respect to cases or controversies likely to come before the court. This standard is replaced with the ABA Model Code provision that precludes a judge or judicial candidate, in connection with any cases, controversies, or issues that are likely to come before the court, from making any pledge, promise, or commitment that is inconsistent with the impartial performance of adjudicatory duties. Additional guidance regarding application of this standard is found in Comments [8] through [12] of Rule 4.1.

Rules 4.3(C) and (E)—Use of the Terms “Judge” and “Reelect”

Former Canon 7(D)(2) required a sitting judge, when running for a different judicial office, to identify the court on which the judge then serves. This matter is now addressed by the more general prohibition in Rule 4.3(C) and Comment [2]. Rule 4.3(E) also limits use of the term “reelect” where the judicial candidate has not been elected to or is not the current occupant of the office being sought.

Rule 4.6(E)—Definition of “In-kind” Contribution

Rule 4.6 contains several definitions, unique to Canon 4, that were contained in former Canon 7(A). The definition of “in-kind” contribution is modified to correspond to the statutory definition applicable to candidates for nonjudicial office. See R.C. 3517.01(B)(16).

Post-election Campaign Finance Statements

To promote greater access to campaign contribution and expenditure information, former Canon 7(C)(8) required successful judicial candidates to file copies of their campaign finance statements with the clerk of court. Because these statements are now readily available electronically through web sites maintained by the Secretary of State and county boards of election and in view of the cost associated with filing these statements in multi-county appellate districts, this duplicate filing requirement is not retained in the 2009 Ohio Code.