

The Arkansas Code of Judicial Conduct of 2009



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With its Per Curiam Order of April 23, 2009, the Supreme Court brought closure to a two year process, and adopted a new Code of Judicial Conduct, effective July 1, 2009. The Code, now binding on all Arkansas judges and judicial candidates, is the third Code to provide guidance and a basis for discipline. The Code, the result of 18 months of work, is strikingly different in its format from the predecessor, but markedly little changed from the substance of the prior Code.

Background:

1) In 1924 the American Bar Association adopted the Canons of Judicial Ethics. The 36 provisions included generalized admonitions and specific prohibitions.¹ These Canons were adopted by the Arkansas Judicial Council in September 1958, and in January 1963

the Supreme Court declared them “a proper code of standards for the judiciary of this state.”² The Canons were based upon ancient precedents, including the Book of Deuteronomy, the Magna Charta, and Bacon’s Essay of Judicature. In later years the Canons were criticized as “mere posturing” and not helpful on difficult issues.

2) The American Bar Association adopted the first Code of Judicial Conduct in August 1972. That Code was drafted by a 14-member committee which included Dr. Robert A. Leflar of Fayetteville and Edward L. Wright of Little Rock. The Code was adopted by the Arkansas Supreme Court in November 1973.³ Unlike the 1924 Canons, the Code was intended to be enforceable.⁴ Justice Conley Byrd dissented from its

1. See Final Report and Proposed Canons of Judicial Ethics, 9 A.B.A.J. 449 (1923).

2. Rules of the Supreme Court of Arkansas, 237 Ark. 997 (1963).

3. See Per Curiam of November 5, 1973, 255 Ark. 1075, 493 S.W.3d 422 (Appendix)(Code “constitutes proper standards for the Judiciary of this State”).

4. See Howard W. Brill, *The Arkansas Code of Judicial Conduct*, 35 ARK. L. REV. 247 (1981).

adoption, contending that the Code gave the appearance of legislating, that the only discipline of judges rests with the General Assembly through impeachment, and that the adoption of the Code violated the express separation of powers doctrine of Article IV of the Constitution.

3) That first version of the Code of Judicial Conduct was replaced in August 1990, with the American Bar Association adopting a new version of the Code. A twelve member Arkansas committee of six attorneys and six judges recommended that a slightly revised version be adopted in Arkansas.⁵ Effective July 5, 1993,⁶ it became binding on Arkansas judges. Both the 1973 and 1993 Codes had a similar format: statements of norms labeled Canons, specific sections under each Canon, and explanatory Commentary. The five Canons set forth in one normatory sentence a standard for judges. The 1993 Code also included a Preamble, Terminology and Application section.

In addition to switching to gender-neutral terminology, the 1993 Code streamlined the Canons on extra-judicial activities, barred membership in organizations that practice invidious discrimination, introduced a degree of reasonableness into the rules on dis-

qualification, required judicial intervention to prevent discrimination and harassment in the courtroom, and expanded permissible ex parte communications.⁷

4) In the following 15 years the Arkansas Code was modified on several occasions by the Court. The most significant changes, following the arrival of non-partisan elections with Amendment 80, were in the judicial campaign sections. In addition, the court made changes to provisions involving letters of recommendations, nepotism, and appearances before a legislative body. It also inserted provisions for the Arkansas Lawyer Assistance Program.⁸

Since July 1991 the Arkansas Judicial Ethics Advisory Committee, a branch of the Judicial Discipline and Disability Commission, has issued advisory opinions interpreting the Code of Judicial Conduct. Advisory opinions are given only on issues relating to prospective conduct and do not address issues of law.⁹

5) Following four years of study, the American Bar Association adopted the third version of the Code in February 2007. While preserving the Canons, which state “overarching principles of judicial conduct,” the format was

5. Judge Ellen Brantley, Judge Eugene Harris, Judge Cecil Tedder, Judge Rice VanAusdall, Judge Henry Wilkinson, Judge Randall Williams (Co-Chair), Howard W. Brill (Co-Chair) Carolyn Clegg, Herschel Friday, Martin Gilbert, John Stroud, Jr. and John W. Walker.

6. Per Curiam of July 5, 1993, 313 Ark. 735.

7. See *Recent Developments—Arkansas Code of Judicial Conduct*, 46 ARK. L. REV. 1047 (1994).

8. Per Curiam of December 7, 2000, 343 Ark. 780.

9. Advisory opinions of the Judicial Ethics Advisory Committee are cited in this article as JEAC.

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dramatically changed by going to a “Restatement” mode. The four Canons are implemented by 39 enforceable black letter Rules. The accompanying Comments contain both “aspirational statements and guidance in interpreting and applying the Rules.”¹⁰ The Canons are preceded by four sections: Preamble, Scope, Terminology and Application.

In June 2007 Arkansas Bar President Jim Sprott appointed a 16-member Task Force of attorneys and judges to evaluate the proposal and make recommendations to the House of Delegates of the Bar Association.¹¹ The Task Force included three members who had also served on the 1991-1992 committee.¹²

The Task Force met in the Fall of 2007 and the Spring of 2008; its preliminary recommendations were released for comment to all judges, interested groups of attorneys, and the public. After further revisions, the final recommendations were presented to the House of Delegates at Hot Springs in June 2008, which revised Rule 2.3 (and related provisions), and then approved the recommendations. A petition was filed with the Supreme Court, and after public comment, the Court, with only the deletion of one sentence from a comment, adopted the report.

Early in its deliberations, the Task Force developed several guiding principles: 1) the format and approach of the ABA proposal was preferable to the existing Code; 2) as far as possible, it would follow the ABA proposal to assist in uniform interpretation and to benefit from interpretations from other jurisdictions; 3) careful consideration and deference would be given to any prior Arkansas variations contained in the existing Code; and 4) the Task Force would keep in mind the realities of the judicial structure and experience in Arkansas.

This article is not intended to go through the Code provision by provision. The Rules speak for themselves. For example, new provisions, but non-controversial provisions of the Rules include: the judge’s authority to make reasonable accommodations to assist pro se litigants;¹³ the use of judicial letterhead for letters of recommendation;¹⁴ permission to meet with jurors after the trial;¹⁵ authority to respond to allegations concerning the judge’s conduct in a matter;¹⁶ and proper notice following the inadvertent receipt of an unauthorized ex parte communication.¹⁷

My intention is to highlight discussions of the Task Force, changes between old and new provisions, prior interpretations and their applicability to the new Code, and unresolved issues for the future. When appropri-

10. Center for Professional Responsibility, American Bar Association, Preface to Code of Judicial Conduct (2007).

11. The members were Howard Brill (Chair), Judge Kathleen Bell, Judge Ellen Brantley, Laurie Bridewell, Michael Crawford, Don Elliott, Frances Fendler, Judge John Finley, Donis Hamilton, Judge Kayo Harris, Judge Leon Jamison, Jim Simpson, Judge Kim Smith, Judge Gordon Webb, Judge Ralph Wilson, Patrick Wilson.

12. Brantley, Brill, Harris.

13. Comment [4] to Rule 2.2.

14. Comment [2] to Rule 1.3.

15. Comment [3] to Rule 2.8.

16. Rule 2.10(E).

17. Rule 2.9(B).

ate, reference will be made to opinions of the Judicial Ethics Advisory Committee, as well as decisions of the Arkansas Supreme Court.

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.

The relatively uncontroversial rules and comments that accompany and implement Canon 1 are little changed from the earlier Code. Although the admonition that judges are to “avoid impropriety and the appearance of impropriety” has been criticized on the grounds of vagueness, the language has been maintained in both the Model Code and the Arkansas Code.

The appearance of impropriety standard is not merely a generalized Canon, but a black letter Rule.¹⁸ Creating an appearance

of impropriety is an independent basis for discipline.¹⁹

Comment [5] to Rule 1.2 explains: “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.” Although this Rule, as with the other Rules, is a basis for discipline, the Code makes clear that not every transgression of a Rule should result in judicial discipline.²⁰ The Model Rules of Professional Conduct for attorneys removed the language of impropriety, but in light of Arkansas Supreme Court case law, the phrase has been retained in the Arkansas Rules of Professional Conduct.²¹

Impropriety, even in the absence of a specific prohibition, has been a basis for judicial discipline. For example, judges have been publicly disciplined for driving while intoxicated,²² writing checks with insufficient funds,²³ participating in a brawl in a tavern,²⁴

18. Rule 1.2.

19. See CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 21. For instances of this standard being applied, see Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63 (2005)(cases fall into categories of use of influence; favoritism in appointments; close and personal relationships; association with criminals; manifestations of bias).

20. See Comment [6] to Scope.

21. See Comment [37] to Rule 1.7: “As an integral part of the lawyer’s duty to prevent conflict of interests, the lawyer must strive to avoid not only professional impropriety, but also the appearance of impropriety. The duty to avoid the appearance of impropriety is not a mere phrase. It is part of the foundation upon which are built the rules that guide lawyers in their moral and ethical conduct. This obligation should be considered in any instance where a violation of the Rules of Professional Conduct are at issue. The principle pervades these Rules and embodies their spirit.” See also Comment [10] to Rule 1.9 and Comment [9] to Rule 1.10.

22. 1999 and 2001 Annual Reports, Judicial Discipline & Disability Commission.

23. 1999 Annual Report, Judicial Discipline & Disability Commission.

24. 1996 Annual Report, Judicial Discipline & Disability Commission.

failing to pay annual attorney license fees,²⁵ failing to pay sales tax on a motor home,²⁶ participating in possible shoplifting,²⁷ and engaging in a sexual relationship with an attorney.²⁸

Rule 1.3 reminds the judge not to engage in activities that might “abuse the prestige of judicial office to advance the personal or economic interests of the judge or others.” Although a judge may write a letter of recommendation,²⁹ and may serve on a jury,³⁰ a judge shall not testify voluntarily as a character witness,³¹ and should not write a letter to a sentencing judge.³² Newly elected or appointed judges may accept judicial robes from a bar association.³³

Canon 2

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

Rule 2.3 bars the judge from manifesting bias or prejudice in the performance of judicial conduct. Similarly, it requires the judge to insist that court officials and attorneys likewise refrain from manifesting any such conduct. The intent of that provision has been in the Code since 1993. But the ancillary ques-

tion has been how to define the inappropriate bias or prejudice. At least three possibilities exist. A) The Arkansas Code of 1993 prohibited bias or prejudice “based upon race, sex, religion or national origin, or other similar factors.” In another provision, the language was “including but not limited to bias or prejudice based upon race, sex, religion or national origin.” The goal was to emphasize those groups and classes that have been uniformly grouped and protected by statutory and case law, but also to recognize that bias and prejudice can be manifested against others. B) The 2007 Model Code vastly expanded the list of protected groups and classes from four to 12: “race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.” In expanding the list, the drafters presented examples of mistreatment of litigants or witnesses within these groups. C) The third option, which was not considered by the Task Force, was to follow the recent proposal of the Judicial Conference of the United States by substituting the language of “personal characteristics.” That proposal eliminated entirely the practice of listing categories of protected persons, expressing instead, in general terms, the principle of avoiding bias and prejudice, and the corre-

25. 1995 and 2004 Annual Reports, Judicial Discipline & Disability Commission.

26. 2002 Annual Report, Judicial Discipline & Disability Commission.

27. 2000 Annual Report, Judicial Discipline & Disability Commission.

28. 1991 Annual Report, Judicial Discipline & Disability Commission.

29. Comment [2] to Rule 1.3.

30. JEAC 98-06.

31. Rule 3.3. *See* JEAC 2000-07 (testimony by affidavit likewise not permitted).

32. JEAC 2000-03; JEAC 2005-01.

33. JEAC 2000-10.

sponding and affirmative principle of treating litigants and others with civility and respect. This third approach rejected the specific list of 12 categories by pointing out that, first, because of the evolving law of discrimination, the list might be outdated, and second, the substantive law distinguished among different types of discriminatory conduct arising in different contexts.

The Task Force followed the recommendation of the American Bar Association and recommended (B). But at the Annual Meeting in June 2008 the House of Delegates, in making its only change in the Task Force's recommendation, substituted (C). That language was accepted by the Arkansas Supreme Court. Now Rule 2.3 provides that a judge shall perform the duties of judicial office "without bias or prejudice"; shall not "by words or conduct manifest bias or prejudice, or engage in harassment"; and shall require lawyers "in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others. Comment [2] to Rule 2.3 has examples of the manifestations of bias or

prejudice: "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". Corresponding changes were made in Comment [3] to Rule 3.1 and Comment [2] to Rule 3.6. Judges have an affirmative obligation to personally refrain from manifesting bias or prejudice, and to demand similar conduct from court officials and attorneys.

Rule 2.5 requires a judge to dispose of matters competently, diligently and efficiently. A judge should be responsive to charges or concerns that a matter is delayed or continued to benefit an attorney or litigant.³⁴ The Court has issued writs of mandamus to compel trial judges to rule upon pending matters,³⁵ and has referred matters to the Judicial Discipline Commission for investigation.³⁶

Rule 2.9 generally prohibits a judge from initiating, permitting or considering ex parte communications.³⁷ However, the Rule itself contains four exceptions, and unique fact pat-

34. *See Eason v. Erwin*, 300 Ark. 384, 781 S.W.2d 1 (1989) (motion for summary judgment in a debt collection case pending for seven months).

35. *Ladwig v. Davis*, 340 Ark. 415, 10 S.W.3d 461 (2000).

36. *Hall v. Simes*, 350 Ark. 194, 85 S.W.3d 509 (2002); *Concrete Construction, Inc. v. Sawyer*, 347 Ark. 1009, 69 S.W.3d 422 (2002).

37. In addition, the Arkansas Constitution, Article 7, Section 23, prohibits judges from commenting on the evidence. Such comments frequently, but not consistently, result in a mistrial. *See Laura Braden Foster, Note, Judicial Comments on the Evidence in Arkansas*, 51 ARK. L. REV. 801 (1998).

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terns, such as judicial communications with the victim in domestic abuse matters, that call for judicial flexibility.³⁸ Failure to adhere to this mandate may require disqualification of the judge and disavowal of the information obtained.³⁹ But in the absence of a clear violation and demonstrable prejudice, recusal is not required.⁴⁰ Rule 2.9(C) prohibits a judge from undertaking an independent factual investigation. That Rule governs information available in all mediums, including electronic, and extends to the judge's law clerks and other staff.⁴¹

Model Rule 2.9(A)(4) provides that: "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." After receiving feedback from the bench and bar, the Task Force deleted that language. It was significant that the Supreme Court had deleted similar language when adopting the 1993 Code. Rule 2.6(B) allows a court to encourage, but not coerce, parties into a settlement. Comment [2] to Rule

2.6 lists six non-exhaustive factors for a judge to consider in deciding upon an appropriate settlement practice.⁴² Arkansas statutory law encourages the use of mediation to resolve disputes.⁴³ Courts are authorized to issue, upon motion of all the parties, orders of reference to appropriate dispute resolution processes.⁴⁴ However, judges are not specifically empowered to use a form of "shuttle diplomacy" and be the carriers of offers and counter-offers back and forth between warring parties. Neither the statutes nor the Code authorize such a judicial function.

To avoid any hint of unfairness or interference, judges are not to make any public comment on any pending proceeding in any court.⁴⁵ This restriction bars a state appellate judge from commenting on testimony given in a federal district court, whether orally or in a press release, until final disposition of the federal matter.⁴⁶

Rule 2.11 makes no substantial changes in the rules on judicial disqualification. Extensive Arkansas case law, which has in

38. JEAC 2002-09.

39. Horton v. Ferrell, 335 Ark. 366, 981 S.W.2d 88 (1998) (special master disqualified and report stricken because of *ex parte* communications).

40. Mallory v. Hartsfield, 350 Ark. 304, 86 S.W.3d 863 (2002) (*ex parte* conversation between attorney and judicial law clerk; violation promptly cured); Kail v. State, 341 Ark. 89, 14 S.W.3d 878 (2000) (communications regarding order permitting visit to crime scene).

41. See Charles E. Geyh and W. William Hodes, Reporters' Notes to the Model Code of Judicial Conduct (2009) 40-41.

42. See Charles E. Geyh and W. William Hodes, Reporters' Notes to the Model Code of Judicial Conduct (2009) 34.

43. See ARK. CODE ANN. § 16-7-201.

44. ARK. CODE ANN. § 16-7-2-202. For a discussion of a variety of ADR approaches, see Judith Kilpatrick, *How Much Do You Know (or Care) About Alternative Dispute Resolution?*, 1996 ARK. L. NOTES 53. See also the articles by Robert Moberly, Judith Kilpatrick, James J. Alfini, Catherine G. McCabe and Douglas H. Yarn in the Symposium Issue on Alternative Dispute Resolution, 54 ARK. L. REV. 161-284 (2001), suggesting that attorneys have a duty to advise clients of ADR options.

45. Rule 2.10.

46. JEAC 2000-02.

the past two decades applied those governing standards,⁴⁷ should not change. The addition of Rule 2.11(A)(5), requiring disqualification if a judge or a candidate made a public statement that appears to commit the judge to a particular result or ruling, is a logical addition in light of the clarification in the free speech of judges and candidates. Model Rule 2.11(A)(4) called for the State to designate a dollar amount of campaign contributions from a party, an attorney or a law firm, and required judicial disqualification when a party, an attorney or firm who had contributed in excess of that amount to the judge's campaign appeared before the judge. The Task Force deleted that requirement. However, recognizing the possibility of a conflict or the appearance of impropriety, the Task Force added Comment [4A].⁴⁸

Likewise, Model Rule 2.13(B) called for the state to designate a dollar amount of campaign contributions, and those who had contributed in excess of that could not be appointed to a position by the judge. The Task Force con-

cluded that, because Arkansas judges make few appointments and this issue had not arisen in Arkansas, the provision should be deleted. The addition of Rule 2.13(D) continues the Arkansas Rule, added in 1990 following a series of newspaper articles concerning the judicial hiring of spouses and relatives, that a judge may hire a spouse or other relative only upon an affirmative showing to the Judicial Discipline and Disability Commission that it is impossible to hire any other qualified person to fill the position.

In 2000 the Arkansas Supreme Court adopted the Arkansas Lawyer Assistance Program.⁴⁹ Appropriate changes were made in the Arkansas Rules of Professional Conduct and the Code of Judicial Conduct. Those changes have been incorporated into Comment [3A] to Rule 2.14 and Comments [3A] and [4A] to Rule 2.15. Judges with a reasonable belief that the performance of a judge or lawyer is impaired are directed to take appropriate action, including a confidential referral to an assistance program.⁵⁰

47. See the collected case law in HOWARD W. BRILL, *ARKANSAS PROFESSIONAL AND JUDICIAL ETHICS* (7th ed. 2006) 426-434.

48. Note: the use of [A] to a Comment indicated that it was a unique Arkansas addition, without renumbering the other comment. Comment [4A]: "The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or publicly supported the judge in his or her election does not of itself disqualify the judge. However, the size of contributions, the degree of involvement in the campaign, the timing of the campaign and the proceeding, the issues involved in the proceeding, and other factors known to the judge may raise questions as to the judge's impartiality under paragraph (A)." In exceptional cases campaign contributions to a judge may create a probability of bias, and then due process requires that the judge disqualify himself from hearing the matter. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009)(reversal of state decision for failure of state supreme court justice to recuse).

49. See *Per Curiam* of December 7, 2000, 343 Ark. 780.

50. Rule 2.14.

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Rules 2.15 and 2.16 require a judge to take appropriate action with regard to attorneys and judges who violate the governing ethical standards, including referrals to the governing disciplinary authority. Such reports have been publicly noted in recent years.⁵¹

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.

In the past decade Arkansas has considered, indeed struggled with, the permissible scope of extrajudicial activities. Under the new Code, as before, judges may participate in such activities, provided that the activities do not interfere with the proper performance of the judge's judicial duties, require frequent disqualification by the judge, or appear to un-

dermine the judge's independence, integrity or impartiality.⁵² The new Code is intended to give judges greater latitude to engage in activities that are law-related.⁵³ Law-related activities are those that involve the law, the legal system or the administration of justice.

On the underlying and controversial issue of free speech, the Task Force was divided. While some members clearly preferred the traditional approach under which judges and candidates deferred from speaking on controversial political and social issues, others believed that developing constitutional law,⁵⁴ changing public acceptance and common sense should afford to both judges and candidates essentially the same free speech rights as any other citizen.⁵⁵

As adopted, the prior enforceable restrictions on judges have, in large part, been removed. Arkansas judges may comment on the wars in Iraq and Afghanistan, may declare themselves to be pro-life or pro-choice,

51. Federal and state judges have referred attorneys with increasing frequency to the Committee on Professional Conduct for investigation and possible sanctions. For example, *White v. Priest*, 348 Ark. 783, 73 S.W.3d 572 (2002) (strident and disrespectful language, and breach of oath of office as attorney); *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002) (disrespect to court); *State v. Warren*, 345 Ark. 508, 49 S.W.3d 103 (2001) (frivolous appeals of criminal matter by the Office of Attorney General); *Ortho-Neuro Medical Associates v. Jeffrey*, 344 Ark. 72, 37 S.W.3d 577 (2001) (conduct disruptive to tribunal); *Hendrix v. Winter*, 70 Ark. App. 229, 16 S.W.3d 272 (2000) (false statement of fact); *LeClere v. State*, 70 Ark. App. 235, 16 S.W.3d 276 (2000) (misleading statements); *Jones v. Clinton*, 36 F. Supp. 2d 1118 (E.D. Ark. 1999) (false statements in deposition). Likewise the Supreme Court has referred trial judges to the Judicial Discipline Commission. *Concrete Construction, Inc. v. Sawyer*, 347 Ark. 1009, 69 S.W.3d 422 (2002) (failure to render a decision within reasonable time); *Walls v. State*, 341 Ark. 787, 20 S.W.3d 322 (2000) (improper public comments and ex parte communications).

52. Rule 3.1.

53. See CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 58. The Judicial Ethics Advisory Committee had previously opined that judges may take a public stand on a proposed constitutional amendment on judicial elections, participate in the public debate on a bond election for a new courthouse, and serve on a committee formed to support the bond proposal. See JEAC 94-01; JEAC 94-04.

54. See *Republican Party of Minnesota v. White*, 536 U.S. 765, 153 L. Ed. 2d 694, 122 S. Ct. 2528 (2002); *Republican Party of Minnesota v. White*, 416 F. 3d 738 (8th Cir. 2005).

55. See Peter Gregory Juetten, Case Note, *Should They Stay or Should They Go: The Implication of Republican Party of Minnesota v. White on Restrictions of Speech During Judicial Election Campaigns*, 56 ARK. L. REV. 677 (2003).

may discuss the wisdom and morality of lotteries and casinos, and may freely write and speak on any topic. Such comments are no longer a basis for judicial discipline. Judges and judicial candidates have only three clear restrictions: (A) They may not “knowingly, or with reckless disregard for the truth, make any false or misleading statement”;⁵⁶ (B) they may not “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”;⁵⁷ and (C) they may 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.”⁵⁸ However, to give guidance and to suggest caution, the Task Force added, and the Court adopted, Comment [5A] to Rule 3.1:

Before speaking or writing about social or political issues, judges should consider the impact of their statements. Comments may suggest that the judge lacks impartiality. *See* Rule 1.2. They may create the impression that a judge has or manifests bias or prejudice toward individuals with contrary social or political views. *See* Rule 2.3. Public comments may require the judge to disqualify himself or herself

when litigation involving those issues comes before the judge. *See* Rule 2.11. 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.

As the Scope to the Code clearly indicates, Comment [5A], unlike the Rules, is not an enforceable provision. It provides guidance and identifies aspirational goals.⁵⁹

Rule 3.2 provides that a judge shall not appear voluntarily at a public hearing, or otherwise consult with an executive or a legislative body or official. To do so risks both improper judicial pressure and undermining judicial independence. However, the rule countenances several exceptions. Certainly judges can appear and consult on matters concerning the law, the legal system and the administration of justice.⁶⁰ Likewise, judges can appear or consult on matters that may directly affect them as private citizens, such as zoning decisions that may impact their own lands.

The 1993 Code permitted a judge to appear or consult “when acting pro se in a matter involving the judge or the judge’s interests.” That language was the basis for a letter of admonishment against Court of Appeals Judge Wendell Griffen for comments that he made to a group of state legislators. In discussing

56. Rule 4.1(A)(11).

57. Rule 4.1(A)(12).

58. Rule 4.1(A)(13).

59. *See* Scope, Paragraphs [3] and [4].

60. JEAC 2001-03 (judges permitted to contact members of General Assembly in regard to judicial reorganization plan; JEAC 2003-04 (judges may host dinner for legislators to discuss legislative issues of interest).

race relations at the University of Arkansas in light of the dismissal of basketball Coach Nolan Richardson, he had commented on racial inequities, reminded them that they controlled the University budget, and in conclusion urged the legislators to “send a budgetary vote of no confidence ... Show them the money.” His position before the Judicial Discipline and Disability Commission was that he had spoken to the legislators on his own behalf, and that, in light of his involvement in University affairs over three decades, his “interests,” as permitted by the Code, included race relations.⁶¹ The Commission rejected that position, finding that his comments were not related to the law, the legal system or the administration of justice. Further, his appearance was not “in connection with a matter involving himself or his interests,” reading the language as limited to financial or property interests, not political or topical issues. However, the Supreme Court reversed the admonishment, concluding that the language in the Code was ambiguous and unenforceable.⁶² A few months later,

the Court resolved the issue by removing the debated language entirely. Judges in effect were barred from even talking with government officials about their own property.⁶³

In addressing this issue, the Task Force, and the Supreme Court, adopted the ABA’s recommendation: judges may appear or consult “when the judge is acting pro se in a matter involving the judge’s legal or economic interests.” Returning to the original question of whether a judge may appear at a public hearing or consult with an executive or legislative body or official and discuss race relations at a state university, such an appearance is not permitted by the language of Rule 3.2(C). Whether such comments could be construed as law-related, and therefore permissible under Rule 3.2(A), or whether such comments are ultimately protected by the First Amendment are different questions.⁶⁴

Rule 3.4 clarifies and reaffirms the standard that judges should not accept appointment to a governmental committee, board, commission, or other position. However, a judge may accept appointment to such a posi-

61. For his comments and reflections on the disciplinary proceedings and the judicial opinions, as well as the underlying policy and constitutional issues, see Honorable Wendell L. Griffen, *Judicial Independence and Accountability Meet Extra-Judicial Speech and the First Amendment: An Uneasy Co-Existence*, 28 U. ARK. LITTLE ROCK L. REV. 103 (2005).

62. Griffen v. Arkansas Judicial Discipline and Disability Commission, 355 Ark. 38, 130 S.W.3d 524 (2003). The three dissenters argued that the Canon was not vague; that his conduct in lobbying the legislature was egregious; that he had used the prestige of judicial office to advance private interests; that a judge cannot cast aside judicial robes and act as another citizen. See Benjamin D. Jackson, Case Note, Griffen v. Arkansas Judicial Discipline and Disability Commission: An Unclear Opinion on Vagueness, 58 ARK. L. REV. 983 (2006).

63. See Per Curiam of July 1, 2004, 358 Ark. 499.

64. See the comments by the author of the majority opinion, Honorable Robert L. Brown, *From Earl Warren to Wendell Griffen, A Study of Judicial Intimidation and Judicial Self-Restraint*, 28 U. ARK. LITTLE ROCK L. REV. 1, 13-14 (2005).

tion “that concerns the law, the legal system, or the administration of justice.” Under the prior Code the Judicial Ethics Advisory Committee had previously advised judges not to serve on the Sex Offenders Assessment Committee,⁶⁵ an advisory committee to the State Hospital⁶⁶ or the Arkansas State Parks and Tourism Committee,⁶⁷ but permitted judges to serve on the Board of Advisors for Legal Assistants at a community college,⁶⁸ a planning board of a quasi-governmental agency devoted to the administration of justice,⁶⁹ and the Arkansas Commission on Child Abuse.⁷⁰

Rule 3.6 prohibits a judge from being a member of, or using the facilities, of any organization that practices invidious discrimination. Comment [2] recognizes that whether an organization practices invidious discrimination is a complex question, which cannot be determined merely by examining the membership rolls. Arkansas retains its own Comment [2A], which provides examples of instances that do not constitute invidious discrimination. However, public approval of, or participation in any discrimination that gives the appearance of impropriety is a violation of the Code. Comment [4] clarifies that a judge’s membership in a religious organization cannot be construed as a violation of the

rule against participating in discriminatory organizations. Ultimately the judge’s own conscience must determine whether participation in an organization violates the Rule.⁷¹

Subject to the general restrictions on extrajudicial activities in Rule 3.1, a judge may participate in educational, religious, charitable, fraternal and civic organizations that are non-profit. That broad description covers organizations ranging from Rotary to the League of Women Voters, from churches to Scouts, from environmental organizations to gun organizations, from pro-life groups to pro-choice groups. Rule 3.7 specifically permits a judge to participate in managing assets, planning fund-raising, appearing and speaking at events. Members of the Task Force voiced concern about being disciplined for inviting a person to join Rotary or attend church. Accordingly, Arkansas modified the Model Rule and specifically authorized judges to solicit memberships in such organizations, provided the solicitation is done in a non-coercive fashion.⁷²

Soliciting membership for an organization is distinguished from soliciting funds for that organization.⁷³ Solicitation of funds abuses the prestige of the judicial office and may have a coercive element. Neither the worthiness

65. JEAC 2004-04.

66. JEAC 93-01.

67. JEAC 96-10.

68. JEAC 2001-01.

69. JEAC 96-01.

70. JEAC 2003-02.

71. Comment [2A] to Rule 3.6. *See also* JEAC 2000-04 (whether judge could serve on board of directors of Country Club of Camden).

72. Rule 3.7(A)(3).

73. *See* JEAC 2004-3 (judge cannot solicit funds for charitable organizations, even if the organization and the prospective donee are located outside Arkansas). The restrictions on fund-raising for charitable organizations apply to judges, but not to candidates for judicial office. JEAC 2002-01.

of the cause, nor the innocent nature of the fundraising, nor the geographical separation can justify the solicitation of funds. Judges cannot participate in a fund-raising athletic competition for a local charity,⁷⁴ or serve on a fund raising committee for the local youth club.⁷⁵ Judges cannot solicit funds for charitable organizations, even if the organization and the prospective donee are located outside Arkansas.⁷⁶

A judge may serve as an officer or director of such an organization, but not if it is likely to be engaged in adversary proceedings in the jurisdiction.⁷⁷ Likewise, a judge may speak at an event sponsored by such an organization. But if the event is a fund-raising event, the judge may speak only at an event of a law-related organization.⁷⁸ Therefore, prior advisory opinions that a judge could not

speak at a Philander Smith College dinner or at a church event when part of the ticket price would go to support alumni activities or scholarship funds remain valid.⁷⁹ In contrast with the prior Code, a judge may appear and speak at fund-raising events of law-related organizations.⁸⁰

Minor and non-coercive participation in fund-raising events sponsored by an educational or religious organization is permitted. For example, a judge may serve as an usher or food server at such events.⁸¹ Note that examples of the judge serving as cashier or ticket taker are not included.⁸² Likewise, a judge's name and identification may be listed on fund-raising letterhead, when all members are similarly identified.⁸³ Such announcement is not viewed as coercive and does not abuse the prestige of the judicial office.⁸⁴ A

74. JEAC 93-03.

75. JEAC 94-09.

76. JEAC 2004-05.

77. Rule 3.7(A)(6). *See* JEAC 93-05 (judge may serve on Board of non-profit organization intended to help juvenile offenders; JEAC 2009-02 (judge and family members may create non-profit corporation to sell Gospel music, but judge should be alert to applicable Code provisions). In some instances an educational organization may also be governmental, raising the issue of whether Rule 3.4 or Rule 3.7 governs. On occasion the Judicial Ethics Advisory Committee concluded that the role was more educational than governmental. *See* JEAC 95-03 (judge permitted to serve on advisory board for public technical college); JEAC 2007-01 (judge permitted to serve on Board of Visitors for University of Arkansas at Fort Smith).

78. Rule 3.7(A)(4).

79. JEAC 92-02; JEAC 94-03.

80. *See* CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 70. *See* JEAC 2005-07 (a judge could not speak or be a "roaster" at a banquet of the Northeast Arkansas Legal Support Professionals; query whether that is a law-related organization).

81. *See* Comment [3] to Rule 3.7.

82. *See* CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 71.

83. Comment [4] to Rule 3.7.

84. *See* CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 71.

judge may participate in a bluegrass band that provides background music for a charitable fund-raising event.⁸⁵

Some organizations that fall within Rule 3.7 may be so associated with one side in legal disputes or issues that membership or association would cast reasonable doubt on a judge's ability to act impartially. Accordingly, Arkansas judges have been advised that they may not have or continue membership in the American Trial Lawyers Association or the Arkansas Trial Lawyer Association,⁸⁶ and cannot be a Judicial Fellow of the organization.⁸⁷ But judges may attend ATLA meetings and forums, speak at ATLA programs, and participate in similar ways.⁸⁸

The Rules place restrictions on judges fulfilling fiduciary roles,⁸⁹ bar a judge from serving as an arbitrator or mediator,⁹⁰ and forbid a judge from engaging in the practice of law.⁹¹ Arkansas judges have been removed from the bench, in part, for practicing law in violation of this rule.⁹² However, the judge may act pro

se and may, without compensation, review documents and give transactional advice to family members.

Lawyers leaving firms to assume full-time judicial duties may be compensated for work performed before departure pursuant to an employment or partnership agreement, but cannot be compensated for work performed after departure.⁹³ Nor may a judge receive "client attraction funds" for referring a client to the former firm. Attempts to transfer interests in pending litigation or a law firm to a blind trust are equally likely to violate the restrictions on the practice of law and the appearance of impropriety.⁹⁴

Rules 3.11 - 3.15, which address the financial aspects of judges' personal and extrajudicial activities, are the most significant organizational change of the new Code.⁹⁵ Although the prior specific authorization that judges could engage in "remunerative activities" has been removed, those activities are not prohibited.⁹⁶ In general, judges should

85. JEAC 93-06.

86. JEAC 99-04; 99-07.

87. JEAC 2001-02.

88. JEAC 99-06; JEAC 99-07.

89. Rule 3.8. A judge cannot serve as the trustee of a life insurance trust, even when established by a long-time friend. JEAC 2004-05.

90. Rule 3.9.

91. Rule 3.10.

92. *Judicial Discipline and Disability Commission v. Thompson*, 341 Ark. 253, 16 S.W. 3d 212 (2000).

93. JEAC 96-09.

94. *See* JEAC 2005-02.

95. *See* CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 55.

96. *See* Comment [1] to Rule 3.11(A).

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avoid financial activities that will interfere with judicial duties; involve the judge in frequent transactions or continuing business relationships with lawyers likely to come before the court⁹⁷ or lead to frequent disqualification of the judge.⁹⁸ Judges may hold and manage personal and family investments.⁹⁹ However, judges may not serve as an officer or director of any business entity, except for a family enterprise.¹⁰⁰

In accord with those general guidelines, judges are free to write books¹⁰¹ and earn royalties; give speeches and be compensated; serve as referees for high school football games for compensation;¹⁰² teach a course for paralegals at a junior college;¹⁰³ and teach evening courses at a state university.¹⁰⁴ Rule 3.12 specifically permits a judge to accept

reasonable compensation for extrajudicial activities.¹⁰⁵

Rule 3.13 establishes three tiers of gifts. A) Gifts, regardless of value, cannot be accepted by a judge if prohibited by state law or if acceptance “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”¹⁰⁶ B) Minor gifts may be accepted by the judge and need not be reported. Those gifts include ordinary social hospitality, items with little intrinsic value, awards and prizes in random drawings, and scholarships and fellowships available on the same basis to others.¹⁰⁷ The same subsection permits a judge to accept a gift, loan, bequest or anything of value, whether from a relative or friend (including a lawyer) when that relative or friend is so close to the judge that dis-

97. Rule 3.11(C)(3). For example, a newspaper published a series of articles focusing on real estate transactions and joint ownership between a judge and a local attorney.

98. Rule 3.11(C)(2). Judges should not have a landlord-tenant relationship with attorneys likely to appear before them; the presence of the relationship requires recusal. JEAC 97-03 and JEAC 97-05. *Compare* Black v. Van Steenwyk, 333 Ark. 629, 970 S.W.2d 280 (1998)(dissenting opinion of Justice Brown relied on advisory opinions in finding that the trial judge had abused his discretion in not recusing).

99. Rule 3.11(A).

100. Rule 3.11(B).

101. JEAC 96-04 (Supreme Court justice may write book and give speeches); JEAC 2005-06 (judge may appear in judicial robes in photograph on front of book).

102. JEAC 92-04.

103. JEAC 95-05.

104. JEAC 2000-06.

105. Comment [1] to Rule 3.12 permits “honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing and other extrajudicial activities.” The interpretation has been offered that Rule 3.11 permits only those financial and business activities specifically identified. *See* CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 77. However, that is inconsistent with the language in Comment [1]: “financial activities, including...” , as well as Rule 3.12.

106. Rule 3.13(A).

107. Rule 3.13(B).

qualification would be required under Rule 2.11.¹⁰⁸ Such gifts are unlikely to cause any reasonable person to question the judge's impartiality.¹⁰⁹ C) A judge may accept, but must then publicly report gifts that accompany a public testimonial; invitations to attend certain events without charge; and gifts, benefits and items of value received from a party, person or lawyer who has appeared or who is likely to appear before the judge.¹¹⁰ These gifts are publicly disclosed to preserve public confidence in the integrity, impartiality and independence of the judiciary.¹¹¹

Applying these rules, does the Code permit a judge to accept the following gifts? 1) A Christmas fruit cake, with a value of \$25? Yes, because the fruit cake constitutes ordinary social hospitality and has limited or little intrinsic value.¹¹² 2) A gift of a Mediterranean cruise from a wealthy in-law? Yes, because the judge would be required to recuse if the in-law appeared in front of the judge in court.¹¹³ Note that neither the fruit cake, nor the cruise, need to be reported under the Code, unless the Code is overridden by state law;¹¹⁴ 3) A gift of a set of golf clubs, valued at \$500, from the judge's former law

partner and friend. Yes, however, as a gift of value, it must be reported.¹¹⁵ 4) The same gift of golf clubs, but from a firm that has a case pending in the judge's court. No, this gift would appear to a reasonable person to undermine the judge's impartiality¹¹⁶ and acceptance would appear to a reasonable person to be improper.¹¹⁷

Despite the preceding examples, the Rule on gifts may be difficult to apply. Common sense suggests that the judge has four options, not mutually exclusive, to guard against accusations or even discipline with regard to a questionable gift: 1) Decline the gift; 2) Report the gift on the annual state reporting form; 3) When the parties appear in court in a pending matter, announce the gift on the record; and 4) Recuse.

Rule 3.14 and 3.15, which govern reimbursement of expenses and public reporting requirements, have been changed from the prior Code, modified from the Model Code, and simplified. Under the prior Code judges had a dual reporting requirement: first under the Code, and second under state statutes. The deadlines were different, the reporting standards varied, and the mechanics of

108. Rule 3.13(B)(2), Comment [2].

109. See CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 82.

110. Rule 3.13(A).

111. See CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 82.

112. See Comment [4] to Rule 3.13.

113. See Comment [2] to Rule 3.13.

114. Rule 3.15.

115. Rule 3.13(A).

116. Rule 3.13(A).

117. Rule 1.2.

filing the reports were in conflict. The Task Force examined both and concluded that the statutory requirements were far more comprehensive, were revised periodically by the legislature, and governed all public officials. Accordingly, the scope of reporting, the time for reporting, the manner of reporting and other issues are now determined by state law, and not the Code itself.¹¹⁸ Judges are required to publicly report compensation received for extrajudicial activities, gifts received, and expense reimbursement.¹¹⁹ Reimbursement of expenses from governmental entities need not be reported.¹²⁰

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.

Canon 4 governs and restricts the political activity of all judges generally. Special provisions govern judges and non-judges involved in judicial campaigns. In reviewing the Model Rules governing judicial and political activity, the Task Force modified them in light of the prior Arkansas Code, the non-partisan elections of Amendment 80, and Arkansas ju-

dicial campaign experience.

For the first time public judicial campaigns have a beginning point: 365 days before the first applicable election.¹²¹ From that date on candidates may speak publicly through any medium; attend or purchase tickets for dinners or other events, including those sponsored by a political organization; seek, accept, or use endorsements from any person or organization other than a partisan political organization; and generally engage in political activities.¹²² For example, the candidate may speak to environmental and civic organizations, buy tickets for the Greene County Democratic Party fish fry, speak to the Sebastian County Republican Women luncheon, attend the Gillett Coon Supper, and seek the endorsement of a newspaper. However, judges and candidates may not publicly identify themselves as members of a party, seek party endorsements, speak on behalf of or against other candidates, or lend their names to a party.¹²³

Earlier provisions of the Code had prohibited a candidate from personally seeking expressions of public support.¹²⁴ That restriction has been removed. A candidate may approach individuals and ask for their public support, whether to request their names in a newspaper advertisement, to ask for a sign to be placed in their yards, to offer a bumper

118. Rule 3.15(B).

119. Rule 3.15(A).

120. Comment [4A] to Rule 3.14.

121. Rule 4.2(B).

122. Rule 4.2(B).

123. Rule 4.1(A)(1,2,3,6,7).

124. The Code prior to 2001 had barred candidates from personally Seeking public support. See JEAC 95-04 and JEAC 99-08. The post Amendment 80 revisions removed that limitation.

sticker, or to seek newspaper editorial support. However, those requests are distinct from requests for contributions of money or other financial support, which are expressly prohibited.

Two activities permitted by the Model Rules were deemed inappropriate by the Task Force, and thus are not allowed in Arkansas: Candidates may not make contributions to a political organization or candidate for public office, and candidates may not publicly endorse or oppose candidates for the same judicial office.¹²⁵ The intent of these changes is to remove Arkansas judges and candidates a step further from the partisan political process.

In one typically Arkansas distinction, Arkansas departed from the Model Rule by adding Comment [6A] to Rule 4.1: “Judges, even when not during a judicial campaign, may attend or purchase tickets for dinners or other events sponsored by a political organization.” The Task Force believed that such events as fish fries and barbecues are inherently a part of Arkansas public life, and judges should not be compelled to withdraw from such activities.

It is important to emphasize the different treatment between an event for a political organization and for a political candidate; judges may attend the former, but not the latter. Judges and judicial candidates may

not purchase tickets, nor attend, events such as “Clinton for President Rally,” “Beebe for Governor luncheon,” and “Boozman for Congress fish fry.” That intent is clearly demonstrated in the supporting memoranda that were submitted to the Court. While the definition of a political organization¹²⁶ in the terminology is broad enough to support a different reading, at least for disciplinary purposes,¹²⁷ the Task Force’s intent is supported by the specific prohibition on publicly endorsing or opposing a candidate for any public office.¹²⁸ Further, the Task Force deleted the language “a candidate for public office” from Rule 4.2(B)(4), further indicating that the candidate may attend the event sponsored by a political party or organization, but not a candidate.¹²⁹

A political organization can be a political party or an organization created to support the election of candidates. For example, an organization might exist solely or primarily to support candidates for political office that it deems to be pro-environment. A judge could attend or purchase a ticket from that organization. It would be helpful if the rules more precisely distinguished between a political organization, a political party, and a political candidate.

An apparent inconsistency exists with Rule 4.2(B)(4) which says that judicial candidates may attend such events only during the 365-day campaign. The result is judges

125. The Arkansas Code deleted Model Rule 4.2(B)(3) and (B)(6). The Judicial Ethics Advisory Committee had earlier ruled that the Arkansas District Judges Council could not make contributions to candidates for the Arkansas legislature. JEAC 2006-01.

126. The confusion resulted because the prior Code had different definitions for a political party and a political organization, adopted in December 2001 following the implementation of Amendment 80, but the new Code has a single definition: “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 campaign committee created as authorized by Rule 4.4. See Rules 4.1 and 4.2.

127. See also Comment 5 to Rule 4.2.

128. Rule 4.1(A)(3).

129. JEAC 2009-03.

may attend at any time; candidates may attend during the 365-day campaign; candidates who are not sitting judges are not bound by the Rules until they announce, and therefore prior to the official announcement they can attend as citizens. The Task Force should have found an easier and cleaner way to express its intent; namely that any one (sitting judges, judges running for reelection, lawyers who are running for judge within the 365 days, anyone contemplating running for judge, and indeed the world) can attend these political organization events at any time.

The candidate establishes a campaign committee, which may be started prior to the official commencement of the 365-day campaign. Fund-raising by the committee may begin 180 days before the first contested election, and may continue for 45 days after the last contested election in which the candidate appears.¹³⁰ For example, assume the May election has three candidates, and two survive for the November run-off election. The candidate who is eliminated may raise funds for only an additional 45 days, but the two survivors may continue to raise funds through the November election and for 45 days after.¹³¹

The 45-day post-election restriction applies also to non-contested elections.¹³² The Judicial Ethics Advisory Committee had previously concluded that when a candidate is

unopposed, the committee may solicit contributions for 45 days after the filing deadline for candidates.¹³³

The Task Force considered changing the time periods. Strong sentiment was voiced for shortening or eliminating the 45-day post-election period. The dual concerns were that the 45 days encouraged candidates to borrow funds and run up debts late in the campaign, and post-election fund raising permits the campaign committee for the successful candidate to assert undue pressure on lawyers and others “to help the Judge pay off his debts.” Any campaign fund surplus is to be returned to the contributors or turned over to the State Treasurer.¹³⁴

Fund-raising will be undertaken by the committee, not by the candidate personally. The candidate can personally neither solicit or accept campaign contributions.¹³⁵ It is the duty of the candidate to take reasonable measures to ensure that the committee and others do not engage in any prohibited activities.¹³⁶

Obviously a candidate will know the identities of prominent and public supporters; the candidate is permitted to personally solicit the support of individuals and organizations; further, state law requires that the identities of donors above a dollar amount be publicly disclosed. However, the spirit of the Canon is that the candidate be isolated from the de-

130. Rule 4.4(B).

131. Comment 2[A] to Rule 4.4.

132. See Comment [2A] to Rule 4.4.

133. JEAC 96-02.

134. Rule 4.4(C). See JEAC 93-04; JEAC 93-07.

135. Rule 4.1(A)(8).

136. Rule 4.1(B).

tails of the campaign finances. Accordingly, Arkansas added Comment [3A] to Rule 4.4:

To reduce potential disqualification and to avoid the appearance of impropriety, judicial candidates should, as much as possible, not be aware of those who have contributed to the campaign.” Comment [4A] to Rule 2.11 indicates that in some instances it may be necessary for a judge to recuse when a party or litigant appearing before him or her is or was a campaign supporter. The attorney’s open political support of a judge in an election campaign creates the potential for the appearance of impropriety that may require recusal of the judge.¹³⁷

Rule 4.1 places three restrictions on the statements that judicial candidates may make: a) false or misleading statements are forbidden; b) statements that might reasonably be expected to affect the outcome or impair the fairness of a matter pending in any court are barred; and c) in connection with cases or controversies likely to come before the court, the candidate may not make pledges, promises or commitments that are inconsistent with the impartial performance of judi-

cial duties.¹³⁸ Comments [11-15] are intended to distinguish the prior “announce” clause, which was held unconstitutional, from the “pledges, promises and commitments” language.¹³⁹ In contrast with prior law, judicial candidates are not barred from speaking on social or political issues.

However, the Task Force inserted Comment [13A] to Rule 4.1:

Before speaking or announcing personal views on social or political topics in a judicial campaign, candidates should consider the impact of their statements. Such statements may suggest that the judge lacks impartiality. See Rule 1.2. They may create the impression that a judge has or manifests bias or prejudice toward individuals with contrary social or political views. See Rule 2.3. Public comments may require the judge to disqualify himself or herself when litigation involving those issues come before the judge. See Rule 2.11. 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.

137. *Massongill v. County of Scott*, 337 Ark. 281, 991 S.W.2d 105 (1999).

138. Rule 4.1(A)(11,12,13).

139. The prior language had stated that a candidate shall not “announce views on disputed legal or political issues.” A circuit judge candidate stated that plea bargaining was not acceptable to him and would not be allowed in his court if elected. Disciplinary charges were brought against the candidate under the Code provision. The provision was held unconstitutional in *Beshear v. Butt*, 863 F. Supp. 913 (E.D. Ark. 1994) and replaced in January 1996.

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As with Comment [5A] to Rule 3.1, Comment [13A] urges candidates to consider the impact that personal statements on social and political issues might have. This Comment was approved by a strong majority of the Task Force. The Comments are intended to give guidance and identify aspirational goals for judges, but are not a basis for discipline. Some members of the Task Force remained concerned about the wisdom or constitutionality of the Comment,¹⁴⁰ believing it might have an improper chilling effect. The new Code also removes the prior requirement that candidates conduct judicial campaigns “with dignity appropriate to judicial office.”¹⁴¹

Both the Model Code and the Arkansas Code continue the prohibition that a judge or candidate is not permitted to publicly endorse or oppose a candidate for any public office.¹⁴² Likewise, contributions to a political organization or a political candidate are barred.¹⁴³ Arguments have been advanced that dicta in

recent decisions suggest that those prohibitions will be declared unconstitutional. A majority of the Task Force was both reluctant to address those constitutional arguments, and convinced that such restrictions are in the best interest of the judicial system, particularly in a non-partisan judicial election system, and should be retained. The Judicial Ethics Advisory Committee had previously indicated its unwillingness to address the constitutional arguments.¹⁴⁴

Family members of a judge or a candidate are free to engage in their own political activity and may run for office.¹⁴⁵ However, a judge or candidate cannot become involved in another’s campaign and should take reasonable steps to avoid the suggestion or implication that they endorse the family member’s candidacy or political activity.¹⁴⁶ For instance, the spouse of a judge may endorse a political candidate, but may not place a yard sign on property owned jointly with the judge.¹⁴⁷

140. *Republican Party of Minnesota v. White*, 536 U.S. 765, 153 L. Ed. 2d 694, 122 S. Ct. 2528 (2002); *Republican Party of Minnesota v. White*, 416 F. 3d 738 (8th Cir. 2005). See David B. Bogard, *The Lifting of Judicial Speech Restraint*, 26 U. ARK. LITTLE ROCK L. REV. 1 (2003); Peter Gregory Juetten, Case Note, *The Implications of Republican Party of Minnesota v. White on Restrictions of Speech During Judicial Election Campaigns*, 56 ARK. L. REV. 677 (2003).

141. The Arkansas Code also removed the third sentence of Comment [13] from the Model Code, and inserted the fourth sentence in Arkansas Comment [13A].

142. Rule 4.1(A)(3).

143. Rule 4.1(A)(4).

144. JEAC 2006-02; JEAC 2007-03.

145. Comment [5] to Rule 4.1. JEAC 2002-06 (spouse may be volunteer or employee in statewide campaign).

146. Comment [5] to Rule 4.1.

147. JEAC 2006-03.

A part-time judge, even if appointed, may use the title “Judge” in campaign advertising when running for the position of a full time judge.¹⁴⁸ However, a former judge or a person who had served as a special judge is not permitted to use the title.¹⁴⁹ Such usage has been deemed to be false or misleading.¹⁵⁰ Similarly a judicial candidate who is not an incumbent judge should not be pictured in a judge’s robe or seated at a judge’s bench in campaign materials.¹⁵¹

Rule 4.5 requires a judge to resign the judicial position “upon becoming a candidate for a nonjudicial elective office.”¹⁵² The “resign to run” rule is intended to prevent the candidate from using the judicial office to promote his candidacy, and to guard against post-election retaliation if the judge loses the election.¹⁵³ The Rule is also applicable to part-time judges.¹⁵⁴

The prior Code had expressly stated, as of December 2001, that the judicial election rules applied to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her candidate conduct. An

unsuccessful candidate, who is an attorney, is subject to lawyer discipline under Rule 8.2(b) of the Arkansas Rules of Professional Conduct, for his or her campaign conduct. Although not expressly stated, enforcement is the same under the new Code.¹⁵⁵

Part-time Judges

The Code of Judicial Conduct covers full-time judges.¹⁵⁶ Four categories of part-time judges are mentioned in the Application Section. The Task Force deleted “Retired Judge Subject to Recall,” as that individual who is not permitted to practice law is not found in Arkansas law, while retaining the other three categories. The “Pro Tempore Part-Time Judge,” such as the lawyer appointed as a Special Justice of the Arkansas Supreme Court for a single case, has the fewest restrictions.¹⁵⁷ “Periodic Part-time Judges” are those who expect to serve repeatedly on a part-time basis, but under a separate appointment for each matter, such as a retired judge willing to accept frequent assignments. The most difficult issues involved

148. JEAC 2002-03.

149. JEAC 2005-08.

150. Rule 4.1(A)(11).

151. See JEAC 2006-04.

152. JEAC 2008-02 (county judge is a nonjudicial office, and resignation is required).

153. Comment 2 to Rule 4.5.

154. JEAC 2008-01.

155. See Comment [2] to Rule 4.1 (rules are applicable once a candidate announces).

156. The Judicial Ethics Advisory Committee has advised that a county judge is a non-judicial office, not subject to the Code of Judicial Conduct. JEAC 2008-02.

157. Horton v. Ferrell, 335 Ark. 366, 981 S.W.2d 88 (1998) (special master disqualified and report stricken because of ex parte communications).

“Continuing Part-Time Judges,” particularly the more than 100 part-time district judges who also practice law. Despite the conversion of some district judges to a full-time basis, and despite pilot programs, it is not expected that part-time district judges will be abolished in the foreseeable future.

Clearly part-time district judges may practice law, but not in the court on which they judge, and not in a proceeding, or related proceeding, in which the judge served as a judge.¹⁵⁸ But the compromise adopted by the Task Force, and the Court, bars the judge from appearing in any criminal matter in the county in which the judge serves.¹⁵⁹

Comment [2A]: Paragraph (B) does not, as a general rule, prohibit a continuing part-time judge from practicing law. However the position of a judge in presiding over a criminal matter and then appearing as a criminal defense attorney in a court of general jurisdiction and opposing that same prosecutor creates an appearance of impropriety, even when the proceedings are separate. Accordingly, continuing part-time judges are prohibited from appearing in any criminal matter in the county where the judge serves, regardless of how the criminal matter arises.

For example, the district judge in Prairie Grove (Washington County) cannot be the attorney for any criminal matters in Circuit Court or other district courts in Washington

County, but may handle criminal matters in Madison County (which is in the same judicial circuit). The rationale for the restriction is that part-time judges would appear to be acting inappropriately in handling criminal defense matters.¹⁶⁰ Likewise, this Comment bars a part-time judge from being a part-time prosecutor in the same county.¹⁶¹ Under the old Code the Judicial Ethics Advisory Committee had opined that a district judge could not represent criminal law in the entire circuit; that is, in front of any of the judges who would be hearing de novo appeals from the district court, and in opposition to the prosecuting attorneys over whose cases the judge presided.¹⁶² That opinion appears to no longer be controlling.

As to the part-time judge’s civil law practice, there is no similar bright line. But the Task Force was concerned about the risk of misuse of judicial authority or prestige. As one member of the Task Force said, “On Monday I am in Circuit Court, vigorously challenging the adverse attorney; on Tuesday, I am in District Court, and discover that my opponent is now the presiding judge.” To give guidance and to suggest caution, the Task Force added Comment [3A]:

[3A]: Because the position of the judge is paramount to the judge’s private law practice, the judge should be particularly sensitive to conflicts that may arise when the judge presides over matters involving particular attorneys and then, in his or her private law prac-

158. Application, III (B).

159. Application, III(B).

160. JEAC 2002-04; JEAC 2008-08. The Judicial Discipline Commission had previously enforced this rule. *See* its 2001 Annual Report.

161. JEAC 2005-03; (improper to simultaneously be a part-time judge in Tuckerman and a part-time prosecutor in Newport, both communities in Jackson County); JEAC 2008-08.

162. JEAC 98-02; JEAC 2005-04.

tice, appears in adversary proceedings in a court of general jurisdiction opposing the same attorneys who appear before the judge. Opposing counsel may be hampered in vigorous advocacy against an attorney who wears judicial robes and presides over cases involving that counsel. The primacy of judicial service and the obligation to avoid even the appearance of impropriety mandate caution in accepting civil cases in disputed matters.

The relationship between a part-time district judge and his civil practice has been raised in several contexts. A part-time district judge for a city should not represent the city in any case in any forum.¹⁶³ A part-time judge may not represent an individual in a domestic relations matter when the adverse spouse of that individual has an outstanding fine balance with the district court over which the judge presides.¹⁶⁴ Similarly, the judge may not represent a client, such as a bank, in a debt collection action against an individual who has a similar fine balance.¹⁶⁵ A district judge for one community is not barred from being the city attorney for another community in

the same county,¹⁶⁶ or the county attorney,¹⁶⁷ but such joint positions may be unwise and imprudent. For instance, a part-time district judge serving as legal advisor to a city might result in excessive recusal when the city, its officials or its employees appeared in the district court.¹⁶⁸ Likewise, a district judge who continued to serve as managing attorney for a legal services organization might be compelled to recuse frequently.¹⁶⁹

An inmate filed a pro se civil rights action against a county detention center and its officials. The county was represented by an attorney, who, as the district judge, had presided over the arraignment of the inmate. Although the judge had merely found the inmate to be indigent, appointed him counsel, and set the case for trial before a different judge, the federal court granted the inmate's motion that the defense counsel be disqualified. Referring to three opinions of the Judicial Ethics Advisory Committee,¹⁷⁰ which pointed out the appearance of impropriety that might arise when a district judge engages in a particular civil practice, the court concluded it was inappropriate for the lawyer to continue as defense counsel when he had presided at the arraignment over the inmate.¹⁷¹

163. JEAC 97-04.

164. JEAC 93-02.

165. JEAC 93-02.

166. JEAC 2008-01. The opinion further noted that Rule 4.5 would require the judge to resign when she runs for reelection as the city attorney.

167. JEAC 99-02.

168. JEAC 2008-04.

169. JEAC 2004-07.

170. JEAC 99-02; JEAC 97-04; JEAC 2005-03.

171. Johnson v. Steed, Civil No. 06-6018 (Hot Springs Division, W.D. of Arkansas), Order of Feb. 22, 2007 (Judge Jimm Hendren).

Administrative Law Judges

The Code of 1993 did not mention administrative law judges. The Application Section stated: “Anyone, whether or not a lawyer, who is an officer of a judicial system and performs judicial functions, including an officer, such as a magistrate, court commissioner, referee or special master or referee, is a judge within the meaning of this Code.” Application A. In sharp contrast, the 2007 Code clearly encompasses administrative law judges: Application, I(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, special master, referee, or member of the administrative law judiciary.”¹⁷²

When the Task Force confronted this issue, it recognized that it had three options: a) retain the status quo, and remove the reference to ALJ’s; b) adopt the recommendation of the American Bar Association, keep the language and include ALJ’s within the Code;¹⁷³ or c) draft specific language making only particular rules binding on ALJ’s. The third approach might have been the most desirable, but the Task Force lacked the experience or insight to make those judgment calls. In addition, given the variety of roles that ALJ’s play in Arkansas, the task of choosing particular

rules would have been lengthy and difficult. The Task Force elected to leave that task to another time and to a more appropriate and knowledgeable group. The language adopted by the Task Force and by the Supreme Court makes the new Code binding on all ALJ’s in Arkansas, whether or not they are attorneys.

Administrative law judges have a unique status. They are part of the executive branch of government; they are selected based upon merit, political connection, a quasi civil service system, or some combination; they are not truly independent; generally speaking they are compensated at a lower rate than judicial branch judges.

Certainly, of the 39 rules, the majority are applicable to ALJ’s without any dispute: for example, the requirement of competence and fairness, respect for litigants, avoidance of prejudice, the standards for disqualification, promptness in ruling, limits on ex parte communications. In similar fashion, many of the rulings of the JEAC should likewise be held to be applicable to ALJ’s.

But some Canons and Rules can never be applicable in the truest sense. For instance, an ALJ cannot be truly independent. The issue of independence is not an element of due process. The Arkansas Supreme Court has settled that issue.¹⁷⁴ It is more properly correctly described as an issue of perception.

172. See *Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998) (although not a lawyer, special master is subject to Code; disqualified and report stricken because of ex parte communications).

173. The ABA recommendation was based in part on a 2001 policy that provided that members of the ALJ should be accountable under appropriate ethical standards adapted from the Code in light of the unique characteristics and positions of an ALJ. See CHARLES E. GEYH AND W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) 15. The Court has said that, at least in part, members of administrative agencies that perform quasi-judicial functions are subject to the Code. See *Acme Brick Co. v. Missouri Pacific R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991).

174. For example, see *C.C.B. v. Arkansas Department of Health and Human Services*, 368 Ark. 540, 247 S.W.3d 870 (2007), rejecting the argument that due process was denied because the presiding administrative law judge was part of the Office of Chief Counsel and subordinate to the chief counsel; “the combination of investigative and adjudicative functions does not, without more, constitute a due process violation,” at 546.

Does the claimant appearing before the ALJ truly believe that the hearing is independent from the control of the executive branch? How does the ALJ conduct himself and the hearing to give assurance of independence to the claimant?

In the absence of a major restructuring of the administrative law judiciary, that generalized concern is not likely to go away. Some states have adopted a central hearing panel mode that might obviate the generalized concern. In such a format all ALJ's are part of a single quasi-judicial agency, and assigned to preside over particular matters in administrative agencies.¹⁷⁵ But, in the absence of such a dramatic change in Arkansas, the issue of true independence remains. In the interim, consider two specific judicial Rules and their applicability to ALJ's.

A) A judicial branch judge cannot practice law.¹⁷⁶ The rule is clear. Judges in Arkansas have been severely sanctioned for violation of this prohibition.¹⁷⁷ Should that rule apply to an ALJ? If an ALJ presides over child abuse hearings during the week, should that ALJ be permitted to draft wills and charge clients for work done on weekends? That fundamental policy issue needs to be addressed.

B) Judicial branch judges are prohibited in many ways from the political process: they cannot openly

support candidates for political office and cannot make financial contributions. Should that same restriction apply to ALJ's? Should an ALJ be free to make a contribution to a presidential campaign, sign a petition in support of a gubernatorial candidate, or put a political bumper sticker on her car? Likewise, that issue has not been resolved.

In 1995 a section of the Administrative Law Judges drafted a Model Code of Judicial Conduct for State Administrative Law Judges. Though published by the American Bar Association, it was never formally adopted by the ABA. That model Code did not attempt to give specific answers to the above questions. Consider its statement on elections: "An administrative law judge shall not engage in inappropriate political activity." Perhaps the choice of "inappropriate" is intended to give an ALJ some discretion and flexibility and then expect that she will exercise common sense. Perhaps an ALJ says "I will give funds to a candidate, but I will not support the candidate openly."

The argument that the ALJ's are not bound by the Code in such areas follows these lines: they are part of the executive branch of government; in light of the strict Separation of Power doctrine in the Arkansas Constitution,¹⁷⁸ the Supreme Court has no power to restrict them; given their lower

175. For example, see Ann Wise, *Improving State Governance: Critical Issues in State Administrative Law*, 68 LA. L. REV. 1169 (2008); David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219 (2000); Shelia Bailey Taylor, *The Growth and Development of a Centralized Administrative Hearings Process in Texas*, 17 JOUR. OF NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDGES 113 (1997).

176. Rule 3.10.

177. See *Judicial Discipline and Disability Commission v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000).

178. See Article IV, Arkansas Constitution.

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salaries and arguably lessened prestige, they should not be so limited.

Three possible methods exist for ALJ's to obtain answers to these types of questions? 1) An opinion could be sought from the Judicial Ethics Advisory Committee, which interprets the Code; 2) an opinion could be sought from the Attorney General, which responds to inquiries from public officials; 3) the Supreme Court could be asked to determine which provisions of the new Code are binding on ALJ's, similar to the provisions for part-time judges.

However, on at least one issue, ALJ's need not be concerned. Given the precedents established by the Judicial Discipline and Disability Commission since its creation in 1991, and in light of recent statements by the

current Executive Director,¹⁷⁹ the Commission does not interpret its authority as extending to Administrative Law Judges. Any discipline of ALJ's, for violation of the Code or on any other basis, rests entirely with the executive branch.

Conclusion

The Arkansas Code of Judicial Conduct of 2009 is a significant step forward for Arkansas judges and judicial candidates. The new Code is easier to understand, it consolidates Canons, it gives more guidance, it removes unenforceable provisions, and it provides a cleaner basis for discipline. Questions certainly remain, but advisory opinions, disciplinary proceedings, and constitutional litigation will address and answer them in the years ahead.

179. E-mail from David Stewart on May 11, 2009.