ALASKA JUDICIAL APPLICANT GUIDELINES

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ALASKA JUDICIAL APPLICANT GUIDELINES

I. INTRODUCTION

This manual has been prepared jointly by the Alaska Commission on Judicial Conduct, the Alaska Judicial Council, and the Alaska Bar Association to provide guidance to applicants for judicial positions in Alaska. Our purpose is to preserve the integrity and dignity of Alaska's judicial selection process and the public's confidence in it. The manual discusses the statutes, court rules, and ethical considerations governing the permissible areas of supportive activity by judicial applicants. The professional conduct of lawyers in Alaska is governed by the Alaska Bar Rules. The conduct of judges in Alaska is governed by the Alaska Code of Judicial Conduct. The conduct of applicants for judicial positions, however, is governed by both. Individuals who currently do not hold a judicial position, but who seek to be appointed to one, are subject to certain rules and restrictions regulating the conduct of judges. By law, lawyers seeking judicial appointment are held to the same standards of conduct in Canon 5 of the Alaska Code of Judicial Conduct as are sitting judges and violations of those standards can subject a successful applicant to discipline by the Alaska Commission on Judicial Conduct and an unsuccessful one to discipline by the Alaska Bar Association. The purpose of this manual is to provide applicants with guidance and assistance in avoiding conduct violations that, ultimately, would prove damaging both to the applicant and to the judicial system.

These guidelines are designed to give guidance to judicial applicants. They do not establish additional rules not found in the Code of Judicial Conduct, nor are they designed or intended to provide an independent basis for attorney or judicial discipline.

II. BACKGROUND

Alaska's judicial selection process serves as a model for other states. Known widely as a "merit selection" process, it was designed by the members of the Alaska Constitutional Convention to preserve the integrity of the judiciary by insulating it as much as possible from parochial concerns and political influence.[1] While other states often select judges based on their service to the political party structure or personal relationships to those in power, Alaska's system of selection allows only the most qualified individuals to reach the appointing authority. This important state policy is best reflected in the Bylaws of the Alaska Judicial Council:[2]

> The Judicial Council shall endeavor to nominate for judicial office and for public defender those judges and members of the bar who stand out as most qualified based upon the council's consideration of their: professional competence, including written and oral communication skills; integrity; fairness; temperament; judgment, including common sense; legal and life experience; and demonstrated commitment to public and community service. The Council shall actively encourage qualified members of the bar to seek nomination to such offices, shall endeavor to prevent political considerations from outweighing fitness in the judicial and public defender nomination processes, and shall consistently strive to inform the public of Alaska's Judicial Council selection process.

As with all governmental systems, the integrity of the process is fragile, relying on enforcement of governing rules and the character of those entrusted with their care. Alaska's judicial selection system is established by constitutional and statutory provisions and guided by the ethical rules governing the legal profession and judges. Enforcement takes many forms and the consequences of marginal conduct can affect the professional reputations of judicial applicants for years to come.

Those charged with the responsibility of screening and appointing members of the judiciary take that responsibility seriously. These include members of the Alaska Judicial Council (which evaluates and screens applicants), the Governor (who makes the appointment), and the Governor's staff (which frequently has responsibility for collecting public comments, evaluating individuals

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[1] The discussion at Alaska's constitutional convention relating to this topic and outlining the original aspirations for the process can be found at the Alaska Judicial Council's website at http://www.ajc.state.ak.us/General/akccon.htm

[2] See Bylaws of the Alaska Judicial Council, Article 1, Policies, Section 1.

nominated by the Alaska Judicial Council, and advising the governor on the appointment). Inappropriate and subtly pressured communications can affect their determinations adversely to the applicant.

While this publication focuses on the legal and ethical minimum standards for conduct, those involved in the nominating and appointing process expect much more than mere compliance with the minimum standards imposed by law. Consequently, these guidelines should not be viewed as providing a guide for merely avoiding discipline but should be used as an aspirational guide towards exhibiting judicial traits during the application process. Generally, history has shown that an applicant who acts judiciously -- that is, behaves like a judge -- during the application and screening process stands a better chance of convincing an appointing authority that he or she is worthy of the judicial appointment. Conversely, otherwise meritorious candidates have adversely affected their likelihood of appointment by conducting themselves during the screening process in a manner that, ultimately, was deemed to be injudicious or unduly and inappropriately political. Applicants are advised, therefore, to give both the ethical rules and the aspirational guidance in this publication serious consideration and reflection.

Drafted by a committee with experience in enforcement of judicial and attorney ethics rules, as well as the state judicial selection process, these guidelines attempt to clarify the existing standards and expectations for appropriate judicial applicant behavior. The guidelines will not, in themselves, address all of the potential issues that arise during the judicial selection process, but should raise issues and identify areas of concern to judicial applicants.

Generally, these guidelines apply to both judge and attorney applicants for judgeships. Where the standards differ for each, those differing standards are noted. Judicial applicant conduct is generally governed by Canon 5 of the Alaska Code of Judicial Conduct. The limitations set out in Canon 5 have two chief concerns: maintaining the impartiality of the judge or the prospective judge and maintaining the dignity of judicial office. Canon 5 provisions apply to both judge candidates and attorney candidates for judgeships.

III. FUNDAMENTAL CONCEPTS

Truthfulness and Accuracy

Both the Alaska Code of Judicial Conduct[3] and the Alaska Rules of Professional Conduct[4] prohibit intentional misrepresentation of any fact relating to the candidate or that candidate's opponent. Applicants should use all reasonable efforts to ensure that application documents are accurate and complete and that all statements by them or others acting on their behalf, directly or indirectly, are truthful.

Preserving Independent Judicial Decision-making

Judicial applicants are prohibited from giving indications of how they may resolve or rule on cases or issues that may come before them as judges, either through pledges or promises or through statements that imply outcomes. In addition, when commenting on controversial topics or unsettled legal issues, applicants must make special efforts to avoid statements that could be interpreted as a commitment to a particular view.[5] Obvious issues which raise concern and sometimes are raised by interest groups include: abortion rights, native law issues, affirmative action issues, medically assisted suicide, imposition of the death penalty, and other developing constitutional issues. Judge applicants also must refrain from commenting on any litigation pending in the judicial system. Any comments by an applicant could be viewed as an attempt to influence the appellate process or the fairness of hearings at the trial level.

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[3] Canon 5A(3)(d)(iii).

[4] Rules 8.2(a), 8.4(c).

[5] Republican party of Minnesota, et al. v. White, 122S.Ct. 2528 was decided on June 27, 2002 and held that a Minnesota Code of Judicial Conduct provision that prohibited candidates for judicial election from announcing views on disputed legal or political issues violated the First Amendment. Alaska has neither initial judicial elections nor the same provision as the Minnesota Code, consequently these guidelines have not been altered since the Minnesota v. White decision. Any implications for Alaska's judicial appointment process as a result of this decision are unclear.

Integrity of the Process

As stated at the outset of these guidelines, their ultimate purpose is to ensure that the judicial selection process is accessible, fair, and based on merit. Applications for judicial vacancies should not be viewed as political campaigns. While applicants may take certain steps to garner support, especially during the post nomination phase of the process, applicants should act with caution. The process should not lend itself to a public perception that money, connections and political promises lead to appointments more than the "merit" of the individual applicant.

IV. PENALTIES FOR NONCOMPLIANCE

Formal Discipline

The conduct of all judicial applicants, lawyers and judges alike, is governed by the Alaska Rules of Professional Conduct and the Alaska Code of Judicial Conduct. Violations of these rules and code provisions can result in a full range of formal disciplinary sanctions, including the ultimate sanctions of disbarment and removal from judicial office. Unsuccessful lawyer judicial applicants who violate the ethics rules are subject to discipline by the Alaska Bar Association. Successful lawyer applicants and all state judge applicants who violate the ethics rules are subject to discipline by the Alaska Commission on Judicial Conduct. Procedural rules for both of these disciplinary bodies are included in the appendices to this manual.

Informal Consequences

Apart from formal disciplinary action, those who engage in marginal application activity risk alienating those they seek most to impress. Blanket letter-writing campaigns, arranging for lobbyists or other individuals to make strategic phone calls, and asking judge friends to campaign for the applicant, adversely reflect on the applicant's reputation for integrity and judicious conduct.

V. GUIDELINES

Types of Organizations That May Not Be Contacted By A Judicial Applicant

Canon 5A of the Alaska Code of Judicial Conduct prohibits candidates from making speeches on behalf of a political organization, attending political gatherings, or soliciting funds or making contributions to a political organization. Political organizations generally are groups whose primary purpose is to influence the outcome of an election. Typical groups that do not fall into this category (and are therefore allowable venues for judicial applicants) are Rotary, chambers of commerce, Elks clubs, churches, and community councils.

Types of Statements That May Be Made by Judicial Applicants

As outlined above, candidates are prohibited from making any pledges or promises or implying outcomes in cases or positions on issues that may come before the court. States have disciplined judicial candidates for making statements indicating that the candidate "is (or will be) tough on drunk drivers," "will impose the death penalty on convicted murderers," and "has received union endorsements."

Acceptable public statements that may be made by judicial applicants include references to aspects of the applicant's personal and professional background that relate to judicial skills and qualifications, comments that address issues of court administration and procedures, and expressions of philosophical support for concepts of equal treatment for all participants in court proceedings under established law. Applicants may be asked to respond to brief interviews by groups that are making decisions about endorsing an applicant. While these interviews may be uncomfortable, if an applicant responds with accurate biographical information and restricts comments to those areas described above, these interviews can avoid difficulties.

The most troublesome statements are those that imply a debt owed by the candidate to the supporter, whether that supporter is an individual or a group. Having a potential litigant endorse an applicant's candidacy may imply improper ties to that individual or to a group's partisan interests. Extreme caution should be exercised when seeking the support of particular groups, industries, associations with advocacy purposes, and those affiliated with a particular interest in the justice system. These could include businesses or industry groups involved in development of natural resources or those opposed to development, advocates of particular positions in family issues, insurance companies and hospitals, victims' or prisoners' rights organizations, and private associations advocating a single issue that may come before the court.

Maintaining the Dignity of Judicial Office

When addressing any organization or otherwise communicating during an application process, the Code requires that the candidate "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary."[6]

(a) **Dignity in Form of Communication.** Certain forms of communication are commonly viewed as "undignified." These may include form-letter mass mailings, phone calls to those without any pre-existing relationship to the caller or applicant, mass e-mail communications, or personally approaching individuals without any pre-existing relationship solely for the purpose of gaining their support when the individuals or organizations contacted are not bar members or organizations normally interested in judicial selection.

Example of Undignified Communication to the Public:

> *Dear Neighbor: I'm running for judicial office and would really appreciate it if you would call, write, or e-mail the Judicial Council and the Governor to tell them you support my appointment as a judge.*
>
> *Signed,*
>
> *John Doe*

Example of Dignified Communication to the Public:

> *Dear Jill: As you may know, I've applied for the Juneau District Court position. Based on our close work together in working with juvenile offenders, I was hoping you would feel comfortable in sharing your views of my capabilities as they relate to the district court's work with the Alaska Judicial Council. I do not need to see copies of any of your correspondence with them.*
>
> *Signed,*
>
> *John Doe*

[6] Canon 5A(3)(a).

(b) Dignity in Tone and Content of Communication. Regardless of the particular form of communication used by an applicant, tone and content can render a communication "undignified." As stated above, any misrepresentation, or promise or pledge, express or implied, is prohibited. Typically, communications that attack the qualifications of an opponent, even if true, are viewed as undignified and, under some circumstances, are prohibited. Using prominent clients or citing to newsworthy cases or decisions to promote one's candidacy is questionable conduct as it is difficult to do in a dignified way. The tone of all communications should be reflective of the tone of court decisions: fact-based, without emotional content, and substantively meaningful.

Equally troubling is a communication to members of the bar which asks members to give an applicant a high rating on the bar survey conducted by the Alaska Judicial Council to boost the applicant's numerical scores compared to other applicants. As experience and studies by the Judicial Council have demonstrated, every applicant has strengths and weaknesses and it is unfair to the selection process to give an applicant the same numerical score in all categories unless it is truly justified. It is also inappropriate to give a favored applicant high ratings and all other candidates lower ratings in order to increase that applicant's standing relative to other applicants. It is also possible that efforts to influence the bar survey could lead the Judicial Council to believe that an applicant's ratings did not accurately reflect the applicant's abilities and discount those particular survey results.

Example of Undignified Communication to Bar Members:

> *Dear Colleague: Jane Doe is running for superior court. I urge you to give Jane all "5s" in the bar poll which will soon be arriving at your office. Jane needs your support and this is great way to show you care.*
>
> *Signed,*
>
> *Loyal Friend*

Example of Dignified Communication to Bar Members:

> *Dear Colleague: Jane Doe has applied for Fairbanks Superior Court. As you may know, Jane served for five years in the civil division of the Fairbanks Attorney General's office before her current private practice focusing on family law. While she lacks any experience in the direct area of criminal law, she has exhibited intelligence and sensitivity in my work with her, both as co-counsel and as opposing counsel in recent years. I hope that you fairly consider her qualifications when commenting on the applicants for this judgeship.*
>
> *Signed,*
>
> *Joe Roe*

Permissible Communications By A Judicial Applicant[7]

The Code of Judicial Conduct permits candidates, including judges who are candidates for other judicial office, to promote their candidacy by circulating letters to the general membership of the bar and to organizations interested in judicial selection. A judge need not object when individual lawyers or groups of lawyers decide to circulate a letter in support of the judge's candidacy. However, the statements must conform to the Code.

If the candidate is a judge, the candidate should ask individuals and organizations not to send copies of endorsement letters to the candidate. Sitting judges must frame their requests for support in a circumspect and cautious manner because they must avoid even the appearance of using the power of judicial office to obtain endorsements.

The Code permits candidates to seek privately communicated support or endorsement in addition to the required letters of reference and other opinions solicited by the Judicial Council. A candidate may ask individuals or organizations to send a letter to the Alaska Judicial Council or to the Governor, or to speak in support of the candidate at a public hearing held by the Council, or at a private meeting with the Governor or the Governor's staff.

However, the candidate may not ask or authorize individuals or organizations to run newspaper advertisements endorsing the candidate or to send letters to their membership or to other

[7] Canon 5B, Commentary

organizations encouraging them to support the candidate.

Example of Impermissible Newspaper Ad:

> *The officers and members of XYZ Organization wholeheartedly support John Doe for appointment to the superior court. Please call or write the Judicial Council and the Governor and tell them that you support John!!*

Example of Impermissible Endorsement Letter:

> *Dear fellow XYZ Organization member: I'm sending this letter to our members asking all of you to support Jane Doe in her quest for the superior court.*
>
> *Signed,*
>
> *Loyal Friend*

Applying Standards to Family Members

Applicants are required by the Code of Judicial Conduct[8] to "encourage members of the candidate's family to adhere to the same standards that apply to the candidate" in support of the candidate. Applicants should, therefore, review these guidelines with family members and encourage them to keep the judicial applicant informed of their communications concerning the candidacy.

Applying Standards to Other Supporters

Lawyers and judges are often given responsibility in the Rules of Professional Conduct and the Code of Judicial Conduct to exercise some control over the ethical conduct of those they supervise who are not directly governed by these ethical rules.[9] While there is no direct ability to control the actions of others, applicants for judicial positions should share these guidelines with individuals who express a desire to assist in the application process. To the extent that the applicant has advance knowledge of communications by supporters that may not comply with these

[8] Canon 5A(3)(a).

[9] See e.g. Canon 3C(2) Alaska Code of Judicial Conduct, Rule 5.3 Alaska Rules of Professional Conduct.

guidelines, applicants should make reasonable efforts to encourage compliance with these guidelines.

Contact with the Alaska Judicial Council and the Governor

The Alaska Judicial Council is charged under the Alaska Constitution with the responsibility of evaluating and recommending candidates for judicial office to the Governor. The Governor is responsible for the final selection.

Both the Council and the Governor depend on the frank and candid assessments of a candidate's qualifications for judicial office supplied by members of the bar, the judiciary, and the public. To be meaningful, however, these communications should be based on the individual's or organization's personal experience with the candidate and not simply a "form letter" recitation of the candidate's qualifications.

Quality truly outweighs quantity in these communications. A candidate who relies on the sheer volume of communications with the Council or the Governor's office runs the risk of having those communications viewed in a negative light because of the writer's lack of sincerity or because of the unnecessary and unhelpful burden the communications place on office resources. The arrival of a large volume of endorsement letters unavoidably triggers the suggestion that the letters were solicited and that the candidate is relying more on his or her relationships than on experience, qualifications, and merit.

Other political activities can create the appearance of improper political influence. These activities may include making large contributions to the governor's campaign and attending partisan or campaign fundraising events while an applicant. Other activities that are equally inappropriate include asking an elected official of the same party as the sitting governor to ensure that the governor knows the applicant is a loyal party member or a supporter. All of these partisan political activities are prohibited activities for both candidates for appointment to judicial office and sitting judges and, therefore, any judicial applicant engaged in these activities could also be subject to disciplinary action.[10]

[10] Canon 5 A.

CONCLUSION

The judicial application process is not easy. The process itself is lengthy, disruptive to a law practice, time- consuming, and exposes the applicant to personal and professional criticism. These difficulties, however, are necessary and desirable alternatives to the purely political system used to select judges in many other states. By following the letter and spirit of these guidelines, applicants can avoid conduct that can damage not only their own reputations but also that of our selection system itself.

Appendix A
Constitutional and Statutory Provisions

ALASKA STATUTES
CONSTITUTION OF THE STATE OF ALASKA
ARTICLE IV. THE JUDICIARY

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 4. Qualifications of Justices and Judges

Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

ALASKA STATUTES
CONSTITUTION OF THE STATE OF ALASKA
ARTICLE IV. THE JUDICIARY

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 5. Nomination and Appointment

The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

ALASKA STATUTES
CONSTITUTION OF THE STATE OF ALASKA
ARTICLE IV. THE JUDICIARY

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 8. Judicial Council

The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

CONSTITUTION OF THE STATE OF ALASKA
ARTICLE IV. THE JUDICIARY

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 10. Commission on Judicial Conduct

The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

Alaska Stat. § 22.30.010

TITLE 22. JUDICIARY
CHAPTER 30. JUDICIAL CONDUCT

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 22.30.010. Commission on judicial conduct

The Commission on Judicial Conduct shall consist of nine members as follows: three persons who are justices or judges of state courts, elected by the justices and judges of the state courts; three members who have practiced law in this state for 10 years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three citizens who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. Commission membership terminates if a member ceases to hold the position that qualified that person for appointment. A person may not serve on the commission and on the **judicial council** simultaneously. A quorum of the commission must include at least one person who is a justice or judge, at least one person appointed by the governor who has practiced law in the state for 10 years, and at least one citizen member who is not a justice, judge, or member of the state bar. The commission shall elect one of its members to serve as chairman for a term prescribed by the commission. A vacancy shall be filled by the appointing power for the remainder of the term.

Alaska Stat. § 22.30.011

TITLE 22. JUDICIARY
CHAPTER 30. JUDICIAL CONDUCT

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 22.30.011. Powers and duties of the commission

(a) The commission shall on its own motion or on receipt of a written complaint inquire into an allegation that a judge

(1) has been convicted of a crime punishable as a felony under state or federal law or convicted of a crime that involves moral turpitude under state or federal law;

(2) suffers from a disability that seriously interferes with the performance of judicial duties and that is or may become permanent;

(3) within a period of not more than six years before the filing of the complaint or before the beginning of the commission's inquiry based on its own motion, committed an act or acts that constitute

(A) wilful misconduct in office;

(B) wilful and persistent failure to perform judicial duties;

(C) conduct prejudicial to the administration of justice;

(D) conduct that brings the judicial office into disrepute; or

(E) conduct in violation of the code of judicial conduct; or

(4) is habitually intemperate.

(b) After preliminary informal consideration of an allegation, the commission may exonerate the judge, informally and privately admonish the judge, or recommend counseling. Upon a finding of probable cause, the commission shall hold a formal hearing on the allegation. A hearing under this subsection is public. Proceedings and records pertaining to proceedings that occur before the commission holds a public hearing on an allegation are confidential, subject to the provisions of AS 22.30.060(b).

(c) A judge appearing before the commission at the hearing is entitled to counsel, may present evidence, and may cross-examine witnesses.

(d) The commission shall, after a hearing held under (b) of this section,

(1) exonerate the judge of the charges; or

(2) refer the matter to the supreme court with a recommendation that the judge be reprimanded, suspended, removed, or retired from office or publicly or privately censured by the supreme court.

(e), (f) Repealed.

(g) If the commission exonerates a judge, a copy of the proceedings and report of the commission may be made public on the request of the judge.

(h) If a judge has been publicly reprimanded, suspended, or publicly censured under this section and the judge has filed a declaration of candidacy for retention in office, the commission shall report to the **judicial council** for inclusion in the statement filed by the **judicial council** under AS 15.58.050 each public reprimand, suspension, or public censure received by the judge

(1) since appointment; or

(2) if the judge has been retained by election, since the last retention election of the judge.

Alaska Stat. § 22.30.060

TITLE 22. JUDICIARY
CHAPTER 30. JUDICIAL CONDUCT

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 22.30.060. Rules and confidentiality

(a) The commission shall adopt rules implementing this chapter and providing for confidentiality of proceedings.

(b) All proceedings, records, files, and reports of the commission are confidential and disclosure may not be made except

(1) upon waiver in writing by the judge at any stage of the proceedings;

(2) if the subject matter or the fact of the filing of charges has become public, in which case the commission may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, or to state that the judge denies the allegations; or

(3) upon filing of formal charges, in which case only the charges, the subsequent formal hearing, and the commission's ultimate decision and minority report, if any, are public; even after formal charges are filed, the deliberations of the commission concerning the case are confidential.

Alaska Stat. § 22.30.066

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CHAPTER 30. JUDICIAL CONDUCT

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 22.30.066. Inquiry

(a) The commission may subpoena witnesses, administer oaths, take the testimony of any person under oath, and require the production for examination of documents or records relating to its inquiry under AS 22.30.011.

(b) In the course of an inquiry under AS 22.30.011 into judicial misconduct or the disability of a judge, the commission may request the judge to submit to a physical or mental examination. If the judge refuses to submit to the examination, the commission shall determine the issue for which the examination was required adversely to the judge.

Alaska Stat. § 22.30.070

TITLE 22. JUDICIARY
CHAPTER 30. JUDICIAL CONDUCT

Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 22.30.070. Disqualification, suspension, removal, retirement and censure of judges

(a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging the judge in the United States with a crime punishable as a felony under Alaska or federal law, or (2) a recommendation to the supreme court by the commission for the removal or retirement of the judge.

(b) On recommendation of the commission, the supreme court may reprimand, publicly or privately censure, or suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under state or federal law or of a crime that involves moral turpitude under state or federal law. If the conviction is reversed, suspension terminates, and the judge shall be paid the judge's salary for the period of suspension. If the judge is suspended and the conviction becomes final, the supreme court shall remove the judge from office.

(c) On recommendation of the commission, the supreme court may (1) retire a judge for disability that seriously interferes with the performance of duties and that is or may become permanent, and (2) reprimand, publicly or privately censure, or remove a judge for action occurring not more than six years before the commencement of the judge's current term which constitutes wilful misconduct in the office, wilful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute. The effective date of retirement under (1) of this subsection is the first day of the month coinciding with or after the date that the supreme court files written notice with the commissioner of administration that the judge was retired for disability. A duplicate copy of the notice shall be filed with the **judicial council**.

(d) A judge retired by the supreme court shall be considered to have retired voluntarily. A judge removed by the supreme court is ineligible for judicial office for a period of three years.

(e) A supreme court justice who has participated in proceedings involving a judge or justice of any court may not participate in an appeal involving that judge or justice in that particular matter.

Alaska Stat. § 22.30.080

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Current through 1998 2nd Reg. Sess. and 1st Sp. Sess.

§ 22.30.080. Definitions

In this chapter

(1) "commission" means the Commission on **Judicial Conduct** provided for in § 10, art. IV, Constitution of the State of Alaska and this chapter;

(2) "judge" means a justice of the supreme court, a judge of the court of appeals, a judge of the superior court, or a judge of the district court who is the subject of an investigation or proceeding under § 10, art. IV, Constitution of the State of Alaska and this chapter, including a justice or judge who is serving in a full-time, part-time, permanent, or temporary position.

Appendix B
Alaska Rules of Professional Conduct and Bar Rules

ALASKA COURT RULES
ALASKA RULES OF PROFESSIONAL CONDUCT
MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

(SCO 1123 effective July 15, 1993; rescinded and repromulgated by SCO 1680 effective April1 5, 2009)

COMMENT

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own **conduct**. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Rule 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 5 of the Code of Judicial Conduct.

(SCO 1123 effective July 15, 1993; rescinded and repromulgated by SCO 1680 effective April 15, 2009)

ALASKA COMMENT

ABA Model Professional Conduct Rule 8.2(b) declares that any lawyer who is a candidate for judicial office "shall comply with the applicable provisions of the Code of Judicial Conduct." But every judge standing for retention is a "lawyer who is a candidate for judicial office", at least as that phrase is defined in the Terminology section of the Alaska Code of Judicial Conduct. Thus, Model Rule 8.2(b) appears to say that if a judge standing for retention violates any provision of the Code of Judicial Conduct, this violation will also constitute a bar offense--because, for a sitting judge, *every* provision of the Code of Judicial Conduct is an "applicable provision".

The Committee concludes, from the COMMENT to Professional Conduct Rule 8.2(b), that Rule 8.2(b) was intended to make sure that lawyers who are not yet judges, but who are candidates for judicial office, abide by the applicable restrictions on political activity set forth in Canon 5 of the Code of Judicial Conduct. Rule 8.2(b) was not intended to make a current judge's violation of any other provision of the Code of Judicial Conduct a bar offense if the violation occurs while the judge is a "candidate for judicial office"--*i.e.*, while the judge is standing for retention.

COMMENT

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) state or imply an ability either to influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Credits

[Adopted effective July 15, 1993. Rescinded and readopted effective April 15, 2009. Amended effective June 23, 2015.]

Editors' Notes

COMMENT

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization.

This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer's conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the

lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. "Covert activity," as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.

Although assisting a client under Rule 1.2(f) may violate federal drug laws, it is not a violation of Rule 8.4(b).

RULES OF THE ALASKA BAR ASSOCIATION
PART II. RULES OF DISCIPLINARY ENFORCEMENT
A. MISCONDUCT

Rule 9. General Principles and Jurisdiction.

(a) **License**. The license to practice law in Alaska is a continuing proclamation by the supreme court of the State of Alaska (hereinafter the "Court") that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor, and to act as an officer of the courts. As a condition of the privilege to practice law, it is the duty of every member of the Bar of this State to act at all times in conformity with the standards imposed upon members of the Alaska Bar Association (hereinafter the "Bar"). These standards include, but are not limited to, the Rules of Professional Conduct and the Code of Judicial Conduct that have been or may hereafter be adopted or recognized by the Court, and Ethics Opinions that have been or may hereafter be adopted by the Board of Governors of the Bar.

(b) **Duty to Assist.** Each member of the Bar has the duty to assist any member of the public in filing grievances against members of the Bar with the Bar Counsel of the Alaska Bar Association (hereinafter "Bar Counsel"). This duty may be fulfilled by assisting that person in preparing a grievance, contacting Bar Counsel regarding that person's grievance, or giving that person information for contacting Bar Counsel regarding a grievance. Each member of the Bar has the duty to assist Bar Counsel in the investigation, prosecution, and disposition of grievances filed with or by Bar Counsel. Each member has the duty to support the members of Area Discipline Divisions in the performance of their duties.

(c) **Attorney Jurisdiction.** Any attorney admitted to the practice of law in Alaska, or any other attorney who appears, participates, or otherwise engages in the practice of law in this State, is subject to the jurisdiction of the Court, the Disciplinary Board of the Alaska Bar Association, and these Rules of Disciplinary Enforcement (hereinafter "Rules"). These Rules will not be interpreted to deny to any other court the powers necessary for that court to maintain control and supervision over proceedings conducted before it, such as the power of contempt.

(d) **Venue.** Disciplinary jurisdiction in this State will be divided into the following areas:

(1) Area 1—The First Judicial District;

(2) Area 2—The Second and Fourth Judicial Districts combined; and

(3) Area 3—The Third Judicial District. Venue will lie in that area in which an attorney maintains an office or any area in which the conduct under investigation occurred.

(e) **Attorney Roster.** Within 30 days of any change, each member of the Bar has the duty to inform the Bar or otherwise make available to the public his or her current mailing address and telephone number to which communications may be directed by clients and the Bar.

(Added by SCO 176 dated February 26, 1974: amended by SCO 345 § 1 effective April 1, 1979: and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 962 effective July 15, 1989; by SCO 1365 effective April 15, 2000; and by SCO 1518 effective October 15, 2004)

RULES OF THE ALASKA BAR ASSOCIATION
PART II. RULES OF DISCIPLINARY ENFORCEMENT
A. MISCONDUCT

Rule 10. The Disciplinary Board of the Alaska Bar Association.

(a) **Definition.** The Board of Governors of the Bar, when meeting to consider grievance and disability matters, will be known as the Disciplinary Board of the Alaska Bar Association (hereinafter the "Board"). The President of the Board (hereinafter "President"), or a Board member at the President's direction, may direct the submission of any matter to the Board by mail, telegraph or telephone. The votes on any matter may be taken in person at a Board meeting, or by conference telephone call.

(b) **Quorum.** A majority of the appointed and elected members of the Board will constitute a quorum. A quorum being present, the Board will act only with the agreement of a majority of the members sitting.

(c) **Powers and Duties.** The Board will have the powers and duties to

(1) appoint and supervise Bar Counsel and his or her staff;

(2) supervise the investigation of all complaints against attorneys;

(3) retain legal counsel and authorize the Executive Director of the Bar (hereinafter "Director") to appoint Special Bar Counsel;

(4) hear appeals from the recommendations of Hearing Committees;

(5) review and modify the findings of fact, conclusions of law, and recommendations of Hearing Committees regardless of whether there has been an appeal to the Board, and without regard to the discipline recommended by the Hearing Committees;

(6) recommend discipline to the Court as provided in Rule 16(a)(1), (2), (3) or (4); order discipline as provided in Rule 16(a)(5); or order the grievance dismissed;

(7) in cases where the Board has recommended discipline as provided in Rule 16(a)(1), (2), (3), or (4), forward to the Court its findings of fact, conclusions of law, recommendation, and record of proceedings;

(8) impose reprimand as a Board upon a respondent attorney (hereinafter "Respondent") upon referral by Bar Counsel under Rule 22(d);

(9) maintain complete records of all discipline matters in which the Board or any of its members may participate, and furnish complete records to the Bar Counsel upon final disposition; these records are subject to the provisions of Rule 21 concerning public access and confidentiality;

(10) issue subpoenas requested by disciplinary authorities of other jurisdictions;

(11) adopt regulations not inconsistent with these Rules; and

(12) after reasonable notice and an opportunity to show cause to the contrary, impose monetary sanctions of not more than $500.00 on any attorney appearing before the Board in a discipline or disability matter, whether the attorney is appearing as a respondent or in a

representative capacity, for the attorney's failure to comply with the Rules of Disciplinary Enforcement or orders issued by or on behalf of the Board.

(d) **Judicial Members.** The Board will have the authority to recommend to the Commission on Judicial Conduct discipline for judicial members of the Bar.

(e) **Proceedings Against Board Members.** Investigations of grievances or disability proceedings against attorney members of the Board will be conducted by Special Bar Counsel in the same manner as investigations and proceedings against other Respondents, except that in the event a formal petition is filed, the Court will perform the duties and have the powers of the Board, as provided in these Rules.

(f) **Board Discipline Liaison.** The president will appoint on an annual basis one or more members of the Board to serve as the Board Discipline Liaison to Bar Counsel and Bar Counsel's staff. The Board Discipline Liaison will

(1) provide guidance and assistance to Bar Counsel and Bar Counsel's staff in implementing the Board's policies;

(2) have the duties provided in these Rules and as assigned by the President;

(3) be excused from sitting on any grievance or disability matter in which the Liaison has knowledge of the matter arising from the performance of the Liaison's duties;

(4) not be considered a member of the Disciplinary Board for the purposes of establishing a quorum when excused from sitting on a grievance or disability matter;

(5) have access to any grievance or disability matter necessary to perform the Liaison's duties or to assist Bar Counsel in making a decision on a grievance or disability matter;

(6) maintain the confidentiality of Bar Counsel's files as required by Rule 21(c).

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 2 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989; by SCO 1048 effective nunc pro tunc September 12, 1990; by SCO 1082 effective January 15, 1992; by SCO 1243 effective July 15, 1996; by SCO 1451 effective October 15, 2001; and by SCO 1756, effective October 14, 2011)

RULES OF THE ALASKA BAR ASSOCIATION
PART II. RULES OF DISCIPLINARY ENFORCEMENT
A. MISCONDUCT

Rule 11. Bar Counsel of the Alaska Bar Association.

(a) **Powers and Duties.** The Board will appoint an attorney admitted to the practice of law in Alaska to be the Bar Counsel of the Alaska Bar Association (hereinafter "Bar Counsel") who will serve at the pleasure of the Board. Bar Counsel will

(1) with the approval of the Board, employ attorneys as Assistant Bar Counsel and other staff as needed for the performance of his or her duties;

(2) supervise Assistant Bar Counsel and the staff of the discipline section of the Bar;

(3) with the approval of the Board, retain and supervise investigators;

(4) supervise the maintenance of any records;

(5) aid members of the public in filing grievances;

(6) process all grievances;

(7) investigate alleged misconduct of attorneys;

(8) after finding probable cause to believe that client funds have not been properly handled, and with the approval of one Area Division member, verify the accuracy of a Respondent's bank accounts that contain, should contain, or have contained client funds; Bar Counsel will serve upon Respondent the results of the verification in writing; any costs associated with the examination or subsequent proceedings may be assessed against the Respondent when substantial irregularities in the accounts are found;

(9) dismiss grievances if it appears from the investigation that there is no probable cause to believe that misconduct has occurred;

(10) in his or her discretion, refer a grievance to the Attorney Fee Review Committee for proceedings under Part III of the Alaska Bar Rules, if the grievance concerns a fee dispute;

(11) in his or her discretion, refer a grievance to a mediator, for proceedings under Rule 13;

(12) in his or her discretion, upon a finding of misconduct and with the approval of one member of an Area Division, impose a written private admonition upon a Respondent;

(13) in his or her discretion, after seeking review in accordance with Rule 25(d), and upon a finding of probable cause to believe that misconduct has occurred, file a petition for formal hearing initiating public proceedings;

(14) in his or her discretion, appeal a recommendation of a Hearing Committee to the Board or, pursuant to Part III of the Rules of Appellate Procedure, file a petition to the Court for hearing on a recommendation or order of the Board;

(15) in the absence of a specific grievance, initiate investigation of any misconduct and prepare and file grievances in the name of the Bar;

(16) appear at reinstatement hearings requested by suspended or disbarred attorneys;

(17) report to the Commission on Judicial Conduct any grievance involving a judge, even if the grievance arises from the judge's conduct before (s)he became a judge, or from conduct unconnected with his or her judicial office;

(18) in his or her discretion, initiate a grievance proceeding against a Respondent who is the subject of disciplinary proceedings before the Commission on Judicial Conduct, whether or not a finding of misconduct has been made by the Commission;

(19) keep the Board fully informed about the progress of all matters in his or her charge;

(20) cooperate with individuals authorized by other jurisdictions to perform disciplinary functions for that jurisdiction; and

(21) perform other duties as set forth in these Rules or as assigned by the Board.

(b) **Grievance Forms.** Bar Counsel will furnish forms which may be used by any person to allege misconduct against an attorney. The forms will be available to the public through the office of the Bar and through the office of every clerk of court.

(c) **Dismissal of Grievance.** Any grievance dismissed by Bar Counsel will be the subject of a summary prepared by Bar Counsel and filed with the Board. The names of the parties involved will not be provided in the summary. Bar Counsel will communicate disposition of the matter promptly to the Complainant and Respondent.

(d) **Record Keeping.** This Bar Counsel will maintain records of all grievances processed and maintain statistical data reflecting

(1) the subject of the grievances received and acted upon;

(2) the status and ultimate disposition of each grievance; and

(3) the number of times each attorney is the Respondent in a grievance, including the subjects of the grievances, and the ultimate disposition of each.

(e) **Quarterly Report to Court and Board.** The Bar Counsel will provide a quarterly report to the Court and the Board providing information about the number of cases filed and closed during the quarter, the status of pending cases, the disposition of closed cases, and the subject of the grievances received. The names of the Respondents will not be provided in the report.

(f) **Delegation to Assistant Bar Counsel.** Bar Counsel may delegate such tasks as (s)he deems appropriate to Assistant Bar Counsel (hereinafter "Assistants"). Any reference in these Rules to Bar Counsel will include the Assistants.

(g) **Proceedings Against Bar Counsel.** Proceedings against Bar Counsel or any Assistant Bar Counsel will be conducted in the same manner as proceedings against any other Respondent. In these matters, the Board will appoint Special Bar Counsel who will perform the duties and have the powers of Bar Counsel as provided in these Rules.

(h) **Disposal of Files.** Bar Counsel will destroy files of disciplinary, disability, and reinstatement proceedings in accordance with Rule 32.

[Amended effective July 15, 1989; July 15, 1998.]

Rule 12. Area Discipline Divisions and Hearing Committees.

(a) **Appointment of Area Division Members.** Members of Area Discipline Divisions (hereinafter "Area Divisions") will be appointed by the chief justice under the procedure set out in this rule. One Area Division will be established in each area defined in Rule 9(d). Each Area Division will consist of

(1) not less than six members in good standing of the Bar, each of whom resided within the area of disciplinary jurisdiction for which he or she is appointed; and

(2) not less than three non-attorney members of the public (hereinafter "public member"), each of whom resides in the area of disciplinary jurisdiction for which he or she is appointed, is a United States Citizen, is at least 25 years of age, and is a resident of the State of Alaska. Area Division members will each serve a four year term, with each term to commence July 1 and expire on June 30th of the fourth year. No member will serve for more than two consecutive terms. A member whose term has expired prior to the disposition of a disciplinary or disability matter to which he or she has been assigned will continue to serve until the conclusion and disposition of that matter. This continued service will not prevent immediate appointment of his or her successor. A member who has served two consecutive terms may be reappointed after the expiration of one year. By May 15 of each year, the Board will send the chief justice lists of proposed Area Division members meeting these qualifications together with their resumes. The chief justice will appoint the members of the Area Discipline Divisions from these lists.

(b) **Powers and Duties of Area Division Members.** Upon selection and assignment by the Director, Area Division members will have the powers and duties to

(1) sit on Hearing Committees;

(2) review requests from Bar Counsel to impose private admonitions upon Respondents pursuant to Rule 22(d);

(3) hear appeals from complainants from dismissals of grievances pursuant to Rule 25(c);

(4) review Bar Counsel's decision to file a formal petition pursuant to Rule 25(e);

(5) review challenges to Hearing Committee members pursuant to Section (h) of this Rule; and

(6) issue subpoenas and hear challenges to their validity pursuant to Rule 24(a).

(c) **Representation of Respondents Prohibited.** Members serving on Area Divisions will not represent a Respondent in disability or grievance matters during his or her term.

(d) **Failure to Perform.** The chief justice has the power to remove an Area Division member for good cause. The chief justice will appoint a replacement attorney or public member to serve the balance of the term of the removed member.

(e) **Assignment of Hearing Committee Members.** The Director will select and assign members of an Area Division to a Hearing Committee of not less than two attorney members and one public member. In addition, the Director will appoint an attorney member as chair of the Hearing Committee.

(f) **Hearing Committee Quorum.** Three members of a Hearing Committee will constitute a quorum, one of whom will be a public member. The Hearing Committee chair will vote except when an even number of Hearing Committee members is sitting. Each Hearing Committee will act only with the agreement of a majority of its voting members sitting for the matter before it.

(g) **Conflict of Interest.** A Hearing Committee member may not consider a matter when

(1) (s)he is a party or is directly interested;

(2) (s)he is a material witness;

(3) (s)he is related to the Respondent by blood or affinity within the third degree;

(4) the Respondent has retained the Hearing Committee member as his or her attorney or has been professionally counseled by him or her in any matter within two years preceding the filing of the formal petition before the Committee; or

(5) (s)he believes that, for any reason, (s)he cannot give a fair and impartial decision.

(h) **Challenged Member.** Any challenge for cause to an Area Division member assigned to a Hearing Committee must be made by either Respondent or Bar Counsel within 10 days following notice of the assignment, unless new evidence is discovered which establishes grounds for a challenge for cause. The challenge will be ruled upon by an Area Division member selected by the Director from the Area Division from which the Hearing Committee was chosen. If the Area Division member finds the challenge well taken, he or she will notify the Director, who will assign another member of the Area Division to the Hearing Committee. If a quorum exists in the absence of the challenged member, the Director need not assign a replacement. Within 10 days of the notice of assignment of Hearing Committee members, a Respondent may file one peremptory challenge and the Bar Counsel may file one peremptory challenge. The Director will at once, and without requiring proof, relieve the challenged member of his or her obligation to participate, and the Director will assign another member of the Area Division to the Hearing Committee. If a quorum exists in the absence of the challenged member, the Director need not appoint a replacement.

(i) **Powers and Duties of Committees.** Hearing Committees will have the powers and duties to

(1) swear witnesses, who will be examined under oath or affirmation, and conduct hearings on formal charges of misconduct referred to them by Bar Counsel;

(2) acting as a body, or through a single member, issue subpoenas and consider challenges to their validity;

(3) direct, in their discretion, the submission of proposed findings of fact, conclusions of law, recommendations, and briefs; and

(4) submit a written report to the Board. This report will contain the Hearing Committee's findings of fact, conclusions of law, and recommendation, and will be submitted together with the record, including any briefs submitted and a transcript of the proceedings before it.

(j) **Proceedings Against Division Members.** Proceedings against attorney members of Area Divisions will be conducted in the same manner as proceedings against any other

Respondent. In the event a formal petition is filed against an Area Division member, or the attorney member is placed on disability inactive status, (s)he will not be assigned to any future matters pending disposition of the proceeding. If a finding of misconduct or disability is made against an attorney Area Division member, (s)he will be removed from the Division in accordance with Section (d) of this Rule. (k) Procedure for Selection and Assignment of Area Division Members by the Director. The Director will select and assign Area Division Members as required by this rule from a roster of the members appointed by the chief justice.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 4 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989; by SCO 1082 effective January 15, 1992; by SCO 1244 effective July 15, 1996; by SCO 1451 effective October 15, 2001; by SCO 1809 effective October 15, 2013; and by SCO 1815 effective April 15, 2014)

RULES OF THE ALASKA BAR ASSOCIATION
PART II. RULES OF DISCIPLINARY ENFORCEMENT
A. MISCONDUCT

Rule 15. Grounds For Discipline.

(a) **Grounds for Discipline.** In addition to those standards of conduct prescribed by the Alaska Rules of Professional Conduct, Ethics Opinions adopted by the Board of Governors of the Bar, and the Code of Judicial Conduct, the following acts or omissions by a member of the Alaska Bar Association, or by any attorney who appears, participates, or otherwise engages in the practice of law in this State, individually or in concert with any other person or persons, will constitute misconduct and will be grounds for discipline whether or not the act or omission occurred in the course of an attorney-client relationship:

(1) conduct which results in conviction of a serious crime as defined in Rule 26(b);

(2) conduct which results in attorney or judicial discipline in any other jurisdiction, as provided in Rule 27;

(3) knowing misrepresentation of any facts or circumstances surrounding a grievance;

(4) failure to answer a grievance, failure to answer a formal petition for hearing, or failure to furnish information or respond to a request from the Board, Bar Counsel, an Area Division member, or a Hearing Committee in conforming with any of these Rules;

(5) contempt of the Board, of a Hearing Committee, or of any duly appointed substitute;

(6) engaging in the practice of law while on inactive status, or while disbarred or suspended from the practice of law for any reason;

(7) failure to perform or comply with any condition of discipline imposed pursuant to these Rules; or

(8) failure to inform the Bar of his or her current mailing address and telephone number as provided in Rule 9(e).

(b) **Unauthorized Practice of Law.**

(1) For purposes of the practice of law prohibition for disbarred and suspended attorneys in subparagraph (a)(6) of this rule, except for attorneys suspended solely for nonpayment of bar fees, “practice of law” is defined as:

(A) holding oneself out as an attorney or lawyer authorized to practice law;

(B) rendering legal consultation or advice to a client;

(C) appearing on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate judge, commissioner, hearing officer, or governmental body which is operating in its adjudicative capacity, including the submission of pleadings;

(D) appearing as a representative of the client at a deposition or other discovery matter;

(E) negotiating or transacting any matter for or on behalf of a client with third parties; or

(F) receiving, disbursing, or otherwise handling a client's funds.

(2) For purposes of the practice of law prohibition for attorneys suspended solely for the non-payment of fees and for inactive attorneys, "practice of law" is defined as it is in subparagraph (b)(1) of this rule, except that these persons may represent another to the extent that a layperson would be allowed to do so.

(c) **Employment of Disbarred, Suspended, or Resigned Attorney.**

(1) For purposes of this rule:

(A) "disbarred or suspended attorney" means an attorney who has been disbarred or suspended from the practice of law in any jurisdiction;

(B) "employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(C) "involuntarily inactive attorney" means an attorney who has been transferred to interim disability inactive status or to disability inactive status under Alaska Bar Rule 30 or under a comparable rule in another jurisdiction; and

(D) "resigned attorney" means an attorney who has resigned from the bar association of any jurisdiction while disciplinary charges are pending.

(2) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive attorney to perform the following on behalf of the member's client:

(A) render legal consultation or advice to the client;

(B) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate judge, commissioner, or hearing officer;

(C) appear as a representative of the client at a deposition or other discovery matter;

(D) negotiate or transact any matter for or on behalf of the client with third parties;

(E) receive, disburse, or otherwise handle the client's funds; or Rule 15.1

(F) engage in activities which constitute the practice of law.

(3) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive attorney to perform research, drafting or clerical activities, including but not limited to:

(A) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(B) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(C) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(4) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive attorney, the member shall serve upon the Alaska Bar Association written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (c)(2) and state that the disbarred, suspended, resigned, or involuntarily inactive attorney will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(5) A member may, without client or Bar Association notification, employ a disbarred, suspended, resigned, or involuntarily inactive attorney whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(6) Upon termination of the disbarred, suspended, resigned or involuntarily inactive attorney, the member shall promptly serve upon the Bar Association written notice of the termination.

(Added by SCO 176 dated February 26, 1974; amended by SCO 304 effective March 20, 1978; by SCO 345 § 7 effective April 1, 1979; by SCO 405 effective, nunc pro tunc, January 1, 1980; by SCO 467 effective June 1, 1981; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 888 effective July 15, 1988; by SCO 941 effective January 15, 1989; by SCO 962 effective July 15, 1989; by SCO 1017 effective January 15, 1990; by SCO 1156 effective July 15, 1994; by SCO 1314 effective July 15, 1998; by SCO 1320 effective July 15, 1998; corrected May 1998; and by SCO 1829 effective October 15, 2014)

ALASKA COURT RULES
RULES OF THE ALASKA BAR ASSOCIATION
PART II. RULES OF DISCIPLINARY ENFORCEMENT
A. MISCONDUCT

Current with amendments received through 7-1-98.

RULE 25. APPEALS; REVIEW OF DISCIPLINE COUNSEL DETERMINATIONS

(a) Interlocutory Appeal. Only upon the conditions and subject to the Rules of Procedure set forth in Part IV of the Alaska Rules of Appellate Procedure may parties petition the Court for review of an interlocutory order, recommendation, or decision of

(1) any member of any Area Division;

(2) a Hearing Committee or a single member thereof; or

(3) the Board or a single member thereof.

(b) Admonition Not Appealable. A Respondent cannot appeal the imposition of a written private admonition. In accordance with Rule 22(d), (s)he may request initiation of formal proceedings before a Hearing Committee within 30 days of receipt of the admonition.

(c) Appeal by Complainant From Bar Counsel's Decision to Dismiss. A Complainant may appeal the decision of the Bar Counsel to dismiss a complaint within 15 days of receipt of notice of the dismissal. The Director will appoint a member of an Area Division of the appropriate area of jurisdiction to review the Complainant's appeal. The appointed Area Division member may reverse the decision of Bar Counsel, affirm the decision, or request additional investigation. This Division member will be disqualified from any future consideration of the matter should formal proceedings be initiated.

(d) Review of Bar Counsel's Decision to File Formal Petition. A decision by Bar Counsel to initiate formal proceedings before a Hearing Committee will be reviewed by the Board Discipline Liaison prior to filing of a formal petition. The Board Discipline Liaison will, within 20 days, approve, modify, or disapprove the filing of a petition, or order further investigation.

(e) Appeal by Bar Counsel. Bar Counsel may appeal the decision made under Section (d) of this Rule within 10 days following receipt of the Board Discipline Liaison's decision. The Director will designate an Area Division Member to hear this appeal. The decision of the Area Division Member will be final.

(f) Appeal of Hearing Committee Findings, Conclusions, and Recommendation. Within 10 days of service of the Hearing Committee's report to the Board, as set forth in Rule 22(1), the Respondent or Bar Counsel may appeal the findings of fact, conclusions of law, or recommendation by filing with the Board, and serving upon opposing party, a notice of appeal. Oral argument before the Board will be waived unless either Bar Counsel or Respondent requests argument as provided in Section (1) of Rule 22.

(g) Respondent Appeal From Board Recommendation or Order. Respondent may appeal from a recommendation or order of the Board made under Rule 22(n) by filing a notice of appeal with the Court within 10 days of service of the Board's recommendation or order. Part II of the Rules of Appellate Procedure will govern appeals filed under this Rule.

(h) Bar Counsel Petition for Hearing of a Board Recommendation or Order. Bar Counsel may petition from a recommendation or order of the Board made under Rule 22(n) by filing a petition for hearing with the Court within 10 days of service of the Board's recommendation or order. Part III of the Rules of Appellate Procedure will govern petitions filed under this Rule.

[Amended effective July 15, 1989; January 15, 1992.]

ALASKA COURT RULES
RULES OF THE ALASKA BAR ASSOCIATION
PART II. RULES OF DISCIPLINARY ENFORCEMENT
A. MISCONDUCT

Current with amendments received through 7-1-98.

RULE 28. ACTION NECESSARY WHEN DISBARRED, SUSPENDED, OR PLACED ON PROBATION

(a) Notice. An attorney who has been disbarred, suspended, placed on probation, or who is under an order of interim suspension, will promptly provide notice of the discipline imposed as required by this Section. Notice will be sent by certified or registered mail, return receipt requested. Notice to clients need only be sent to clients represented by the disciplined attorney on the entry date of the Court's order. Notice required to attorneys representing opposing parties in pending litigation or administrative proceedings need only be sent if the disciplined attorney is an attorney of record at the time of the entry date of the Court's order. Notice will be provided as follows:

(1) an attorney who has been disbarred, suspended for more than 90 days, or who is under an order of interim suspension, will promptly notify

(A) each of his or her clients who is involved in pending litigation or administrative proceedings, and each attorney representing opposing parties in the proceedings, of his or her disbarment or suspension and his or her inability to practice law in the State after the effective date of the disbarment or suspension; the notice given the client will advise the client of the necessity to promptly seek substitution of another attorney; the notice served upon the attorneys for the opposing parties will state the mailing address of the client of the disbarred or suspended attorney; and

(B) each of his or her clients who is involved in any matters other than litigation or administrative proceedings; the notice will advise the clients of his or her disbarment or suspension, his or her inability to practice law in the State after the effective date of the disbarment or suspension, and the need to seek legal advice from a different attorney;

(2) an attorney who has been suspended for 90 days or less will notify all clients in any matters, and each attorney representing opposing parties in any pending litigation or administrative proceedings, that (s)he will be unavailable for the period of time specified in the Court's order; the disciplined attorney will advise his or her clients that they may seek substitute counsel at their discretion; and

(3) an attorney who has been placed on probation will notify all clients in any matters, and each attorney representing opposing parties in any pending litigation or administrative proceedings, of the terms of his or her probation, unless the Court, in its order placing the attorney on probation, relieves the attorney of this duty.

(b) Substitute Counsel. An attorney suspended for 90 days or less will assist his or her clients in arranging for alternate representation where necessary or requested.

Should the client of an attorney who has been disbarred, suspended for more than 90 days, or who is under an order of interim suspension not obtain substitute counsel before the effective date of the disbarment or suspension, the disciplined attorney will move for leave to withdraw in the court or administrative agency in which the proceeding is pending.

(c) Effective Date of Order; Limitation on Practice. Orders imposing disbarment, suspension, or probation will be effective 30 days after the entry date, unless otherwise ordered by the Court in the order imposing discipline. After the entry date of a disbarment or suspension order, the disciplined attorney will not accept any new retainer or accept employment in any new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date, (s)he may, unless otherwise ordered by the Court in the order imposing discipline, wind up and complete, on behalf of any client, all matters which were pending on the entry date of the order.

(d) Prohibition on Practice. An attorney who has been disbarred, suspended, or who is under an order of interim suspension will, during the period of his or her disbarment or suspension, cease all practice of law, including the acceptance of any new clients.

(e) Probation. Probation may be imposed in accordance with Rule 16(a)(3) only in those cases where there is little likelihood that the attorney on probation will harm clients or the public during the period of probation and where the conditions of probation can be adequately supervised. Probation may be renewed by the Court for an additional period if the Board so recommends and the Court concurs in the recommendation. The Board's recommendation for renewal of probation will be submitted to the Court not more than six months, nor less than 60 days prior to the expiration of the original probation period. The attorney on probation will be advised of the recommendation and be given an opportunity to be heard by the Court. The conditions of probation will be specified in writing.

(f) Compliance by Disciplined Attorney. Within 10 days after the effective date of a disbarment or suspension order, the disciplined attorney will file with the Court, and serve upon Bar Counsel, an affidavit showing that

(1) (s)he has fully complied with the provisions of the order and with these Rules; and

(2) (s)he has notified all other state, federal and administrative jurisdictions to which (s)he is admitted to practice of his or her discipline.

The affidavit will also set forth the residence and mailing addresses of the disciplined attorney where communications may thereafter be directed. Pursuant to Rule 9(e), it is the ongoing responsibility of the disciplined attorney to keep the Bar apprised of his or her current address and telephone number.

(g) Public Notice. The Board will cause a notice of the disbarment, suspension, interim suspension, probation, public censure, or public reprimand to be published in

(1) a newspaper of general circulation in Anchorage, Fairbanks, and Juneau;

(2) an official Alaska Bar Association publication; and

(3) a newspaper of general circulation serving the community in which the disciplined attorney maintained his or her practice.

(h) Circulation of Notice; National Lawyer Regulatory Data Bank. The Board will promptly transmit a copy of the order of disbarment, suspension, interim suspension, probation, public censure, or public reprimand to the presiding judges of the superior court in each judicial district in Alaska; to the presiding judge of the United States District Court for the District of Alaska; and to the Attorney General for the State of Alaska, together with the request that the Attorney General notify the appropriate administrative agencies. The presiding judges will make such orders as they deem necessary to fully protect the rights of the clients of the disbarred, suspended, or probationary attorney.

Bar Counsel will transmit to the National Lawyer Regulatory Data Bank maintained by the American Bar Association, and any jurisdiction to which Respondent has been admitted, notice of all discipline imposed by the Court, all orders granting reinstatement, and all public reprimands.

(i) Record Keeping. A disbarred, suspended, or probationary attorney will keep and maintain records of the various steps taken by him or her pursuant to these Rules so that proof of compliance with these Rules and with the disbarment, suspension or probationary order is available. Proof of compliance with the Rules and Court order will be a condition precedent to any petition for reinstatement.

(j) Surrender of Bar Membership Card. Any attorney upon whom disbarment, suspension, or interim suspension has been imposed will, within 10 days of the effective date of the order, surrender his or her Alaska Bar Association membership card to the Director by delivery in person, or by certified or registered mail, return receipt requested.

[Amended effective July 15, 1989; September 12, 1990; January 15, 1991; July 15, 1998.]

Appendix C
Alaska Code of Judicial Conduct

Alaska Code of Judicial Conduct
Canon 3B

(9) A Judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness, or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall take reasonable steps to maintain and insure similar abstention on the part of court staff subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the **Alaska Rules of Professional Conduct**.

Alaska Court Rules
Alaska Code of Judicial Conduct
Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2) and 5C, a judge or a candidate* for appointment to judicial office shall not:

(a) act as a leader of or hold office in a political organization.*

(b) publicly endorse or publicly oppose a candidate for any public office. However, when false information concerning a judicial candidate* is made public, a judge or candidate having knowledge* of contrary facts may make the facts public.

(c) make speeches on behalf of a political organization.*

(d) attend political gatherings.

(e) solicit funds for any political organization* or candidate for public office, pay an assessment or make a contribution to a political organization or candidate for public office, purchase tickets for a political organization's dinners or other functions.

COMMENTARY

A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

Judges should be able to take part in the public debate over proposals to change the legal system or the administration of justice; judges' training and experience make them a valuable resource to the electorate wishing to decide these issues. Since many speeches are given in forums sponsored by political organizations, a question arises concerning the relationship between, on the one hand, a judge's right to speak publicly on issues concerning the legal system and the administration of justice, and, on the other hand, the prohibition contained in Section 5A(1)(d)--that a judge shall not attend the gathering of a political organization. Despite a judge's freedom to speak on legal issues, a judge shall not do so on behalf of a political organization or at a political gathering.

(2)[1]A judge shall resign upon becoming a candidate* in either a primary or general election for any non-judicial office except the office of delegate to a state or federal constitutional convention.

(3) A candidate for judicial office:*

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards that apply to the candidate. “Members of the candidate's family” means the candidate's spouse,* children, grandchildren, parents,

grandparents, and other relatives or persons with whom the candidate maintains a close familial relationship.

COMMENTARY

Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage all other employees and officials subject to the candidate's direction and control, from doing anything on the candidate's behalf that is forbidden to the candidate under these rules.

(c) shall not authorize or permit any person to take actions forbidden to the candidate under these rules, except when these rules specifically allow other people to take actions that would be forbidden to the candidate personally.

(d) shall not:

(i) make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office;

(ii) make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly* misrepresent any fact concerning the candidate or an opposing candidate for judicial office.

COMMENTARY

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies, or issues likely to come before the court. As a corollary, a candidate for judicial office should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the Alaska Rules of Professional Conduct.

In Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224 (7th Cir. 1993), the Seventh Circuit ruled that the ABA's proposed Section 5A(3)(d)(i) and the 1972 predecessor to the ABA's proposed Section 5A(3)(d)(ii) represent an unconstitutional abridgement of judicial candidates' right of free speech.

The Illinois rule at issue in Buckley prohibited judges and judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and further prohibited judges and judicial candidates from "announc[ing] [their] views on disputed legal or political issues." These same restrictions are

currently the law of Alaska: see Alaska Code of Judicial Conduct, Section 7B(1)(c). The Seventh Circuit held that these two restrictions on judges' speech are unconstitutionally overbroad.

Buckley involved two plaintiffs. The first plaintiff was a judge from the intermediate appeals court who ran for the state supreme court; the Judicial Inquiry Board disciplined him for declaring, during the campaign, that he had "never written an opinion reversing a rape conviction." The second plaintiff was a legislator who campaigned for (and was elected to) a seat on the Cook County Circuit Court; he sought relief because "the risk of being sanctioned for violating [the judicial conduct rule] deterred him from speaking out in his campaign on issues that he believed to be important to Illinois voters, including capital punishment, abortion, the state's budget, and public school education."

The Seventh Circuit noted that Buckley presented the collision of two competing political principles: First, "Candidates for public office should be free to express their views on all matters of interest to the electorate." Second, "Judges [must] decide cases in accordance with law rather than [in accordance] with any express or implied commitments that they may have made to their campaign supporters or to others." Buckley, 997 F.2d at 227.

The court declared that "only a fanatic would suppose that... freedom of speech should... entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases[.]" On the other hand, the court likewise disavowed the idea "that the principle of impartial legal justice should... prevent a [judicial] candidate... from furnishing any information or opinion to the electorate beyond his name, rank, and serial number." Id. The court went on to state:

> *The difficulty with crafting a rule to prevent [a judicial candidate from making commitments] is that a commitment can be implicit as well as explicit.... The candidate might make an explicit commitment to do something that was not, in so many words, taking sides in a particular case or class of cases but would be so understood by the electorate; he might for example promise always to give paramount weight to public safety or to a woman's right of privacy. Or he might discuss a particular case or class of cases in a way that was understood as a commitment to rule in a particular way, even though he avoided the language of pledges, promises, or commitments.*
>
> *The "pledges or promises" clause is not limited to pledges or promises to rule a particular way in particular cases or classes of case; all pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office. The "announce" clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. The rule certainly deals effectively with the abuse that the draftsmen were concerned with; but in so doing it gags the judicial candidate. He can say nothing in public about his judicial philosophy, he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize Roe v. Wade. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability--or for that matter about laissez-faire economics, race relations, the*

civil war in Yugoslavia, or the proper direction of health-care reform.... All these are disputed legal or political issues.

The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election. Indeed, the only safe response to Illinois Supreme Court Rule 67(B)(1)(c) is silence. True, the silencing is temporary. It is limited to the duration of the campaign. But [the rule's] interference with the marketplace of ideas and opinions is at its zenith when the "customers" are most avid for the market's "product." The only time the public takes much interest in the ideas and opinions of judges or judicial candidates is when an important judicial office has to be filled....

Id. at 228-29. The Seventh Circuit noted, but expressed no opinion on, the ABA's proposed revision of the "announce his views" clause. In the 1990 version of the model Code, the ABA has amended this Section so that it now prohibits a judge or judicial candidate from making "statements that commit or appear to commit the judge to a particular view or decision with respect to cases, controversies, or issues... likely to come before [the judge's] court." According to the ABA commentary to Section 5A(3)(d)(ii), the predecessor "announce" rule was felt to be too broad.

The Seventh Circuit points out in Buckley that, even with this change, the ABA provisions may run afoul of First Amendment protections. For example, read too broadly, a Section that prohibits a judge from making any pledge or promise (other than to do a good job) could be used as a basis for disciplinary action against a judicial candidate who declared that he or she believed the courts should actively pursue sentencing alternatives to imprisonment. Conceivably, this same provision could subject a judge to discipline for declaring, as Ruth Ginsberg told the Senate Judiciary Committee on July 20, 1993 [as reported in the Anchorage Daily News of 7/21/93], "My approach [to service on the supreme court] is rooted in the [belief] that the place of the judiciary... in our democratic society [is] third in line behind the people and their elected representatives"--a comment that might be construed as a pledge to broadly construe the powers of the legislative branch and to narrowly circumscribe the reach of the Bill of Rights as a check on legislative activity. The Code should be interpreted in a manner that does not infringe First Amendment rights.

(e) may respond to personal attacks or attacks on the candidate's record, as long as the response contains no knowing misrepresentation of fact and does not violate Section 5A(3)(d).

B.[1] Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) A candidate[*] for appointment to judicial office or a judge seeking appointment to another governmental office shall not solicit or accept any funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate[*] for appointment to judicial office or a judge seeking appointment to another governmental office may not engage in any political activity[*] to secure appointment, with the following exceptions:

(a) subject to Section 5A(3), such persons may:

(i) communicate with the appointing authority, including any selection, screening, or nominating bodies;

(ii) seek privately-communicated support or endorsement from organizations and individuals; and

(iii) provide information regarding his or her qualifications for office to organizations and individuals from whom the candidate seeks support;

(b) a non-judge candidate* for appointment to judicial office may, in addition, unless otherwise prohibited by law*:

(i) retain an office in a political organization,*

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and dues to political organizations* and to purchase tickets for political party dinners or other functions.

COMMENTARY

Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may support their own candidacy and seek appropriate support from others.

Sections 5B(2)(a)(ii) and (iii) should be read to allow judicial candidates, including judges who are candidates for appointment to other judicial office, to promote their candidacy by circulating letters to the general membership of the bar and to organizations interested in judicial selection. Similarly, a judge need not object when individual lawyers or groups of lawyers decide to circulate a letter in support of the judge's candidacy. However, these letters must not contain promises or statements forbidden by Section 5A(3)(d) (regarding the candidate's likely decisions or action if appointed), must not contain false statements, and, in general, must not violate any other provision of the Code.

A different problem is presented when a judicial candidate approaches individual lawyers or organizations and seeks their endorsement of his or her candidacy. Even though Canon 5 generally tries to make the rules of political conduct uniform for all judicial candidates (both current judges and lawyers applying to be judges), a sitting judge's approach to individual lawyers inevitably presents problems that do not arise when a non-judge candidate approaches other members of the bar. Because a sitting judge will wield judicial power whether or not the judge's campaign for a different office is successful, a judge who asks individuals for political support runs the risk that the request will give the appearance of abuse of office. Because there is a latent potential for subtle coercion in such requests, a judge's request for the personal endorsement of a lawyer must be circumspect and framed cautiously. A judge must take pains to avoid even giving the appearance that he or she is using or threatening to use the power of judicial office to obtain endorsements.

Section 5B(2)(a)(ii) allows a candidate to seek privately-communicated support or endorsement. Under this provision, a candidate may ask individuals and organizations to send a letter to the Alaska Judicial Council or to the governor, or to speak in support of the candidate at a public hearing held by the Judicial Council or at a private meeting with the governor or the governor's staff. However, a candidate may not ask or authorize individuals or organizations to run newspaper advertisements endorsing the candidate or to send letters to their membership or to other organizations encouraging them to support the candidate. If the candidate is a judge,

the candidate should ask individuals and organizations not to send copies of endorsement letters to the candidate.

Although under Section 5B(2)(b) non-judge candidates seeking appointment to judicial office are permitted during their candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during their candidacy. See Sections 5E and Application Section.

C. Judges Seeking Retention.

(1) A judge who is a candidate* for retention in judicial office may engage in the following political activity to secure retention:

(a) submit a photograph and a statement supporting his or her candidacy for inclusion in the state election pamphlet under AS 15.58;

(b) in response to an unsolicited request,

(i) speak to public gatherings on behalf of his or her candidacy;

(ii) appear on television and radio programs to discuss his or her candidacy; and

(iii) grant interviews regarding his or her candidacy;

(c) form an election committee of responsible persons to conduct an election campaign in anticipation of active opposition to the judge's candidacy; and

(d) reserve media space, domains, and locations, and design and prepare campaign materials in anticipation of active opposition to the judge's candidacy and spend necessary funds for these activities.

(2) A judge who is a candidate* for retention in judicial office may engage in the following additional political activity when there is active opposition to the judge's candidacy:

(a) advertise in newspapers, on television, and in other media in support of his or her candidacy; and

(b) distribute pamphlets and other promotional literature supporting his or her candidacy.

COMMENTARY

Sections 5C(1) and (2) permit a judge who is a candidate for retention to be involved in limited political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity.

Section 5C(2) allows judges seeking retention in office to engage in overt political activity if there is "active opposition" to their candidacy. This Code, like the prior Code, does not define "active opposition." However, the term is meant to be broadly construed. A negative recommendation by the Alaska Judicial Council constitutes active opposition. Holding a press conference, advertising, distributing brochures or leaflets, and sending letters to voters are all forms of active opposition. On the other hand, statements made by individual speakers at Judicial Council meetings rarely constitute active opposition, regardless of what is said. Active opposition may be conducted by individuals acting alone as well as by groups. The opposition need not be specifically targeted at one particular judge or at a discrete group of judges--a newspaper advertisement urging the rejection of all judges standing for retention would be viewed as active opposition to the candidacy of each individual judge. If a judge has

information and believes that active opposition is imminent, the judge may document the basis of this belief to the Judicial Conduct Commission and may then proceed as if there were active opposition to the judge's candidacy.

(3) A judge who is a candidate* for retention in judicial office shall not personally solicit or accept any funds to support his or her candidacy or personally solicit publicly stated support for his or her candidacy. However, if there is active opposition to the judge's candidacy, the judge's election committees may engage in media advertisements, brochures, mailings, candidate forums, and any other legal methods of pursuing the judge's election. Such committees may solicit and accept reasonable campaign contributions, manage and expend these funds on behalf of the judge's election campaign and solicit and obtain public statements of support for the judge's candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committee may solicit contributions and public support for the candidate's campaign preceding the election and for 90 days thereafter. A judge shall not make private use of campaign funds raised by an election committee or use these funds for the private benefit of any other person or permit anyone else to use these funds for the private benefit of any person.

COMMENTARY

Section 5C(2) permits a judge who is a candidate for retention to establish a campaign committee to solicit and accept public support and reasonable financial contributions if there is active opposition to the judge's candidacy. At the start of the campaign, the judge must instruct his or her campaign committee to solicit or accept only contributions that are reasonable under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fundraising, to the extent possible.

Section 5C(2) does not prohibit a judge who is a candidate for retention from initiating an evaluation by a ***judicial*** *selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.*

Sections 5C and 5D are intended to restrict fundraising by and on behalf of individual judges. These Sections are not intended to prohibit an organization of judges from soliciting money from judges to establish a campaign fund to assist judges who face active opposition to their retention.

They are not intended to restrict the ability of judges to spend their own funds in support of their own candidacies.

(4) A judge who is a candidate* for selection as a delegate to a federal or state constitutional convention may engage in any political activity* to secure election allowed to other candidates for that office.

D. Incumbent Judges. A judge shall not engage in any political activity* except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law,* the legal system, or the administration of justice, or (iii) as expressly authorized by another provision of law.

COMMENTARY

Neither Section 5D nor any other Section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system, and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

E. Applicability. Canon 5 applies to all incumbent judges and **judicial** candidates.* A successful candidate, whether or not an incumbent, is subject to **judicial** discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for **judicial** office is subject to Rule 8.2(b) of the **Alaska** Rules of Professional Conduct.

Credits

[Adopted effective July 15, 1998. Amended effective July 1, 2011.]

Appendix D
Commission on Judicial Conduct
Procedural Rules

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ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Judicial Conduct Commission, Rule 1
ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE
Current with amendments received through 5-15-97.

RULE 1. ORGANIZATION OF COMMISSION

A. Meetings.

(1) Annual. There shall be one annual meeting in the first quarter of each calendar year at a date and hour designated by the Commission.

(2) Regular. Other regular meetings at designated locations may be held as needed. Regular meetings may be held either in person or by teleconference.

(3) Special. Special meetings may be called by the chairperson or two members of the Commission upon prior written or verbal notice to all members where there is a need to meet on short notice for a special purpose. If the special agenda includes any public matter, public notice shall be given at least 24 hours prior to the meeting. Special meetings may be held either in person or by teleconference.

B. Notice of Meetings.

(1) Public. At least fourteen (14) days prior to a regular or annual Commission meeting, the Executive Director shall give public notice to be placed in newspapers of general circulation most likely to give notice to the residents of the State of Alaska. The notice shall clearly specify the date, time and place of the Commission meeting and shall also state that anyone wishing to appear at the meeting must contact the Executive Director at the Commission office at least five (5) working days before the meeting. An agenda of public matters shall also be included in the meeting notice.

(2) Members. At least fourteen (14) days prior to a regular or annual Commission meeting, notice of the meeting shall be served on each member of the Commission. The notice shall contain the date, time and place of the meeting, and a tentative meeting agenda. Members may waive the giving of notice for any meeting.

C. Officers.

(1) Chairperson. There shall be a chairperson and a vice-chairperson elected by majority vote of the Commission at the annual meeting, who shall serve for a period of two years. The chairperson shall conduct the meetings, certify Commission recommendations and direct the preparation of meeting agendas, notices, reports, minutes and the keeping of Commission records. The vice-chairperson shall act in the absence of the chairperson.

(2) Executive Committee. The chairperson may appoint an executive committee to perform matters of administration as from time to time are designated by the Commission.

D. Commission Office. The Commission shall establish a permanent office in a building open to the public. The office shall be open and staffed at regular office hours as designated by the Commission.

E. Quorum. No dispositive action may be taken by the Commission unless a quorum of at least a majority of the members serving on the Commission are present, in person or telephonically, at the meeting. A quorum of the Commission must include at least one judge member, one attorney member, and one public member.

F. Voting Requirements. Any act of the Commission requires a majority vote of the members participating in the Commission matter at the time the action is taken.

The names of Commission members voting on any question, prior to a probable cause determination in a matter, shall not be recorded in the minutes unless requested by the member(s) that their names be noted for the record.

G. Order of Business. The order of business of the Commission shall be determined by the chairperson in advance of each meeting. The meetings shall be ordered to encourage attendance by the public, where public matters are considered.

To facilitate productive and effective meetings, any member of the public who wishes to testify at a meeting of the Commission shall make the request to the Executive Director at least forty-eight (48) hours prior to the commencement of the meeting. Requests will be honored only if the general substance or subject area on which the individual wishes to testify concerns a public matter related to the Commission's function. All requests are subject to approval by the Commission Chairperson. Written public testimony will be accepted at any time, concerning any matter relating to the Commission's function.

H. Electronic and Written Records. All meetings of the Commission shall be electronically recorded except for Commission deliberations. Minutes of both public and closed sessions shall be written and approved by the Commission and permanently stored. All Commission documents that relate to allegations of misconduct shall be preserved and include: tape recordings, staff notes and memoranda, transcripts of testimony before the Commission, and correspondence.

I. Commission Member Holdover. To ensure that the Commission continuously fulfills its constitutional responsibilities, a Commission member shall continue to serve as an active member after expiration of that member's term until the vacancy is filled by the appropriate appointing authority.

[Adopted November 1, 1991; amended December 10, 1993; May 9, 1995.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 2. FUNCTIONING OF THE COMMISSION

A. Annual Report. Prior to the annual meeting, the Executive Director shall prepare an annual report of the Commission's activities for presentation at that meeting. Upon approval of the Commission, a copy of the annual report shall be forwarded to the Governor, President of the Senate, Speaker of the House, Chief Justice, the State Publications Distribution and Data Access Center and President of the Alaska Bar. The report shall also be generally available to the public.

B. Executive Director. The Commission may appoint an Executive Director to serve at its pleasure. While serving, the Executive Director shall not be employed by the court system or be a judicial officer.

C. Agents or Employees of Commission. The Commission is authorized to employ persons as appropriate to carry out its duties. Employees may include attorneys, accountants, and investigators.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 3. FINANCIAL ARRANGEMENTS FOR COMMISSION

A. Compensation Proscribed. The Commission members shall serve without compensation for their services.

B. Expenses Allowed. Commissioners shall be reimbursed for expenses necessarily incurred in the performance of their duties as established by state law.

C. Authorization for Payments. Expenses of the Commission shall be authorized to be paid in accordance with the approved Commission budget.

D. Extraordinary Expenses. In the event of an unanticipated funding shortfall, the Commission shall not curtail the discharge of its constitutionally mandated operations, but shall authorize the Executive Director to seek a supplemental appropriation.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 4. DUTIES OF EXECUTIVE DIRECTOR

The Commission shall prescribe the duties and responsibilities of the Executive Director, which include, but are not limited to:

(1) Considering information from any source and receiving allegations and complaints;

(2) Making preliminary evaluations;

(3) Screening complaints;

(4) Conducting and supervising investigations;

(5) Maintaining and preserving the Commission's records, including all complaints, files and written dispositions;

(6) Maintaining statistics concerning the operation of the Commission and making them available to the Commission and to the court;

(7) Preparing the Commission's budget for its approval and administering its funds;

(8) Employing and supervising other members of the Commission's staff;

(9) Preparing an annual report of the Commission's activities;

(10) Employing, with the approval of the Commission, special counsel, private investigators or other experts as necessary to investigate and process matters before the Commission and before the court;

(11) Issuing subpoenas under the direction of the Commission;

(12) Attending all non-deliberative actions of the Commission; and

(13) Serving and publishing notices.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 5. CONFIDENTIALITY

A. Confidentiality. All investigative records, files, and reports of the Commission shall be confidential and no disclosure shall be made except as permitted by AS 22.30.060. All confidential documents acquired in the course of a Commission investigation shall be accorded the same confidentiality as Commission generated documents.

B. Disclosure--Generally. In order to preserve public confidence in the administration of justice the Commission, in its discretion, may issue statements clarifying procedural aspects or explaining the right of a judge to a fair hearing when the subject matter of a complaint is generally known to the public. Unless otherwise provided by these Rules, a person filing an accusation shall have access to only those materials that the person has provided to the Commission.

C. Disclosure--Dismissal. In any instance where accusations against a judge have been considered by the Commission and it has been determined that there is no basis for the filing of charges or for further proceedings before the Commission, the Commission may, at the request, or with the approval of the judge, issue an explanatory statement.

D. Disclosure--Determination. Upon completion of an investigation or proceeding, the Commission shall disclose to the person filing an accusation against the judge that after an investigation of the charges the Commission (i) has found no basis for action against the judge, (ii) has taken an appropriate corrective action, the nature of which, pursuant to statute, cannot be disclosed, or (iii) has filed formal charges against the judge.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 6. PUBLIC INFORMATION

A. Public Statements--General. The Commission may, from time to time, issue press releases and other public statements explaining the nature of its jurisdiction, procedures for institution of accusations, limitations upon its powers and authority, and reports on the conduct of the affairs of the Commission, providing that such releases and reports shall not identify by name, position, or address the identity of any judge or other person involved in any inquiry before the Commission unless such disclosure is otherwise provided for in AS 22.30.060 and these Rules.

B. Formal Proceedings. Upon filing of formal charges, only the formal charges, the answer, the formal evidentiary hearing, and the final recommendation by the Commission including any minority report as to disposition shall become public. Unless otherwise ordered, all discovery items introduced into evidence at the public formal hearing shall become public documents when introduced. All other discovery items shall remain confidential.

C. Formal Ethics Opinions. In its discretion, the Commission may issue Formal Ethics Opinions. Formal Ethics Opinions are not to be confused with Formal Advisory Opinions set out in Rule 19. Formal Advisory Opinions can only be made public at the request of the judge requesting the opinion. Formal Ethics Opinions are opinions, open to the public, based on facts from actual complaints brought before the Commission that are found to violate the Code of Judicial Conduct. The purpose of the Formal Ethics Opinion is to guide judicial conduct. These opinions may not identify the judge or otherwise violate the Commission's obligation to maintain the confidentiality of its proceedings. A Formal Ethics Opinion may not issue until the disciplinary process involving the underlying facts has been concluded and all related appellate proceedings have been adjudicated.

D. Inquiries by the Press. Inquiries by the press concerning Commission activities except those directly involving the Executive Director may be responded to only by the Executive Director. Where special counsel has been retained, the Executive Director may refer inquiries to special counsel. Inquiries by the press concerning the Executive Director's activities and qualifications may be responded to only by the Commission Chairperson or a designated Commission member.

E. Comments by Commission Members. Out of concern for maintaining confidentiality of Commission proceedings and to avoid positions of conflict, it is Commission policy that Commission members should refrain from publicly commenting on the judicial qualifications of any sitting or pro tem judge.

[Adopted November 1, 1991; amended March 1, 1996.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 7. NOTICE

A. General. Unless otherwise specified, notice to the judge, when required by these Rules shall be given by personal service, or prepaid certified or registered mail, addressed to the judge.

B. Dismissal. The Executive Director shall furnish the Commission with a recommendation of each dismissal. The complainant and the judge, if the judge has been given prior Commission notice, shall be informed in writing of the recommendation and that the dismissal will be reviewed by the Commission at its next meeting.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 8. INITIATION AND SCREENING

A. Filing of Accusations.

(1) A written accusation relating to the conduct or physical or mental disability of a judge may be filed upon any reasonable basis. An accusation may be filed by judges, lawyers, court personnel, or members of the general public.

(2) The Commission may on its own motion make inquiry with respect to whether a judge has committed misconduct in office or is physically or mentally disabled.

B. Screening of Accusations. The Executive Director based upon information received from any source concerning any matter within the Commission's jurisdiction shall make a determination as to whether the information or statement is jurisdictional and not frivolous.

If the Executive Director determines that the matter is not within the authority of the Commission or not supported by facts, the Executive Director shall, after providing notice and an opportunity for the complainant to amend, recommend dismissal. The judge shall not be notified of the accusation or the action taken by the Commission after the Commission has dismissed a complaint at this stage as frivolous or not within the Commission's authority.

If the Executive Director determines that the matter is not frivolous, the Executive Director shall make a preliminary investigation to determine what further action should be taken, if any. During the preliminary investigation, the Commission may, in its discretion, notify the subject judge of the accusation.

The Executive Director shall recommend to the Commission whether the facts warrant a formal investigation.

[Adopted November 1, 1991; amended November 20, 1992.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 9. FORMAL INVESTIGATION

A. Notice. The Commission shall determine whether a formal investigation is warranted. If a formal investigation is undertaken, the subject judge shall be served with a notice of the investigation. The notice shall outline only the nature of the charges. Additional information can be obtained through formal motion to the Commission upon a showing of good cause. The judge shall be accorded reasonable opportunity in the course of the formal investigation to present any relevant matters.

B. Right to Appearance. The subject judge shall have the right to appear before the Commission and present relevant additional facts and legal issues prior to the close of the formal investigation. A judge or witness, including the accuser, shall be entitled to counsel of their own choice, and to be accompanied by counsel at any appearance before the Commission.

C. Dismissal. The Executive Director shall, pursuant to Rule 7 B of these Rules, recommend dismissal of all accusations for which a sufficient basis to proceed is not established.

D. Stay. If the Executive Director determines that any investigation may unduly disrupt or delay a pending court proceeding, the Executive Director shall stay the investigation until the next regularly scheduled Commission meeting. The complainant(s), if any, and the judge, if the judge has been given notice of the accusation, shall be informed, in writing, of the stay, and that the stay will be reviewed by the Commission at its next meeting.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 10. SUBPOENAS

A. When Issued. At any stage of its investigations, the Commission shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge, and the production of papers, books, accounts, documents and testimony relevant to the investigation. Subpoenas may also be issued to compel testimony and production during pre-hearing discovery and at the formal disciplinary hearing. Service may be by Commission staff or official process server.

B. Requests for Commission Subpoenas. A request for a Commission subpoena, pursuant to AS 22.30.066, shall be made to the Executive Director and must include: (1) the name of the person or document to be subpoenaed, (2) the purpose and relevance of the testimony or document, and (3) whether the person or document would be available without a subpoena.

C. Non-compliance With Commission Subpoenas. If any person does not attend, testify, or produce any documents required by a Commission subpoena, the Commission may petition the Superior Court in the judicial district where the proceeding is pending for an order compelling the person to comply with the subpoena. Any claim of privilege must be asserted formally before the Commission. Privileges shall be those recognized in Article V of the Alaska Evidence Rules and shall be determined by the Commission.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 11. PROBABLE CAUSE

A. Probable Cause Determination. The Commission shall promptly consider the results of a formal investigation in a formal probable cause hearing. A Master may be designated by the Commission in compelling and extraordinary situations, to determine factual findings related to the charges. A probable cause hearing shall be set at a definite time and place with reasonable notice to the judge. The Commission Chairperson, or a member of the Commission designated by the Chairperson, shall preside over the hearing. At the hearing, the judge and the judge's attorney may appear. Other testimony may be presented in writing but not by live witnesses unless good cause is shown. If the Commission determines that there is probable cause to proceed, it shall comply with Rule 11 C (4).

B. Findings and Report. The Executive Director shall prepare a written report containing the Commission's findings of fact and conclusions for each issue presented.

C. Disposition. The Commission shall dispose of the investigation in one of the following ways:

(1) If the Commission finds that there has been no misconduct, the Executive Director shall be instructed to send the judge and each complainant notice of dismissal pursuant to Rules 5 D and 7 B of these Rules.

(2) (a) If the Commission finds that there has been misconduct for which an informal private admonishment constitutes adequate discipline, the Commission may issue a notice of private admonishment to the judge. The notice shall include the Findings and Report.

(b) Within fifteen (15) days after service of a notice of informal private admonishment, the judge may request reconsideration by the Commission and/or a hearing pursuant to Rule 14 of these Rules, by filing a written motion with the Commission. Thereupon, the Commission may dismiss the complaint, deny the motion for reconsideration, make further investigation, or institute formal charges pursuant to Rules 11 C (4) and 14 of these Rules.

(3) If the Commission finds that there has been conduct that is or might be cause for discipline or otherwise raise concern, but for which an informal adjustment is appropriate, it may issue a letter of caution or enter into a memorandum of understanding and agreement with the judge concerning the judge's future conduct or submission to professional treatment or counseling. The complainant shall be notified pursuant to Rules 5 D and 7 B of these Rules that the matter has been resolved. The Commission shall monitor any prescribed counseling.

(4) If the Commission finds that there is probable cause to believe that there has been misconduct of a nature requiring formal disciplinary proceedings, the chairperson or Executive Director shall cause the judge to be served with the Findings and Report, a complaint containing the formal statement of the charges, the record of the probable cause determination, and all documents upon which the determination was based. The service upon the judge constitutes notice that a response must be filed within twenty (20) days.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 12. PRE-HEARING DISCOVERY

A. General Scope. To expedite the hearing and maintain fairness, discovery should be as full and free as possible. The judge and special counsel shall be entitled to discovery in accordance with the Rules of Civil Procedure except as noted in this rule. Exceptions to discovery are: (1) Commission deliberations, (2) confidential staff memoranda that do not relate to the charges, (3) attorney communications by staff with the chairperson that relate to procedural motions or where the Commission is a party. In addition, the Executive Director may not be compelled to testify as to conversations with the chairperson or other individual Commission members concerning nondispositive motions. The judge shall bear the costs of duplication and transcription of all discovery items that require extraordinary staff resources.

B. Discovery Before Probable Cause. The Commission shall provide witness names, factual allegations, and legal issues to the Judge at the conclusion of the formal investigation if the information does not warrant dismissal. Additional informal discovery may be allowed prior to the probable cause hearing at the Commission's discretion. Formal discovery tools such as depositions and interrogatories shall only be allowed upon a showing of extraordinary need.

C. Discovery After Probable Cause. Discovery requests shall be handled by the presiding chairperson. All formal discovery tools shall be available. With the approval of the Commission, depositions may be presided over by the Commission chairperson or the chairperson's designee (including a Special Master). Interrogatories directed to the Commission seeking factual information relating to the charges shall be allowed.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 13. SPECIAL COUNSEL

A. Role and Duties. The special counsel is hired by the Commission to formally prepare and present the case against the judge. Special counsel represents the public interest and is not authorized to represent any individual Commission member or staff but may represent the entire Commission in related proceedings.

B. Powers. Special counsel has the right to request Commission subpoenas, to depose and file motions. Special counsel does not have the authority to dismiss or amend charges, delay proceedings, or take other dispositive action. Special counsel is authorized to incur only those expenses authorized by the Commission. Special counsel serves at the pleasure of the Commission.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 14. FORMAL DISCIPLINARY HEARING

A. Pre-hearing Conference. Upon receipt of the judge's response to the complaint, the Commission shall set a pre-hearing conference to be held not later than the next regularly scheduled Commission meeting. The Commission chairperson shall preside at the pre-hearing conference. At the conference a discovery and briefing schedule shall be established and the hearing date set. The discovery and briefing schedule shall include: (1) a preliminary witness list, (2) preliminary exhibit lists, (3) a schedule for substantive motions.

B. Discovery. See Commission Rule 12.

C. Master. The formal hearing shall be conducted before either the Commission or a Commission designated Master. A Master should be used only in compelling and extraordinary situations as determined by the Commission. When the hearing is before the full Commission, either the chairperson or another member appointed by the chairperson shall preside. A member of the Commission shall not serve as Master. The Master shall have the same procedural authority as the Commission chairperson when conducting the hearing.

D. Role of the Chairperson. The chairperson is the presiding officer both at the hearing and during pre-hearing and post-hearing motions. The chairperson has the authority to decide all nondispositive motions on behalf of the full Commission.

E. Conduct of Hearing.

(1) At the time and place set for the hearing the full Commission or Master shall proceed with the hearing whether or not the judge has filed an answer or personally appears at the hearing.

(2) The proceedings at the hearing shall be reported by electronic recording device in the same manner as proceedings are reported in a court of record. The judge may, at the judge's expense, provide a court reporter of the judge's choosing.

F. Evidence. The rules of evidence apply and all testimony shall be under oath. The chairperson, presiding member or master shall administer the oath, rule on the admissibility of evidence, and otherwise direct the manner and order of proceedings in the same manner as a judge of a court of record. The standard of proof shall be clear and convincing evidence.

G. Amendment of Complaint. By leave of the Commission, the formal charges may be amended after commencement of the hearing to conform to proof or to set forth additional facts, whether occurring before or after commencement of the hearing if the judge and his counsel are given adequate time to prepare a response.

H. Determination. When the factfinder is a Master, that Master shall, within sixty (60) days after the hearing, submit findings and recommendations, together with the record and transcript of proceedings, to the Commission for review and shall contemporaneously serve them upon the judge. The Commission shall pay all costs associated with the Master's findings and recommendations.

The judge, or Commission counsel, may submit written objections to the findings and recommendations of the Master within 15 days after receipt.

The findings, conclusions and accompanying materials, together with the objections, if any, shall be promptly reviewed by the Commission not later than its next regularly scheduled meeting. The Commission may make independent findings of fact from the record. If the entire Commission served as factfinder, the findings and recommendations shall be drafted pursuant to Commission direction.

If no statement of objections is filed within the time provided, the Commission may adopt, in whole or in part, the findings of the Master without a hearing. If the statement proposes to modify or reject the findings of the Master, the Commission shall give the judge and special counsel an opportunity to be heard orally before the Commission not later than its next regularly scheduled meeting. Written notice of the time and place of the hearing shall be served on the judge at least ten (10) days prior to the hearing.

I. Extension of Time. The chairman of the Commission or the Master may grant reasonable time extensions for good cause shown. Additional continuances may be granted for good cause shown.

J. Hearing Additional Evidence. The Commission may provide for the taking of additional evidence by order at any time while the matter is pending before it. The order shall set the time and place of the hearing and shall indicate the matters on which the evidence is to be taken. A copy of the order shall be served on the judge at least ten (10) days prior to the date of the hearing. The hearing of additional evidence may be before the Master or the Commission, at the Commission's discretion.

K. Role of Executive Director After Formal Charges. After formal charges, the Executive Director may serve as a liaison between the Commission and all counsel of record, and may provide research and administrative assistance as requested by the Commission.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 15. COMMISSION DECISION

A. Decision. The formal decision consists of the Commission Determination and recommendation for sanction or dismissal. Formal decisions are public documents.

B. Minority Report. If a member or members of the Commission dissent from the determination or recommendation for sanction, a minority report shall be transmitted with the majority recommendation to the court. The recommendation for discipline may include any one or more of the sanctions provided for in A.S. 22.30.022(d). The Commission recommendation and minority report may also be submitted to the attorney general and chairs of the senate and house judiciary committees (A.S. 22.30.068).

C. Execution. The determination and recommendation of the Commission shall be signed by the chairperson, or the chairperson's designee, and may be signed by other members, either concurring or dissenting in the determination or recommendation.

D. Witness Fees. All witnesses shall receive fees and expenses in the statutorily allowable amount. Expenses of witnesses shall be borne by the party calling them, unless the physical or mental disability of the judge is in issue, in which case the Commission shall reimburse the judge for the reasonable expenses of the witnesses whose testimony related to the disability.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 16. SUPREME COURT REVIEW

The Commission recommendation shall be filed in accordance with Appellate Rule 406 of the Alaska Rules of Court and shall consist of the Commission's Determination, recommendation for sanction and Minority Report, if any.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 17. CASES INVOLVING MENTAL OR PHYSICAL DISABILITY

A. Procedure. When considering allegations of mental or physical disability, the Commission shall, except as provided in this rule, follow procedures established by Rules 1 through 16.

B. Special Provisions.

(1) If the Commission finds probable cause to believe that a judge suffers from a mental or physical disability and the judge is not represented by counsel, the Commission may appoint an attorney to represent the judge at Commission expense.

(2) If the judge is charged with a disability or raises a disability as an affirmative defense to misconduct, in accordance with A.S. 22.30.066(b), the Commission may request the judge to submit to a physical or mental examination by an independent medical expert. The report of the medical expert shall be furnished to both the Commission and the judge. If the judge refuses to submit to the examination, the Commission shall determine the issue for which the examination was required adversely to the judge.

(3) The Commission shall bear the costs of disability proceedings.

[Adopted November 1, 1991.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 18. COMMISSION MEMBER DISQUALIFICATION

A. Conflict of Interest. A Commission member may not participate in the consideration of a matter when:

(1) the member is a party;

(2) the member is a material witness to the alleged misconduct;

(3) the member is related to the judge or the complainant within the third degree;

(4) the judge has retained the Commission member as the judge's attorney or has been counseled by the Commission member in any matter within two years preceding the filing of the complaint with the Commission; or

(5) the Commission member believes that, for any reason, that member cannot give a fair and impartial decision.

B. Disclosure. Each Commission member shall disclose all facts that may lead to an inference of bias relating to a matter before the Commission. After disclosure, the Commission shall determine whether the facts warrant disqualification. Commission members may also recuse themselves with a statement on the record as to the basis of the recusal.

C. Proceedings Against Commission Members. Proceedings against judge or attorney members of the Commission on Judicial Conduct will be conducted in the same manner as proceedings against any other judge. In the event a formal investigation is initiated against a Commission member, or the member is placed on disability or suspended status, that member will not be assigned to any future matters pending disposition of the proceeding. If a formal finding of misconduct or disability is made against a member of the Commission, that member will no longer participate in Commission business for the remainder of the member's term.

D. Prohibition Against Representing Judges Before the Commission. No Commission member may legally represent or counsel a judge, in a matter before the Commission, during the member's term on the Commission or within two years after the member's term has expired.

[Adopted November 1, 1991; amended May 23, 1994.]

ALASKA COMMISSION ON JUDICIAL CONDUCT RULES OF PROCEDURE

Current with amendments received through 5-15-97.

RULE 19. COMMISSION-ISSUED ADVISORY OPINIONS

A. Issuance of Formal Advisory Opinions. On written request of a state judicial officer subject to the Code of Judicial Conduct, the Commission may issue a written formal advisory opinion concerning the application of the Code to a specific fact situation involving that judicial officer. The request for an opinion should specify all facts relevant to the ethical situation. Both the request for an opinion and the opinion itself shall remain confidential unless the requesting judge asks that it be public.

B. Advisory Opinion Drafting. Written formal advisory opinions shall be drafted by a committee of the Commission, appointed by the Chairperson for the purpose of drafting the opinion, with staff assistance. The drafting committee shall be composed of not less than one public member, one attorney member, and one judge member of the Commission. The full Commission shall vote on adoption of the draft opinion.

C. Use of Formal Advisory Opinions. Reliance on the formal advisory opinion by the requesting judge is an absolute defense to subsequent disciplinary proceedings by the Commission concerning the identical facts addressed by the opinion. If there are distinguishing facts, reliance on the formal advisory opinion will be viewed as merely a good faith defense.

D. Informal Verbal Advisory Opinions. As has been its long-standing practice, informal verbal guidance concerning judicial ethics issues will continue to be available from Commission members and staff. Informal advisory opinions have no legal effect and, if in error, provide no recognized defense to later disciplinary charges.

[Adopted March 1, 1996.]

Appendix E
Excerpts from Legal Treatises

Judicial Criticism

PRACTICE GUIDE

Lawyers are ethically prohibited from making statements about judges or the judiciary that they know are false. The Model Rules also forbid the making of statements with reckless disregard for their truth or falsity. Although the Model Code does not specifically include such a standard, many courts have read one into it, especially in light of the First Amendment constraints on libel actions.

A lawyer's truthful statements or personal opinions about the judiciary should be delivered in a careful, constructive manner. Many courts have interpreted the ethical prohibitions against false statements as also restricting judicial criticism in general.

A lawyer may not criticize the judiciary or its officers during an ongoing trial or the pendency of a case if such conduct would interfere with the fair administration of justice.

Lawyers also are prohibited from knowingly making false statements about candidates for the judiciary. The Model Rules specifically prohibit such statements, as well as those made with reckless disregard for their truth or falsity. The Model Code does not refer expressly to false statements about judicial candidates, and generally lawyers are given more leeway to criticize judicial candidates than they are given to criticize sitting judges.

BACKGROUND

Model Rules

"Rule 8.2 Judicial and Legal Officials

"(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

"Rule 8.4 Misconduct

"It is professional misconduct for a lawyer to:

"(d) engage in conduct that is prejudicial to the administration of justice."

Model Code

"DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers

"(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

"(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

"DR 1-102 Misconduct

"(A) A lawyer shall not:

"(6) Engage in conduct that is prejudicial to the administration of justice."

State Rules

Of the states that have adopted ethics rules based on the ABA Model Rules, the following have amended Rule 8.2(a) so as to modify the lawyer's duty with respect to judicial criticism.

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Delaware, which does not have judicial elections, deletes the phrase "of a candidate for election."

The District of Columbia rules do not contain Rule 8.2.

Colorado proscribes knowingly making false statements of fact about candidates for election or appointment to a judicial office, and knowingly making false accusations against judges and other adjudicatory officers.

Florida expands the coverage of its rule to include statements concerning the qualifications or integrity of a mediator, arbitrator, juror, or member of the jury venire.

New Jersey deletes reference to false statements concerning the integrity of a candidate for judicial office.

North Carolina has adopted the wording of Model Code DR 8-102 as its version of Rule 8.2(a). Thus, a "knowingly" standard rather than a "knowing or with reckless disregard" standard is adopted. The rule is limited to protection of judicial and other adjudicatory officers against false accusations. The rule also deletes reference to false statements concerning the integrity of a candidate for judicial office.

Pennsylvania's Rule 8.2(a) states that "[a] lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." Its Rule 8.2(b) mandates that "[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officers."

Washington proscribes statements about the record, as well as the qualifications or integrity, of a judge. Washington expands upon the obligation expressed in Rule 8.2(a) by adding a paragraph (c), which provides that a lawyer should support and continue traditional efforts to defend judges and courts from unjust criticism in order to assist in the fair and independent administration of justice.

Scope of Regulation

False Statements

Neither the ABA Model Rule 8.2(a) nor DR 8-102(B) prohibits all lawyer criticism of judges or the judiciary. They prohibit only those criticisms or statements that are false. Moreover, the standards differ in their scienter requirements. The Code forbids a lawyer from "knowingly" making false statements; the Rules prohibit statements made with knowledge of their falsity or reckless disregard for their truth or falsity. The Code's "knowingly" standard is not defined in the Code; however, it has been interpreted by many courts as encompassing the reckless disregard standard found in the Rules.

Criticism in General

Despite the express provisions of the Rules and Code, which prohibit only false criticism of the judiciary, courts have traditionally interpreted these standards, as well as the original Canons of Professional Conduct, as restricting all lawyer criticism, whether false or not. These courts have advanced either of two arguments in support of a broad restriction of lawyer statements critical of the judiciary. One argument often raised is that criticism by lawyers lessens public confidence in the judicial system because lawyers are perceived as uniquely qualified to evaluate judges. More than a century ago, the U.S. Supreme Court declared that a lawyer was obligated to comply with certain ethical standards, which include maintaining respect for courts and judicial officers both in and out of court. *Bradley v. Fisher*, 80 U.S. 335 (1872). *See also In re Terry*, 394 NE2d 94 (Ind SupCt 1979) ("unwarranted criticism does nothing but weaken and erode the public's confidence in an impartial adjudicatory process"); *In re Shimek*, 284 So2d 686 (Fla SupCt 1973) (lawyer's statement in memorandum filed with the court that judge was avoiding performance of his sworn duty "cast(s) a cloud of suspicion upon the en-

tire judiciary"); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Horak*, 292 NW2d 129 (Iowa SupCt 1980) ("to permit unfettered criticism regardless of the motive would tend to intimidate judges in the performance of their duties and would foster unwarranted criticism of the courts"); *Kentucky Bar Ass'n v. Heleringer*, 602 SW2d 165 (Ky SupCt 1980) (lawyer's comments at press conference that judge's behavior was unethical and grossly unfair tends to "bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process") Annot., 12 ALR3d 1408, 1412 (1967).

However, the public's right to know was persuasive in *State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P2d 958 (Okla SupCt 1988) (First Amendment right of members of public to receive information from lawyers about the judiciary protects lawyer from discipline for public remarks criticizing judge for racism in conduct of trial; court noted, however, that "false speech" was not involved, as lawyer had "rational basis" for concluding his remarks were factual).

Commentators have argued that silencing all lawyer criticism is of questionable benefit and that a reasonable balance must be sought. *See* Note, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. Ky. L. Rev. 129, 144 (1988) (silencing all attorney criticism is as likely to generate suspicion as it is to promote confidence in the judicial system). *See generally* Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame L. Rev. 489, 504 (1981) (lawyer's right to criticize the judiciary, like the right to advertise, warrants First Amendment protection not only because of the lawyer's rights, but because the public's right to receive information about the judiciary tips the balance; author hails Rule 8.2 and comment for upholding lawyer's duty to inform public of "honest and candid" criticism, regardless of motive).

The alternative argument advanced in support of a broad proscription on lawyer criticism is that lawyers relinquish certain rights as members of a regulated profession and as officers of the court, and must therefore abide by stricter standards of conduct than non-lawyers. *See In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J. concurring) ("obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech"); *In re Frerichs*, 238 NW2d 764, 769 (Iowa SupCt 1976) ("lawyer, acting in a professional capacity, may have some fewer rights of free speech than would a private citizen"); *In re Woodward*, 300 SW2d 385, 393-4 (Mo SupCt 1957) ("layman may, perhaps, pursue his theories of free speech ... until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics"); Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame Lawyer 489, 500 (1981) (public confidence in lawyer criticism of the judiciary is one reason for imposing a higher standard of conduct on lawyers). *See also In re Riley*, 691 P2d 695 (Ariz SupCt 1984); *In re Raggio*, 487 P2d 499, 500-01 (Nev SupCt 1971); *In re Porter*, 521 P2d 345, 349 (Ore SupCt 1974). For a good example of the courts' greater tolerance for criticism by laymen, see *Rinaldi v. Holt, Rinehart & Winston Inc.*, 366 NE2d 1299, 1306 (NY CtApp 1977), in which non-lawyer defendants described a judge as one of the "10 worst judges in New York," "incompetent" and "probably corrupt." The court held that plaintiff could not recover from defendants for "simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme, or erroneous their opinions might be."

In support of the two aforementioned grounds, courts have cited EC 8-6, DR 1-102(A)(5), or Model Rule 8.4(d), as a basis for restricting lawyer criticism that would otherwise be permissible under the express wording of DR 8-102. EC 8-6, while acknowledging that a lawyer, as a citizen, has the right to criticize officials publicly, warns that a lawyer "should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms," explaining that "unrestrained and intemperate statements tend to lessen public confidence in our legal system." This standard has been invoked by courts to penalize criticism considered to be undignified in manner, intemperate in tone, or expressed in inappropriate language. *See, e.g., In re Frerichs*, 238 NW2d 764, 767 (Iowa SupCt 1976) (citation of misconduct is directed not to the fact of lawyer's criticism, but to the nature and manner of his reckless charges); *State v. Nelson*, 504 P2d 211 (Kan SupCt 1972) (criticisms must be made "in a proper tone and through appropriate channels"). *See* ABA Informal Ethics Opinion 1329 (1975), holding that bar associations may take action to prevent the election of an unqualified judge through press releases that are "accurate in content and appropriate in language." Unlike EC 8-6 of the Model Code, Model Rule 8.2 does not prescribe the manner of delivery of truthful criticism of judges by lawyers.

EC 8-6 appears to conflict with other ethical considerations, which seem to encourage lawyer criticism. See, for example, ECs 8-1, 8-2, 8-6, which permit lawyers to provoke changes in the law and expose corrupt or incompetent judges or judicial candidates. *See* Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. Rev 923, 930-32 (1974), and Note, *Attorneys' Rights Under the Code of Professional Responsibility: Free Speech, Right to Know, and the Freedom of Association*, 1977 Wash. U.L.Q. 687, 690-1, for a discussion of these conflicting ethical considerations as well as conflicting Code provisions governing lawyer speech. Although it has been argued that the Ethical Considerations of the Model Code are merely aspirational and should not be relied on as a basis for disciplining lawyers who criticize the judiciary, one state court has rejected this argument, stating that lawyers are bound by the Canons of Professional Conduct, as explained by the ethical considerations, as well as by the disciplinary rules and judicial decisions. *In re Frerichs*, 238 NW2d 764 (Iowa SupCt 1976).

Trial Conduct

DR 1-102(A)(5) and Model Rule 8.4(d) have also been relied on by courts to prohibit criticism, whether false or not, made by a lawyer during the pendency of a trial. These standards broadly provide that a lawyer may not engage in conduct that tends to prejudice the administration of justice. *See In re Sawyer*, 360 U.S. 622, 646 (1959); *In re Friedland*, 376 NE2d 1126 (Ind SupCt 1978); *Kentucky Bar Ass'n v. Heleringer*, 602 SW2d 165 (Ky SupCt 1980); *In re Paulsrude*, 248 NW2d 747 (Minn SupCt 1976); *Farmer v. Board of Professional Responsibility of the Supreme Court*, 660 SW2d 490 (Tenn SupCt 1983).

Opinions

The Model Rules and Model Code proscriptions against making false statements regarding judicial officers apply only to assertions of fact, and not to mere opinions. *Accord Owen v. Carr*, 497 NE2d 1145 (Ill SupCt 1986) (lawyer's letters to judicial inquiry board accusing judge of misconduct are constitutionally protected as expressions of opinion); *State Bar v. Semaan*, 508 SW2d 429 (Tex CtCivApp 1974) (inasmuch as the lawyer's criticism was an expression of opinion, the truth or falsity of the underlying allegation is not in issue); *Justices of the Appellate Division v. Erdmann*, 333 NYS2d 863, 866 (NY SupCt AppDiv 1972) (Greenblott, J., dissenting) (criticism of the judiciary that would be more accurately described as a colorful figure of

speech than as an accusation should not be subject to discipline). *See also Rinaldi v. Holt, Rinehart & Winston Inc.*, 366 NE2d 1299, 1309 (NY CtApp 1977) (Fuchsberg, J., concurring), in which the court distinguished between opinions and facts for purpose of First Amendment protections. *But cf., In re Raggio*, 487 P2d 499 (Nev SupCt 1971), in which the court held that a district attorney was subject to discipline for criticizing a court opinion as being "unexplainable," "shocking," "uncalled for," and "involving semantical gymnastics."

First Amendment

The First Amendment, which guarantees the fundamental right to free speech, was designed to maximize the dissemination of ideas and opinions. The Supreme Court has stated that debate on public issues, however vehement and caustic, should be "uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Despite free speech guarantees, a majority of courts have held that once a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct. *E.g., State v. Nelson*, 504 P2d 211, 214 (Kan SupCt 1972); *Nebraska State Bar Ass'n v. Michaelis*, 316 NW2d 46, 52 (Neb SupCt 1982). Criticisms motivated by reasons other than a desire to improve the legal system are not justified. *In re Johnson*, 729 P2d 1175 (Kan SupCt 1986).

One of the first cases to challenge traditional restraints on lawyer criticisms of the judiciary was *In re Sawyer*, 360 U.S. 646 (1959). In *Sawyer*, the U.S. Supreme Court, in a plurality opinion, reversed a lower court's decision to suspend a lawyer for comments made during a pending trial. The lawyer spoke at a public meeting stating that "horrible" and "shocking" things go on at Smith Act trials and concluding that "there's no fair trial in a Smith Act case" and that "[a]ll rules of evidence have to be scrapped or the Government can't make a case." *Id.* at 629. Justice Brennan, writing for a four-member plurality, held that the record did not support a finding that the lawyer's statements, made out of court during a pending trial, impugned the integrity of the trial judge or reflected adversely upon the impartiality of the trial. The Court distinguished between comments that attack the court or a particular judge and those that attack the state of the law or trials thereunder, concluding that only the former warrants discipline. Finding the lawyer's statements to be an attack on the state of the law, and not an attack on the judges who enforce the law, the Court held that the lawyer's speech was protected under the First Amendment. The Court rejected the argument that during pending trials, even lawyer criticism of the state of the law and of judges in general should be prohibited. The court further declared that lawyer criticism in general should be proscribed only in the rare instance when it "tend[s] to obstruct the administration of justice." *Id.* at 636.

Justice Stewart concurred in the reversal solely on the basis that the evidence was insufficient. However, his opinion indicates his agreement with the dissent, which supports the traditional notion that a lawyer is not merely a citizen, but an officer of the court, subject to higher standards of conduct. Justice Stewart stated that a lawyer cannot invoke the right of free speech to immunize himself from discipline for proven unethical conduct. Justice Frankfurter, writing for the dissent, focused on the speaker's intent, as well as the context in which the lawyer's remarks were made. Finding the lawyer's statements to be direct attacks on the administration of justice and the integrity of the presiding judge, Justice Frankfurter argued that even criticism that attempts to prejudice a pending case or impugn the integrity of a judge should be prohibited as a violation of professional standards of conduct.

Following the Supreme Court's lead in *Sawyer*, a federal district court in Texas

held that a press release issued by a lawyer (who was also a defendant in a pending action) criticizing a judge and prosecutor did not warrant discipline since the lawyer's statement was issued while in his capacity as a private citizen. *Polk v. State Bar of Texas*, 374 FSupp 784 (DC NTexas 1974). The court indicated that even if the lawyer's statement was made in his capacity as a lawyer, it would be protected by the First Amend ment. In accordance with *Sawyer*, the *Polk* court held that a state may not regulate a lawyer's exercise of free speech under the guise of prohibiting professional misconduct unless the speech constitutes an interference with the administration of justice. Concluding that the state's interest in promoting respect for the judicial system must yield to free speech, the court declared "where the protections of the Constitution conflict with the efficiency of a system to ensure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform." *See In re Evans*, 801 F2d 703 (CA 4 1986) (lawyer's letter to judge questioning judge's competency and bias, written during pendency of appeal, was an attempt to prejudice the administration of justice), *cert. denied*, 480 U.S. 906 (1987).

The same standard of "interference with the administration of justice" applied in the *Sawyer* and *Polk* cases has also been applied generally to restrict all extrajudicial statements made by lawyers during the pendency of a trial. Such cases, which do not necessarily involve statements critical of the judiciary or its officers, concern statements made by lawyers that interfere with the fairness of an ongoing trial. The courts, however, disagree as to the level of threatened harm that is constitutionally required before discipline is warranted. For further discussion of this topic, see the chapter on Prohibited Extrajudicial Statements behind the Trial Conduct tab.

Despite the *Sawyer* and *Polk* decisions, most state and federal courts have rejected First Amendment arguments in favor of the state's interest in protecting and defending its public officials and in maintaining respect for the judiciary. Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame Lawyer 489, 490 (1981). *See, e.g., U.S. v. Cooper (In re Zalkind)*, 872 F2d 1 (CA 1 1989) (no refuge in first amendment if lawyer "fill[s] a courtroom with a litany of speculative accusations and insults which raise doubts as to a judge's impartiality"); Eisenberg v. Boardman, 302 FSupp 1360 (DC WWis 1969); *In re Terry*, 394 NE2d 94 (Ind SupCt 1979); *In re Friedland*, 376 NE2d 1126 (Ind SupCt 1978); *In re Frerichs*, 238 NW2d 764 (Iowa SupCt 1976); *In re Raggio*, 487 P2d 499 (Nev SupCt 1971); *In re Lacey*, 283 NW2d 250 (SD SupCt 1979). Some courts have cited EC 8-6, which restricts lawyer criticisms that tend to lessen public confidence in the legal system, in justifying a restriction on lawyer criticisms despite First Amendment arguments. Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame Lawyer 489, 500; *see, e.g., In re Shimek*, 284 So2d 686 (Fla SupCt 1973); *In re Frerichs*, 238 NW2d 764 (Iowa SupCt 1976); *In re Lacey*, 283 NW2d 250 (SD SupCt 1979). *But see Bates v. Arizona State Bar*, 433 U.S. 350 (1977), in which the Supreme Court rejected the state's interest in maintaining respect for the legal profession in favor of granting lawyers their First Amendment right to advertise.

Several courts have stated that lawyer criticism of judicial officers, even when made in a constructive spirit, is not protected by the First Amendment if the lawyer's grievance could have been submitted to the appropriate authorities, rather than publicly aired. These courts argue that by using private grievance procedures, lawyers can avoid casting doubt upon the competence and integrity

of the judiciary. *In re Riley*, 691 P2d 695 (Ariz SupCt 1984); *Kentucky Bar Ass'n v. Heleringer*, 602 SW2d 165 (Ky SupCt 1980); *Nebraska State Bar Ass'n v. Michaelis*, 316 NW2d 46 (Neb SupCt 1982); *In re Lacey*, 283 NW2d 250 (SD SupCt 1979). This view is supported by *Owen v. Carr*, 497 NE2d 1145 (Ill SupCt 1986), in which the Illinois Supreme Court held that a lawyer's letters and memorandums filed with the Judicial Inquiry Board accusing a judge of misconduct constituted protected speech.

Libel and Defamation

In general, public officials receive less protection from defamatory comments than do private individuals. However, the U.S. Supreme Court has recognized limitations on speech that presents public officials in a derogatory manner. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), the Court stated that criticism of public officials ordinarily protected by the First Amendment may result in civil and criminal liability if the criticism is false and if the speaker acts with "actual malice," which was defined as "with knowledge that [the criticism] is false or with reckless disregard of whether it is false or not." Since judges and judicial candidates are public officials, statements about them cannot be prohibited unless the speaker violates this standard. *Rinaldi v. Holt, Rinehart & Winston Inc.*, 366 NE2d 1299, 1305 (1977).

In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court applied the *New York Times* standard to a lawyer being prosecuted under a criminal libel statute for making statements disparaging the conduct of eight judges. The Court held that lawyer criticism of judicial officials does not lose its constitutional protection unless shown to be a "calculated falsehood" made with knowledge of falsity or reckless disregard for the truth. The Court further stated that even false utterances that are honestly believed "contribute to the free interchange of ideas and the ascertainment of truth." *Id.* at 73. *See* Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 Ohio St. L.J. 201, 215 (1986) (author supports *New York Times-Garrison* standard for lawyer criticism cases). Courts have stated that knowledge of falsity is not determined by the genuineness of a lawyer's belief in the truth, but rather by the reasonableness of that belief and the good faith of the lawyer in asserting the allegations. *In re Graham*, 453 NW2d 313 (Minn SupCt 1990) (lawyer stated in letter to U.S. Attorney, in sworn complaint to chief judge, and in affidavit in support of recusal motion, that judge conspired to fix case; his "genuine belief" that this was true did not preclude finding of reckless disregard based on "reasonable lawyer" standard); *Louisiana State Bar Ass'n v. Karst*, 428 So2d 406, 409 (La SupCt 1983).

The so-called "good faith defense" can be taken too far and when it is, it has aroused the court's ire. As Justice Neely so eloquently put it in *West Virginia Committee on Legal Ethics v. Farber*, 408 SE2d 274 (WVa SupCtApp 1991):

> There is courage, and then there is pointless stupidity. No matter what the evidence shows, respondent never admits that he is wrong. Indeed, sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense here when respondent's deficient sense of reality inflicts untold misery upon particular individuals and damage upon the legal system in general.

For a discussion of the appropriate level of investigation that a lawyer should undertake before making a statement about a judge, see *In re Kelly*, 808 F2d 549 (CA 7 1986).

Model Rule 8.2 is thought to be consistent with the *New York Times-Garrison* standard, under which the critical factors are the statement's falsity and the

speaker's knowledge of its falsity or reckless disregard at the time of the utterance. The Model Code prohibits a lawyer from making statements with knowledge of their falsity. DR 8-102, however, does not include the *New York Times-Garrison* standard of "reckless disregard" for the truth. Nevertheless, several cases decided under the Code have included an analysis that parallels this standard.

Discipline

Several state courts have impliedly held that the *New York Times-Garrison* standard of actual malice must be met to discipline a lawyer for criticism of the judiciary. *See, e.g., Ramirez v. State Bar of California*, 619 P2d 399 (Calif SupCt 1980); *In re Jafree*, 444 NE2d 143 (Ill SupCt 1982), *later proceeding*, 759 F2d 604 (CA 7 1985); *Baker v. Monroe County Bar Ass'n*, 311 NYS2d 70 (NY SupCt AppDiv 1970), *aff'd mem.*, 272 NE2d 337 (NY CtApp 1971). The lawyers in these three cases were disciplined for making false critical statements concerning the judiciary after a determination that the falsehoods were propagated with knowledge that they were false and with reckless disregard of the truth. For other cases in which this standard was applied, see *State v. Russell*, 610 P2d 1122 (Kan SupCt 1980); *Justices of the Appellate Division v. Erdmann*, 333 NYS2d 863 (NY SupCt AppDiv 1972), *rev'd on other grounds*, 301 NE2d 426 (NY CtApp 1973); *State Bar v. Semaan*, 508 SW2d 429 (Tex CtCivApp 1974); *Eisenberg v. Boardman*, 302 FSupp 1360 (DC WWis 1969). *See also* Texas Ethics Opinion 369 (1974); Note, *In re Erdmann: What Lawyers Can Say About Judges*, 38 Alb. L. Rev. 600 (1974) (commentator suggests that "[s]ince disciplinary actions against attorneys seem to constitute a serious deterrent to free political discussion, it is arguable that such actions should be subject to the same constitutional limitations as the Supreme Court has imposed in defamation actions"). *Accord* Chapman, *Criticism —A Lawyer's Duty or Downfall*, 1981 S. Ill. U.L.J. 437, 448 (although *Garrison* involved a criminal action, it would appear that a similar standard should apply in lawyer discipline cases); *but see In re Westfall*, 808 SW2d 829 (Mo SupCt 1991) (en banc) (given interest in protecting public, administration of justice, and the profession, a purely subjective standard is inappropriate; objective standard survives first amendment scrutiny in light of compelling state interests served).

There is a substantial body of opinion that questions the applicability of the *New York Times-Garrison* standard to judicial criticism cases. These cases indicate that the interests requiring protection in a defamation action differ from those necessitating protection in a disciplinary action. Defamation is a wrong directed against an individual affecting personal interests, and the remedy is personal redress. In contrast, professional misconduct, although directed at an individual, is a wrong against society and impairs the preservation of a fair and impartial judiciary. It does not warrant punishment for the benefit of the affected person, but rather for society as a whole. *In re Terry*, 394 NE2d 94 (Ind SupCt 1979). *See also In re Evans*, 801 F2d 703 (CA 4 1986) (stating that a public, false and malicious attack on a judge is more than an offense against the judge individually; it is an offense against the dignity and integrity of the courts and judicial system). Moreover, neither civil nor criminal liability is necessary to maintain an action in a disciplinary proceeding. *In re Johnson*, 729 P2d 1175 (Kan SupCt 1986). These opinions argue that ethical rules should be interpreted to require greater restriction on lawyer criticism of the judiciary in order to promote public confidence in the judiciary and to protect the integrity of the judicial system. *See, e.g., Spencer v. Dixon*, 290 FSupp 531, 538 (DC WLa 1968) ("[n]o court has suggested that judges are without authority to control scurrilous and defamatory pleading content, as re-

spects duly constituted members of the judiciary"); *Justices of the Appellate Division v. Erdmann*, 301 NE2d 426 (NY CtApp 1973) (Burke, J., dissenting) (*New York Times* and *Garrison* are limited to civil and criminal defamation actions and should play no role in attorney disciplinary proceedings); *State v. Nelson*, 504 P2d 211 (Kan SupCt 1972) (the *New York Times* standard is "clearly inapplicable" in disciplinary proceedings for violation of DR 8-102(B)).

Sanctions

Courts have imposed sanctions, ranging from censure to disbarment, for lawyer criticisms that are knowingly false or made with reckless disregard for the truth. *See In re Jafree*, 444 NE2d 143 (Ill SupCt 1982), *later proceeding*, 759 F2d 604 (CA 7 1985) (disbarment); *In re Evans*, 801 F2d 703 (CA 4 1986) (disbarment); *In re Riley*, 691 P2d 695 (Ariz SupCt 1984) (censure); *In re Ronwin*, 680 P2d 107 (Ariz SupCt 1983) (denied admission); *Ramirez v. State Bar of California*, 619 P2d 399 (Calif SupCt 1980) (suspension/probation); *People v. Harfmann*, 638 P2d 745 (Colo SupCt 1981) (disbarment); *Cerf v. State*, 458 So2d 1071 (Fla SupCt 1984) (reprimand); *In re Terry*, 394 NE2d 94 (Ind SupCt 1979) (disbarment); *In re Friedland*, 376 NE2d 1126 (Ind SupCt 1978) (suspension); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Hurd*, 360 NW2d 96 (Iowa SupCt 1984) (suspension); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Horak*, 292 NW2d 129 (Iowa SupCt 1980) (reprimand); *State v. Russell*, 610 P2d 1122 (Kan SupCt 1980) (censure); *Kentucky Bar Ass'n v. Nall*, 599 SW2d 899 (Ky SupCt 1980) (reprimand); *Louisiana State Bar Ass'n v. Karst*, 428 So2d 406 (La SupCt 1983)(suspension); *In re Paulsrude*, 248 NW2d 747 (Minn SupCt 1976) (disbarment); *Nebraska State Bar Ass'n v. Michaelis*, 316 NW2d 46 (Neb SupCt 1982) (disbarment); *In re Vincenti*, 458 A2d 1268 (NJ SupCt 1983) (suspension); *In re Baker*, 311 NYS2d 70 (NY SupCt AppDiv 1970), *aff'd mem.*, 272 NE2d 337 (NY CtApp 1971) (suspension); *Bar Ass'n of Greater Cleveland v. Carlin*, 423 NE2d 477 (Ohio SupCt 1981) (suspension); *Carter v. Muka*, 502 A2d 327 (RI SupCt 1985) (disbarment); *In re Lacey*, 283 NW2d 250 (SD SupCt 1979) (censure); *Farmer v. Bd. of Professional Responsibility of the Supreme Court*, 660 SW2d 490 (Tenn SupCt 1983) (suspension); *In re Donohoe*, 580 P2d 1093 (Wash SupCt 1978) (reprimand).

For further information on cases involving judicial criticism by lawyers see generally Annot., 68 ALR3d 273 (1976) (attorney discipline for in-court criticism of court or judiciary); Annot., 27 LEd2d 953 (1971) (First Amendment restrictions on attorney licensing and regulation); Annot., 12 ALR3d 1408 (1967) (attorney's criticism of judiciary as grounds for disciplinary action); Annot., 95 ALR2d 1450 (1964) (constitutional aspects of libel or slander of public officials); Annot., 26 ALR4th 170 (1983) (election campaign activities as ground for disciplining attorney).

This subject also is discussed, in this Manual, in the chapters on Prohibited Extrajudicial Statements and on Contempt: Other Criticism of Court behind the Trial Conduct tab.

Isolated Instances

A few courts have tended to be more lenient in cases where the lawyer's criticism, although intemperate or unjustified, was an "isolated instance" of disrespect. In *Justices of the Appellate Division v. Erdmann*, 301 NE2d 426 (NY CtApp 1973), a lawyer was quoted in a magazine article as criticizing trial judges for failing to leave questions of guilt or innocence to juries, and describing appellate division judges as "whores who became madams." The court held, in a per curiam decision, that isolated instances of disrespect for judges and courts are not subject to discipline even when "expressed by vulgar and insulting words, or other incivility, uttered, written, or committed outside the precincts

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of a court." The court added that persistent or general courses of conduct degrading to the law, bar and courts, and irrelevant or grossly excessive, would present a different issue. One commentator has suggested that this portion of the *Erdmann* decision implied that the Code was intended to prohibit repeated conduct. 38 Alb L. Rev. 600, 606-8. *See, e.g., In re Whiteside*, 386 F2d 805 (CA 2 1967) (disbarment affirmed for grossly disrespectful allegations repeatedly made by lawyer against judge); *In re Evans*, 801 F2d 703 (CA 4 1986) (lawyer's failure to investigate, coupled with his unrelenting reassertion of his charges against a judge, warranted disbarment); *Bar Ass'n of Greater Cleveland v. Carlin*, 423 NE2d 477 (Ohio SupCt 1981) (one-year suspension for persistent derogatory attacks on the judiciary).

Similarly, in *In re Snyder*, 472 U.S. 634 (1985), the U.S. Supreme Court reversed the suspension of a lawyer who wrote a harsh letter to a judge's secretary criticizing the administration of the Criminal Justice Act, its requirement that supplemental documentation be provided in support of attorneys' fees, and the inequities of assignments under the Act. The Court held that a single incident of rudeness does not support a finding of misconduct or reflect a lack of fitness to practice law.

See also State Bar v. Semaan, 508 SW2d 429, 433 (1974) (Texas Court of Civil Appeals stated that "it cannot be said that isolated instances of the nature here raise a fact issue of professional misconduct" where lawyer who wrote letter to the editor critical of a judge responded to another lawyer's editorial praising the judge and criticizing the lawyer).

Judicial Campaigns

It has been held that a candidate for judicial office has a First Amendment right to challenge the ability, decisions, and judicial conduct of an incumbent judge. *In re Donohoe*, 580 P2d 1093 (Wash SupCt 1978); Model Code EC 8-6 (lawyers should protest earnestly against those who are unsuited for the bench). *See also* Michigan Ethics Opinion C-227 (1982) (judicial candidate for state supreme court may criticize a majority portion of a divided opinion by that court and the legal philosophy that is the basis for the opinion); *In re Beatty*, 517 NE2d 1065 (Ill SupCt 1987) (disciplinary complaint dismissed where no allegation lawyers had actual knowledge of falsity of their campaign statements against two judges running for retention). *But see In re Riley*, 691 P2d 695, 703 (Ariz SupCt 1984) (limiting a candidate's right to criticize an opponent, the court stated that a lawyer may accurately criticize an incumbent judge but may not impugn the integrity of the judicial system or question the decisions of the judge).

However, all courts agree that any challenges to an incumbent's qualifications must be done fairly and accurately and must be based upon facts. *In re Baker*, 542 P2d 701 (Kan SupCt 975); *In re Donohoe*, 580 P2d 1093 (Wash SupCt 1978) (lawyer censured for making false and misleading statements during a political campaign about an incumbent's trial record). *See also In re Riley*, 691 P2d 695 (Ariz SupCt 1984) (lawyer censured for derogatory public comments made during judicial campaign against incumbent which questioned courts' decisions and administration of justice); *In re Johnson*, 729 P2d 1175 (Kan SupCt 1986) (candidate for county attorney's office received censure for making false statements against opponent); *State v. Russell*, 610 P2d 1122 (Kan SupCt 1980) (lawyer censured for uncomplimentary and knowingly false political advertisement in newspaper against opponent in local campaign); *Nebraska State Bar Ass'n v. Michaelis*, 316 NW2d 46 (Neb SupCt 1982) (lawyers disbarred for placing a political advertisement in a newspaper which listed several factual charges of misconduct, illegal acts, and other violations of the law against an incumbent judge that the lawyer knew or

should have known to be false). *See generally* Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 Ohio St. L.J. 201 (1986); Annot., 26 ALR4 170 (1983).

Duty to Defend Judges

The statement in EC 8-6 that adjudicatory officials are "entitled to receive the support of the bar against unjust criticism" is not continued under the Model Rules. It has been argued that this provision imposes an affirmative duty on lawyers to defend judges who are unjustly criticized. *See* Palmer, *The Judge: Maligned, Attacked and Undefended*, 55 Chi. B. Rec. 21 (1973). *Cf. Rinaldi v. Holt, Rinehart & Winston Inc.*, 366 NE2d 1299, 1309 (NY CtApp 1977) (Fuchsberg, J., concurring) (in accord with Palmer but not specifically relying on EC 8-6).

Although an affirmative duty to defend the judiciary such as that arguably imposed by EC 8-6 has not been incorporated into Model Rule 8.2, the Comment to that rule encourages lawyers "to continue traditional efforts to defend judges and courts unjustly criticized."

APPLICATION

Criticism in Pleadings

▸ Defense counsel was admonished for stating in a petition for rehearing that the state supreme court was "willfully avoiding" constitutional questions. The lawyer argued that he was fulfilling his professional duty to be critical of the judiciary. The court stated, however, that the basis for imposing discipline was not directed to the fact that the lawyer had criticized the judge, but to the nature and manner of his reckless charges. Relying on DR 8-102 and EC 8-6, the court held that the lawyer's comments were "unprofessional" in that they attributed to the court "sinister, deceitful, and unlawful motives and purposes." The court also stated that the First Amendment did not protect the type of statements made by the lawyer. Finally, the court noted that the lawyer's assertion that his intent was not to allege that the court committed illegal acts should be judged according to its likely effect on the public's belief in the integrity of the court. Based on the lawyer's subjective intent not to show disrespect or defiance to the court, or to accuse, falsely or otherwise, any member of the court, the court held that the lawyer's conduct warranted only admonishment. *In re Frerichs*, 238 NW2d 764, 767 (Iowa SupCt 1976).

▸ A lawyer was reprimanded for accusing a judge in pleadings of appointing opposing counsel on basis of being a "political crony," and of awarding fees to repay political contributions. The court held that by not investigating the truth of his accusations and thus filing false and unsubstantiated charges against a judge's integrity, the lawyer's conduct warranted discipline. Further, the court held that the lawyer's false accusations represented more than a personal attack on a judge, but cast slur and insult upon the judiciary as a whole. *Cerf v. State*, 458 So2d 1071 (Fla SupCt 1984).

▸ An Iowa lawyer was reprimanded for filing a counterclaim falsely alleging that the judge in the case participated in a conspiracy to deprive a litigant of his civil rights. The court held that a lawyer "must not be permitted to engage in unbridled criticism of the court without basis in fact, even if ... it is for the ostensible purpose of asserting a basis for federal jurisdiction of a civil rights claim." The court further stated that "to permit unfettered criticism regardless of the motive would tend to intimidate judges in the performance of their duties and would foster unwarranted criticism of our courts." *Committee on Professional Ethics and Conduct of the Iowa State*

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Bar Ass'n v. Horak, 292 NW2d 129 (Iowa SupCt 1980).

▸ A California lawyer was suspended for 30 days, with one year probation, for stating in a court brief filed in the federal court of appeals that the state court of appeals judges acted "illegally" and "unlawfully" in reversing judgment against his clients, and for later filing statements in a petition for certiorari in the U.S. Supreme Court claiming that the judges falsified the record and suggesting that their "unblemished" records were "undeserved." In imposing discipline, the court held that there was no First Amendment violation where the lawyer's statements were made without factual substantiation and with reckless disregard for the truth. *Ramirez v. State Bar of California*, 619 P2d 399 (Calif SupCt 1980).

Letter to Judge

▸ The U.S. Court of Appeals for the Fourth Circuit affirmed the disbarment, from a federal district court, of a lawyer who wrote a letter to a judge which stated that the judge's decision to dismiss the lawyer's client's case was either a result of the judge's incompetence in the matter or a reflection of his Jewish bias in favor of the opposing firm. Citing DRs 1-102 and 8-102, the court held that the letter was "undignified, discourteous and degrading," and an attempt to prejudice the administration of justice while the case was on appeal. The court found that the lawyer neither investigated the judge's actions in other cases nor established a reasoned basis for charging the judge with incompetence and bias. The lawyer's statements, therefore, amounted to accusations that he known or should have known were false. The court also was unpersuaded by the lawyer's argument that his criticisms were protected by the First Amendment. *In re Evans*, 801 F2d 703 (CA 4 1986).

Criticism in Court

▸ A lawyer was suspended for one year for responding to court rulings with statements of disbelief, profanity, disparagement of the judge, and general disrespect for the judge, including characterizing the court's orders as "capricious" and "whimsical" and repeatedly accusing the court of favoritism to opposing counsel. In rejecting the disciplinary commission's recommendation of public reprimand, the court held that it would not tolerate a lawyer's engaging in such persistent derogatory attacks on a judicial officer which in effect reflect on the decorum of the judicial process itself. *Bar Ass'n of Greater Cleveland v. Carlin*, 423 NE2d 477 (Ohio SupCt 1981).

▸ A lawyer was suspended for not less than 30 days for referring to a paternity hearing as an "ordeal," "travesty," and "the biggest farce I've ever seen," and referring to the referee as "the biggest fool I've ever seen." Finding the lawyer to be in violation of DRs 1-102 and 8-102, the court held that the lawyer demonstrated undignified and discourteous conduct degrading to the tribunal and prejudicial to the administration of justice. *In re Friedland*, 376 NE2d 1126 (Ind SupCt 1978).

▸ The Minnesota Supreme Court disbarred a lawyer for, after receiving an adverse ruling and after court was adjourned, calling the judge a "horse's ass," for, later in court, describing the proceedings as a "kangaroo court," and for other acts of misconduct. The court cited Canon 1's provision requiring lawyers to protect the public, profession, and courts in furtherance of the administration of justice as the basis for imposing discipline. *In re Paulsrude*, 248 NW2d 747 (Minn SupCt 1976).

Judicial Campaigns

▸ The Kansas Supreme Court, in a per curiam decision, affirmed public censure as the appropriate sanction for a lawyer who had made knowingly false statements about an opponent in an election for county attorney's office. The lawyer wrote letters to a majority of the registered voters criticizing his opponent's stand on drugs, juvenile corrections care,

and driving under the influence laws, as well as his accessibility as legal advisor to the local police. The lawyer argued that his statements were constitutionally protected and did not prejudice the administration of justice. The court rejected these arguments. Citing DR 8-102 and EC 8-6, the court stated that a lawyer's right to free speech is limited to statements about a public official that are not false and are motivated by a desire to improve the legal system. Moreover, lawyers as officers of the court are bound by ethical standards requiring them to maintain respect for the courts and its officials. The court also concluded that the actual malice standard applied in libel cases is inapplicable in discipline cases. Finally, the court held that DR 1-102(A)(5) applied since the lawyer's false statements interfered with the administration of justice by attempting to influence the results of an election. *In re Johnson*, 729 P2d 1175 (Kan SupCt 1986).

▸ A lawyer received public censure for comments made to reporters about the incumbent in the course of a judicial campaign, including that a contempt order was "crazy" and motivated by revenge and that the "state simply doesn't get a fair trial in his court." Concluding that lawyers are held to a narrower standard of free speech than non-lawyers when discussing the judiciary, the court held that the lawyer's comments questioning the court's decisions and administration of justice and the fact that the lawyer should have submitted his grievance to the proper authorities warranted discipline. However, the court noted that a lawyer running for office has a First Amendment right to criticize an incumbent judge for matters such as intemperate behavior, injudicious actions, lack of judicial temperament, unpredictability, and unnecessary delay in rendering decisions. *In re Riley*, 691 P2d 695 (Ariz SupCt 1984).

Out-of-Court Statement

▸ A lawyer was suspended for one year for publicly accusing a judge, after appearing before him as a defendant, of being dishonest and corrupt, of engaging in fraud and misconduct, of being blackmailed or of accepting bribes to influence his decisions; and of publishing allegations of judicial misconduct in a letter in the town newspaper. The court stated that DR 8-102 is violated when a lawyer intentionally causes accusations to be published which he knows to be false, or which, with the exercise of ordinary care, he should know to be false. The court concluded that a lawyer's subjective belief in the truthfulness of his assertions does not excuse reckless disregard for the truth. *Louisiana State Bar Ass'n v. Karst*, 428 So2d 406 (La SupCt 1983).

▸ A lawyer's letters and memorandums to the Judicial Inquiry Board accusing a judge of misconduct were neither libelous nor grounds for discipline. The court held that the lawyer's statements were susceptible to "innocent construction" and were constitutionally protected expressions of opinion. The court further noted that it is the right and duty of lawyers to submit grievances to the proper authorities. *Owen v. Carr*, 497 NE2d 1145 (Ill SupCt 1986).

▸ A lawyer was disbarred for various acts of misconduct, including writing a letter to state public officials accusing a named judge of conspiring to cover up criminal activity. The court held that such an accusation was without basis and false, made for personal and not professional reasons, and did nothing but weaken and erode the public's confidence in an impartial adjudicatory process. The lawyer argued that his comments were protected under the First Amendment and that the standard applied in defamation cases should be applied in his case. The court, however, rejected both arguments stating that the lawyer was charged with professional misconduct and not defamation. *In re Terry*, 394 NE2d 94 (Ind SupCt 1979).

▸ A lawyer's published remark to a news reporter that the "state courts were

incompetent and sometimes downright crooked" was not protected First Amendment speech, even though the lawyer contended that his comment was made in good faith and in the spirit of constructive criticism. The court ordered censure and held that the lawyer had breached obligations imposed upon him by law and his profession. The court further noted that a lawyer has a right to respectful criticism but should voice such criticism to the state's judicial qualification commission. *In re Lacey*, 283 NW2d 250 (SD SupCt 1979).

Applicable Standard For Discipline

▸ Elizabeth Holtzman was the high-profile district attorney for Kings County, New York. She issued a "news alert" to the media and released a letter she had written in which she stated that a certain judge, in the presence of others, had asked a rape victim to get down on the floor and show the position she was in when she was assaulted. The judge, she stated, "profoundly degraded, humiliated and demeaned" the victim. Holtzman had neither read the trial record nor met with any of the personnel who were alleged to have been present, but relied on an interoffice memo from a newly admitted trial assistant.

An administrative judge of the New York City Criminal Court conducted an investigation and concluded that Holtzman's accusations were unsupported. Holtzman herself wound up being reprimanded for conduct reflecting unfitness to practice law. Affirming the discipline, the state court of appeals found it to be "of no consequence that she might be charged with violating DR 8-102(B) [the judicial criticism rule, analogous to Rule 8.2] based on this same course of conduct." "Indeed," the court continued, "in the present case there are factors that distinguish petitioner's conduct from that prohibited under DR 8-102(B)—most notably, release of the false charges to the media—and make it particularly relevant to her fitness to practice law."

The court declined to extend the *New York Times* doctrine to lawyer discipline and rejected Holtzman's argument that she could only be disciplined if she made her accusations with knowledge of or reckless disregard as to their falsity, the "constitutional malice" standard defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964): "Accepting petitioner's argument would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth."

Holtzman's petition for certiorari on the question of whether the standard of constitutional malice must be applied to lawyer disciplinary actions was denied by the U.S. Supreme Court. *In re Holtzman*, 577 NE2d 30 (NY CtApp 1991), *cert. denied*, 112 SCt 648 (1991).

▸ When the state court of appeals issued a writ of prohibition barring him from further prosecution of a certain criminal defendant, prosecutor Westfall went on television with harsh criticism of the opinion. The judge who wrote the opinion, he said, "distorted the statute ... and convoluted logic to arrive at a decision that he personally likes." Westfall also said the judge's reasons were "somewhat illogical" and "even a little bit less than honest." He claimed the judge had "made up his mind before he wrote the decision and just reached the conclusion that he wanted to."

The prosecutor was disciplined under Rule 8.2(a). He appealed, claiming that his statements were directed to the court's opinion rather than to the judge's qualifications or integrity. Furthermore, he said, he had merely expressed his opinion, and because opinions cannot be false, he could not be disciplined under Rule 8.2(a).

The court of appeals rejected Westfall's arguments. The court then moved to the question of whether the "with knowledge or in reckless disregard" standard used in defamation cases must also be applied in lawyer disciplin-

ary proceedings. The court concluded that this "constitutional malice" was not a prerequisite to the imposition of discipline; the compelling state interests involved warrant the application of an objective standard in discipline cases. Having concluded this, the court accepted the finding of its master that Westfall had in fact acted with reckless disregard as to the truth or falsity of his statements. Over the dissent of the chief judge, who declared that the principal opinion "chills lawyers' speech about judicial decisions," the court reprimanded the prosecutor.

Westfall's petition for certiorari was denied on the same day as was that of Holtzman. *In re Westfall*, 808 SW2d 829 (Mo SupCt), *cert. denied*, 112 SCt 648 (1991).

Statements Later Proved True

A lawyer had been permanently disbarred for charging particular judges with corruption without adequate "proof." Later the same judges received convictions of bribery. In an unusual application of the "knowledge or reckless disregard" standard, the eventual judicial determination of the truth of the lawyer's remarks warranted consideration of the lawyer's application for reinstatement, but not vacatur of the disbarment order. *State ex rel. Oklahoma Bar Ass'n v. Grimes*, 436 P2d 40 (Okla SupCt 1967).

JUDICIAL CONDUCT AND ETHICS

THIRD EDITION

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Chapter 11

ELECTION AND POLITICAL ACTIVITIES

§ 11.01. Scope of Chapter

Canon 5 of the 1990 Model Code of Judicial Conduct[1] attempts to reconcile the perceived need for an elected judiciary with the general desire for a judiciary of unquestioned integrity, independence, and impartiality. Canon 5 of the 1990 Code succeeds Canon 7 of the 1972 Code. In his notes to Canon 7 ("A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office") of the ABA's 1972 Model Code of Judicial Conduct, the Reporter for the drafting committee explained that the committee sought to deal with the "tensions between the demands of political reality and the necessity that a judge be impartial and appear to be impartial."[2] He thus characterized the resulting subsections of Canon 7 as "compromises between political reality and the aim of maintaining the appearance of judicial impartiality."[3]

Although the Reporter did not elaborate on what was meant by "political reality," we might assume that it included such basic aspects of the electoral process as the notion that judicial candidates must be allowed to present

[1] ABA MODEL CODE OF JUDICIAL CONDUCT (1990), Canon 5: A Judge or Judicial Candidate shall refrain from inappropriate political activity.

[2] E.W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 96 (1973).

[3] *Id.*

themselves and their views to the electorate and to develop the resources (funds) to do so. We might then view the strictures of Canon 5 and similar ethics provisions as seeking to control political behavior in ways that will assure 1) faithfulness to the electoral process and 2) judicial impartiality and the appearance of impartiality. This chapter reviews the ethics rules governing a judge's involvement in political activities and the case law and ethics advisory opinions interpreting these ethics rules.

§ 11.02. Relevant Ethics Provisions

Canon 5 of the Model Code of Judicial Conduct governs the campaign and political activities of judges and candidates for judicial office. It should be noted, however, that no Code provision has more variations among the states that have adopted the Code than Canon 5.[4]

Other provisions of the Code of Judicial Conduct may also be relevant to campaign conduct. In one case a judge who improperly used her office facilities and employees for political purposes was found to have violated Code of Judicial Conduct Canon 2A, which requires a judge to act in a manner promoting public confidence in the integrity and impartiality of the judiciary.[5]

Several provisions of the 1924 Model Canons of Judicial Ethics applied to campaign and political activities of judges and candidates for judicial office.[6] The

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[4] D. FRETZ, R. PEEPLES & T. WICKER, ETHICS FOR JUDGES 42-47 (1982).

[5] *In re* Conda, 72 N.J. 229, 370 A.2d 16 (1977).

[6] ABA CANONS OF JUDICIAL ETHICS (1924) [hereinafter Canons], Canons 28, 29, 30, 32 & 34.

> 28. PARTISAN POLITICS. While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.
>
> He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.
>
> Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.

Canons, Canon 28.

> 29. SELF-INTEREST. A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is a judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

Canons, Canon 29.

constraints imposed by these Canons did not differ markedly from those of the Code of Judicial Conduct Canon 5. The new Canon merely presents the ethical obligations of judges and candidates in a more specific, orderly, and succinct fashion.

Candidates for judicial office who are attorneys are also subject to provisions regulating the ethical conduct of lawyers. In 1969, the American Bar Association promulgated the Model Code of Professional Responsibility to replace its 1908 Model Canons of Professional Ethics as the national standard for rules of lawyer ethics.[7] The Model Code was adopted in substantially the form promulgated in forty-nine states, usually by order of the state supreme court.[8] Illinois drafted and adopted its own code of legal ethics.[9] The American Bar Association later

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30. CANDIDACY FOR OFFICE. A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Canons, Canon 30.

32. GIFTS AND FAVORS. A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

Canons, Canon 32.

34. A SUMMARY OF JUDICIAL OBLIGATION. In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

Canons, Canon 34.

[7] L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 6 (1984).

[8] *Id.*

[9] *Id.* Illinois substantially adopted the ABA Model Code of Professional Responsibility by Supreme Court Order effective Aug. 1, 1981.

developed Model Rules of Professional Conduct, and promulgated these new standards in 1983 as a suggested replacement for the Model Code.[10]

Several provisions of the Model Code of Professional Responsibility are relevant to lawyers who are candidates for judicial office, or otherwise participate in the process of election or appointment of judicial officers. Disciplinary Rule 1-102(A)(4) states, "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This provision would be violated by a lawyer-candidate or campaign worker who participates in the use of campaign advertisements or statements which are untrue or misleading. Additional limitations on campaign advertising are imposed by Disciplinary Rule 2-101,[11] which places restrictions on the form and content of lawyer publicity. Further, Disciplinary Rule 8-102[12] prohibits the use of falsehoods by lawyers who are promoting candidates for judicial office or criticizing incumbent judges. The rationale for the DR 8-102 restrictions is provided in Ethical Considerations 8-6 and 8-8.[13] Finally, Disciplinary Rule 8-103(A) provides that all lawyer-

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[10] *Id.*

[11] (A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1969).

[12] (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102 (1969).

[13] Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6 (1969).

> Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time,

candidates for judicial office must comply with Canon 7 of the Code of Judicial Conduct.[14]

The newer Model Rules of Professional Conduct include similar provisions governing the conduct of lawyers who are candidates or are otherwise involved in campaigns for judicial office. Lawyer-candidates are prohibited from making false or misleading claims about themselves by Rules 7.1,[15] 8.2(a),[16] and 8.4(c).[17] Rules 8.2(a) and 8.4(c) also serve to prohibit lawyer-candidates and lawyers working in campaigns from making false statements about opposing candidates. Rule 8.2(b)[18] requires a lawyer who is a candidate for judicial office to comply with relevant provisions of the Code of Judicial Conduct, and Rule 8.4(f)[19]

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should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-8 (1969).

[14] (A) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-103(A) (1969).

[15] A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

[16] (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth of falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1983).

[17] It is professional misconduct for a lawyer to:

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

...

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983).

[18] A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(b) (1983).

[19] It is professional misconduct for a lawyer to:

...

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(f) (1983).

prohibits lawyers working in a judge's re-election campaign from assisting the candidate in conduct which violates the Code of Judicial Conduct or other law.

In addition to the ethical provisions governing the conduct of judges and lawyers, candidates for judicial office may also be subject to state statutes concerning election practices, financial disclosure, and other campaign-related matters.[20] Interpretation of the campaign ethics provisions of the judicial and attorney standards of conduct is available through a limited body of case law, and through a much larger number of ethics advisory opinions issued by agencies in twenty-one states[21] and by the American Bar Association. Also, ethical guidelines for judicial campaigns have been adopted by bar associations in a number of states[22] and by the supreme court in at least one state.[23]

§ 11.03. Jurisdiction Over Campaign Ethics Violations

Incumbent judges campaigning for re-election who commit ethical violations are subject to discipline by a judicial discipline agency in all jurisdictions.[24] Most judicial discipline agencies have jurisdiction over acts by judges occurring prior to the time the judge takes office.[25] Thus, these agencies are able to address ethical violations occurring during a campaign after a successful candidate takes office. However, judicial discipline agencies generally do not have jurisdiction over non-judge candidates during the course of a campaign.[26]

Each jurisdiction has also created an agency to investigate allegations of misconduct by attorneys, and in appropriate instances to initiate proceedings which may result in discipline.[27] Grounds for discipline of attorneys are violations of the state version of the Code of Professional Responsibility, or, the Model Rules of Professional Conduct.[28] Thus, attorney discipline agencies can

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[20] *See, e.g.*, Minnesota Fair Campaign Practices Act, Minn. Stat. Ann. § 210A.01.

[21] Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Washington, West Virginia, Administrative Office of the U.S. Courts.

[22] *See, e.g.*, New York State Bar Ass'n Comm. on Prof. Ethics, Op. 289 (1973).

[23] Ethical Guidelines for Judicial Campaigns, S.D. Codified Laws Ann. ch. 12-9 app.

[24] *See* sections 1.03 and 1.04.

[25] *See, e.g., In re* Samford, 352 So. 2d 1126 (Ala. 1977) (judge could be removed from office for conduct including stealing funds from a client's trust account while he was an attorney); *In re* Gillard, 271 N.W.2d 785 (Minn. 1978) (lawyer's misconduct that occurred before his appointment to judicial office may be the basis for judicial disciplinary action).

[26] Ala. Judicial Inquiry Comm'n, Op. 80-83 ("A candidate for judicial office, who is not a judge, is not subject to the jurisdiction of the Judicial Inquiry Commission but is subject to the original jurisdiction of the Alabama Supreme Court").

[27] *See* AMERICAN BAR ASSOCIATION, DIRECTORY OF LAWYER DISCIPLINARY AGENCIES AND CLIENTS' SECURITY FUNDS (1985) (agencies listed for each jurisdiction).

[28] AMERICAN BAR ASSOCIATION, SURVEY OF LAWYER DISCIPLINARY PROCEDURES IN THE UNITED STATES 9 (1984).

address ethical violations by attorneys assisting in campaigns for judicial office, and by attorneys who are currently candidates for judicial office or who have been unsuccessful candidates for such an office.[29]

Some states permit non-attorneys to serve as judicial officers in limited jurisdiction courts. Ethical violations committed by a non-attorney in the course of a campaign for judicial office can be punished by the judicial discipline agency if the candidate is successful. Otherwise, neither the judicial discipline agency, nor the attorney discipline agency, will gain jurisdiction over a non-attorney candidate, and ethical violations by such candidates will remain unaddressed. Of course all candidates for judicial office, including non-attorneys, are subject to civil or criminal process for violation of state election laws.[30]

§ 11.04. General Restrictions on Political Activities

The Model Code of Judicial Conduct places a number of general restrictions on the activities of judges and candidates for judicial office. Restrictions on the time and place of political appearances are imposed by the portions of Canon 5 of the Code dealing with judges' political conduct in general, and dealing specifically with conduct of candidates for office. Canon 5A(1) provides that, except as authorized by 5B(2), 5C(1), and 5C(3), a judge or a candidate for judicial office may *never*:

1. Act as a leader or hold an office in a political organization.[31]
2. Publicly endorse or publicly oppose another candidate for public office.
3. Make speeches on behalf of a political organization.
4. Attend political gatherings.
5. Solicit funds for, pay an assessment to, or make a contribution to a political organization or another candidate, or purchase tickets for political party dinners or other functions.

Under Canon 5C, however, an elected judge or a candidate for a judicial office filled by public election *may*, to the extent permitted by state law:[32]

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[29] N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 289 (1973) ("The canons, the guidelines and all other rules applicable to judicial campaigns apply not only to judges but also to others seeking judicial office, and persons acting on their behalf, and apply to campaigns for primary as well as general elections"). *See also* CODE OF PROFESSIONAL RESPONSIBILITY D.R. 8-103(A) (1969); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 (1983).

[30] *See* Burns v. Valens, 400 N.W.2d 123 (Minn. App. 1987) (allegations of violations of Code of Judicial Conduct alone will not support an election contest — must allege violations of state election laws).

[31] *In re* Blauvelt, 801 P.2d 235 (Wash. 1990) (a judge serving as a delegate to a political party's county convention is a "leader" within the meaning of the Code prohibition).

[32] Political activities exceeding those permitted by state law may violate Canon 2A. *In re* Vandelinde, 366 S.E.2d 631 (W.Va. 1988) (magistrate reprimanded for contributing $5,000 to a

1. Purchase tickets for and attend political gatherings.[33]
2. Contribute to a political organization.
3. Identify himself or herself as a member of a political party.
4. Speak to political gatherings on his or her own behalf when a candidate for election.
5. Publicly endorse or oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

An incumbent judge occupying such an office is also permitted to engage in these activities throughout his or her tenure in office, except that he or she may only speak to political gatherings while a candidate for re-election.

§ 11.05. Timing and Types of Campaign Appearances

To date, all ethics advisory opinions dealing with the earliest permissible date for beginning a campaign for judicial office have been directed to campaign activity by incumbents. In Kentucky, the state Code of Judicial Conduct states that a judge is a candidate for re-election during his or her entire term of office. Therefore, a Kentucky advisory opinion holds that a judge may campaign for re-election at any time, so long as the time limits on solicitation of campaign funds are observed.[34]

Some states establish time limits for campaigning by law. In New York, for example, an "announced" judicial candidate may attend politically sponsored affairs within nine months of a primary or a nominating convention. To qualify for participation in such affairs, an aspirant for office must have publicly announced his or her candidacy by some affirmative action such as a letter to an appropriate political officer or a letter to the media.[35]

It may sometimes be difficult to determine when an incumbent who is not yet a candidate for re-election is improperly speaking to political gatherings on his or her own behalf, and when such a person is merely speaking to such gatherings on legal matters as permitted by Canon 4 of the Code. A Florida advisory opinion states that it is permissible for an incumbent judge, prior to the time of qualifying for re-election, to attend a partisan political club meeting to give a speech about the role of a county court judge in the judicial system, to attend a partisan

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campaign organization where maximum statutory limit was $1,000). *See also In re* Barrett, 593 A.2d 529 (Del. 1991) (judge suspended for, *inter alia,* attending political fundraising events and distributing tickets to court personnel where Delaware Code explicitly prohibited such activities).

[33] *In re* Blauvelt, 801 P.2d 235 (Wash. 1990) (a judge's attendance at a political party's precinct caucus and county convention is permitted under the Code).

[34] Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-42(3); Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-45(5).

[35] N.Y. Office of Court Admin., Judicial Ethics Op. 76 (1977); N.Y. Office of Court Admin., Judicial Ethics Op. 134 (1978); N.Y. Office of Court Admin., Judicial Ethics Op. 149 (1978).

political club meeting solely to be introduced as a guest who is a county court judge, or to attend a nonpartisan meeting of a civil, social, or homeowners group to give a speech about the role of a county court judge.[36]

Once the timing issue is resolved and a campaign is clearly under way, candidates for a judicial office filled by a public election between competitors may appear before virtually any group, so long as the appearance does not denigrate the dignity of the office sought or imply that the candidate, if successful, would act in a biased or partial manner. Thus, such a candidate may, along with other candidates, attend a "political fair" sponsored by various civic groups to permit voters to become acquainted with candidates.[37] He or she may also speak as the sole guest speaker at a club affiliated with a political party.[38] However, it would probably be inappropriate for such a candidate to appear before a group that espouses views of an invidiously discriminatory nature, because an appearance before such a group could be construed as indicating future bias.[39]

The Code is silent on whether candidates competing for the same judicial office may make joint appearances. However, one ethics advisory opinion states that a candidate may not engage in a public debate with another candidate or other candidates for the same office, because this would almost certainly put the candidate in the position of having to make pledges of future conduct in office.[40]

§ 11.06. Special Considerations for Merit Selection, Nonpartisan Election, and Appointive Jurisdictions

Under the 1990 Code, the same provisions generally apply to candidates for retention under a merit system of selection as apply to those judges facing public election between competing candidates in partisan elections. However, under the 1972 Code, somewhat different strictures apply to judges facing retention elections in merit plan jurisdictions, and unopposed candidates for re-election. Under Canon 7B(3), such candidates may only begin to campaign once active opposition has formed. An Arizona ethics advisory opinion tempers this rule by holding that a candidate for retention or reelection may begin to campaign as soon as he or she reasonably believes that he or she has or will have substantial opposition, regardless of how early it may be.[41]

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[36] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 77-21 (1978).

[37] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 74-11 (1974); Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 77-21 (1978).

[38] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-6 (1978).

[39] *See* Model Code, Canon 7B(1)(c). *See also* Canon 2 (recently amended comments concern membership by judges in organizations that practice discrimination in selecting members).

[40] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-13 (1978).

[41] Ariz. Judicial Ethics Advisory Comm., Op. 78-1 (1978).

Because Canon 7A has been interpreted as applying to candidates seeking retention in office under a merit plan,[42] Canons 7A(1)(c) and (2) appear to preclude most types of campaign appearances by candidates for retention in jurisdictions using a merit selection process. However, Canon 7B(3) permits such a candidate who encounters active opposition to campaign "in response thereto." Although a sensible reconciliation of these subsections should permit such a candidate to speak before gatherings of voters on his or her own behalf, regardless of the nature of the gathering, the extent to which such campaign activity would be permitted remains unclear.

Jurisdictions in which judges are elected on nonpartisan ballots often have laws prohibiting candidates for judicial office from campaigning, or otherwise representing themselves, as members of a political party.[43] In *In re Kay*[44] and *In re Pratt*,[45] the Supreme Court of Florida publicly reprimanded two judges for giving the appearance, through the mailing of sample ballots, that they were endorsed by the "Democratic" or "Republican" parties, and for failing to disclaim any appearance of a partisan endorsement in these ballots.

The 1990 Code contains a separate provision for candidates seeking appointive judicial office. Canon 5B(1) prohibits such candidates from soliciting or accepting funds, either personally or through a committee. Canon 5B(2) permits a non-judge candidate, unless prohibited by law, to retain office in a political organization, attend political gatherings, and continue to offer financial support to political organizations and candidates.

§ 11.07. Political Activity on Behalf of Other Candidates

To avoid enabling judges to lend the prestige of their offices to advance the private interests of others,[46] Canon 5A(1)(b) forbids judges or candidates for judicial office to endorse or oppose any candidate for public office. Thus, candidates for judicial office must be cautious in appearing with, or participating in joint campaign appearances with, other candidates, so as not to give the impression that such action constitutes an endorsement of the other candidates. A number of sitting judges have been disciplined for participating in and supporting other persons' campaigns for judicial office. One judge was disbarred and effectively removed from office for numerous ethical violations, including arranging and attending political gatherings and serving as a toastmaster at a

[42] ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 85-1513 (April 27, 1985).

[43] *See, e.g.*, Fla. Stat. Ann. § 105.071. *In re* Stoker, Statement of Charges (Wash. Comm'n on Jud. Conduct, Jan. 17, 1991).

[44] 508 So. 2d 329 (Fla. 1987).

[45] 508 So. 2d 89 (Fla. 1987).

[46] Model Code, Canon 2B. "(A judge) shall not lend the prestige of his office to advance the private interests of others...." *Id.*

testimonial for another candidate.[47] Another judge was publicly reprimanded for improper conduct including sending 100 postcards and letters in support of a judicial candidate.[48] Other judges have been disciplined for contributing money,[49] or money and public support,[50] to candidates for judicial office.

Judges have also been disciplined for involvement in the campaigns of candidates for non-judicial offices. A Michigan judge was censured for actively supporting his court administrator's bid to unseat an incumbent mayor,[51] and a Florida judge was reprimanded for assisting in the campaigns of two county politicians.[52]

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[47] *In re* Troy, 364 Mass. 15, 306 N.E.2d 203 (Mass. 1973). *See also In re* Turner, 573 So. 2d 1 (Fla. 1990) (judge reprimanded for active involvement in son's campaign for county judge); *In re* Codispoti, 438 N.E.2d 549 (W.Va. 1993) (judge censured for involvement in wife's judicial campaign and in misleading campaign advertisements).

[48] Office of Disciplinary Counsel v. Capers, 15 Ohio St. 3d 122 (1984). *See also In re* Martin, 434 S.E.2d 262 (S.C. 1993) (judge reprimanded for placing campaign signs on his property, sponsoring a campaign barbeque, and allowing his photo to appear in a campaign endorsement); *In re* Ovard, Determination (Texas Comm'n, Dec. 17, 1994).

[49] *In re* Carter, 47 Ky. Bench & Bar No. 3, p. 16 (Ky. Comm'n, July 1983); *In re* Sallee, 579 N.E.2d 75 (Ind. 1991) (judge reprimanded for purporting to make campaign contribution in name of spouse); *In re* Martin, Determination (W. Va. 1998) (judge admonished for making contribution to another judicial candidate).

[50] *In re* Smith, 449 So. 2d 755 (Miss. 1984). *But see In re* Hill, 437 S.E.2d 738 (W.Va. 1993) (complaint dismissed against judge who, while campaigning for judicial office, endorsed another judicial candidate because the West Virginia version of then Rule 7A(1)(b) contained a "technical deficiency" that apparently permitted endorsements by judges who are themselves candidates).

[51] *In re* Bayles, 399 N.W.2d 394 (Mich. 1986). The judge had continued his political activities even after receiving a letter of admonishment three years earlier for driving a van with a bumper sticker endorsing a political candidate. *See also* Letter from Chief Judge United States Court of Appeals for the Seventh Circuit to Judge Paul E. Riley (Oct. 7, 1996) (the Chief Judge of the United States Court of Appeals for the Seventh Circuit reprimanded a judge for attending a fund-raising dinner for a political candidate).

[52] *In re* DeFoor, 494 So. 2d 1121 (Fla. 1986). The judge was charged with aiding the campaigns of the two politicians by, *inter alia*, developing campaign strategies and privately lobbying in the local community. *See also In re* Schmidt, Unreported Determination (Cal. Comm'n, Nov. 30, 1989) and *In re* Katic, 549 N.E.2d 1039 (Ind. 1990) (judge suspended for outwardly opposing a candidate for township trustee, influencing a political party's choice of primary candidates, leading search for candidates, and personally encouraging candidacy of certain individuals). *See also In re* McGregor, 614 So. 2d 1089 (Fla. 1993) (judge reprimanded for actively campaigning for spouse in spouse's campaign for county clerk of court); *In re* Decker, Determination (N.Y. Comm'n on Judicial Conduct, Jan. 27, 1994) (judge admonished for public support of county executive's campaign); *In re* Steady, 641 A.2d 117 (Vt. 1994). *In re* Judicial Campaign Complaint Against Keys, 671 N.E.2d 1124 (Ohio Comm'n of Judges, Sept. 11, 1996) (entry of a cease and desist order against two judicial candidates who had allowed their names to be listed on an invitation as members of a committee for a fund-raiser in support of the re-election of the county recorder); *In re* Cacciatore, Determination (N.Y. 1998) (judge admonished for endorsing non-judicial candidates); Public Admonishment of Hiber (Cal. 1998) (judge disciplined for giving clerk $250 to donate in her name to a non-judicial candidate).

Joint campaign activities run the risk of appearing to violate the prohibition on endorsements. Two Florida judges received public reprimands for contributing to a pool of money that was used to mail "sample ballots" (approved by the judges) that gave the appearance that each judge endorsed the other.[53] On the other hand, campaign literature endorsing several candidates for judicial office issued by someone other than the candidates has been approved by an ethics advisory body in New York.[54] A Louisiana ethics opinion holds that a group of judges facing opposition for reelection may publish a sample ballot suggesting that all be reelected, but may not include unopposed candidates on the sample ballot.[55] Commentary to the Code states that a candidate may run on the same ticket as other candidates without running afoul of limitations on endorsements.[56]

Judges have also been disciplined for indirect involvement in the campaigns of others. A part-time town justice in New York was admonished for permitting a partnership in which he had an interest to contribute to campaigns other than his own,[57] and a judge in North Carolina was censured for making contributions to a senate campaign committee.[58] The Supreme Court of North Carolina rejected the judge's argument that a contribution to a campaign committee is a contribution to a "political organization" allowed by Canon 7A(2).

§ 11.08. Restrictions on Campaign Advocacy and Related Constitutional Issues

Canons 7B(1)(a) and (c) of the 1972 Model Code of Judicial Conduct caution that a candidate for a judicial office:

> (a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him; and
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

The dictates of Canons 5A(3)(a) and (d) of the 1990 Code are similar, except that there is no prohibition against judges announcing their views on disputed legal or political issues. Instead, Canon 5A(3)(d)(ii) prohibits "statements that commit or

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[53] *In re* Pratt, 508 So. 2d 89 (Fla. 1987); *In re* Kay, 508 So. 2d 329 (Fla. 1987).

[54] N.Y. Office of Ct. Admin., Judicial Ethics Op. 34 (1975).

[55] La. Sup. Ct. Comm. on Judicial Ethics, Op. 57 (1982).

[56] Model Code, Canon 7A(1)(b) comment. "A candidate does not publicly endorse another candidate for public office by having his name on the same ticket." *Id.*

[57] *In re* DeVanl, Unreported Determination (N.Y. Comm'n 1985).

[58] *In re* Wright, 329 S.E.2d 668 (N.C. 1985).

appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court..."

Thus, a candidate cannot conduct an undignified campaign[59] on a platform advocating preferences for specific persons or groups, misrepresent the candidate's qualifications or make misleading statements,[60] make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,[61] commit himself or herself in advance on disputed legal issues, or announce views on disputed political issues.[62] It has been said, however, that given the limitations on campaign speech by judicial candidates, "the man in the moon and the weatherman are about all of the people a judicial candidate can with impunity talk about without attitudinizing himself."[63]

Various Code restrictions on campaign advocacy have been challenged on First and Fourteenth Amendment grounds in federal and state courts. In a successful federal court challenge, a district court judge ruled that the provision

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[59] *See In re* Baker, 535 So. 2d 47 (Miss. 1988) (judge received private reprimand for soliciting the political support of a litigant over the telephone, raising the specter of influence peddling); *In re* Hopewell, 507 N.W.2d 911 (S.D. 1993) (lawyer candidate for judicial office disciplined for impugning the integrity of the judicial system and his opponent).

[60] *In re* Tully, Order No. 90-CC-2 (Ill. Cts. Comm'n, Oct. 25, 1991) (appellate court justice reprimanded for statements in advertisements implying that he was an appellate court judge running for retention rather than a circuit judge running for election as an appellate justice and for misrepresenting his qualifications by failing to identify the persons or organizations that had allegedly endorsed the judge as "highly qualified"); *In re* Judicial Campaign Complaint Against Burick, 705 N.E.2d 422 (Five Judge Comm'n Appointed by Ohio Sp. Ct. 1999) (judicial candidate reprimanded and fined for stating that incumbent opponent was appointed by political bosses, supporting death penalty, making a statement about a sentence imposed by opponent while case still pending, and making misleading statements about endorsements).

[61] *But see In re* Tully, Order No. 90-CC-2 (Ill. Cts. Comm'n, Oct. 25, 1991) (Commission held that statements made by the judge that he was "tough on crime" and "tough on taxes" were within the realm of general comment and did not rise to the level of a pledge or promise); *In re* Buckley, Order No. 91-CC-1 (Ill. Cts. Comm'n, Oct. 25, 1991) (Commission held that although an appellate court justice's statement in his campaign for the Supreme Court that he "has never written an opinion reversing a rape conviction" was an implicit pledge that the justice would treat rape convictions summarily, the violation was insubstantial, insignificant, and did not warrant a reprimand; the Commission also found that the justice had not violated the Code by stating that he was "for the victims of crime" and part of "our toughest anti-crime team").

[62] *See, e.g.*, Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-15 (1978). Christenson *et al.* v. Board of Comm'rs on Grievances & Discipline of the Supreme Ct. of Ohio, 575 N.E.2d 790 (Ohio 1991) (court denied writ of prohibition seeking to prohibit the Board from enforcing the Code provision preventing judicial candidates from making known their views on disputed legal and political issues).

[63] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-13 (1978). For arguments against restrictions on campaign speech *see* Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987); Comment, *First Amendment Rights of Attorney and Judges in Election Campaigns*, 47 OHIO ST. L.J. 201 (1986).

of Canon 7B(1)(c) of the Florida Code of Judicial Conduct that prohibited discussion of "disputed legal or political issues" violates a judicial candidate's First Amendment right to freedom of speech.[64] In enjoining the enforcement of this portion of the canon, the court explained that "a person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office."[65] Although the court acknowledged that regulating a candidate's speech might serve a compelling state interest in maintaining public confidence in the objectivity of the judiciary, the court found that a blanket prohibition of discussion of any disputed legal or political issue was overly broad and thus unconstitutional. The court stated that when a state decides to select its judiciary through popular election, "it must recognize a candidates' right to make campaign speeches *and* the concomitant right of the public to be informed about the judicial candidates."[66] It pointed out that the public generally has "little more than biographical data" to assess candidates for judicial office[67] and stated that it was "in the public interest to permit disclosure of truthful, relevant information helpful to the decision-making processes employed by Florida voters in an election of their trial judges."[68]

In a subsequent case before the same federal district court judge, plaintiffs launched a First Amendment challenge to Florida's Canon 7B(1)(a) requirement that candidates for judicial office "maintain the dignity appropriate to judicial office."[69] The candidate had been informed by Florida's Committee on Standards of Conduct Governing Judges that his proposal to speak publicly about truthful information concerning his opponent (including a conviction for leaving the scene of an accident and the fact that he had been the subject of three FBI investigations) would violate Canon 7B(1)(a). The district judge's ruling that the candidate's subsequent election rendered the case moot was overturned by the U.S. Court of Appeals for the Eleventh Circuit.[70] The Eleventh Circuit ruled, *inter alia*, that the judicial candidate's election did not render the First

[64] American Civ. Liberties Union, Inc. v. Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990). *See also* Clark v. Burleigh, 279 Cal. Rptr. 333 (Cal. App. 6th Dist. 1990) (provision of California Election Code that limits a judicial candidate's statement for a voter's pamphlet to reciting a candidate's personal background and qualifications, and prohibits any reference to opponents, violates the First Amendment in that it is overbroad and a prior restraint of speech); Beshear v. Butt, 773 F. Supp. 1229 (E.D. Ark. 1991) (court ruled that Canon 7A(1)(c) was unconstitutionally overbroad and vague in a challenge brought by a state judicial candidate who had been charged with willfully violating the canon provision by stating that plea bargaining is not acceptable to him and would not be allowed in his court).

[65] *Id.* at 1097.

[66] *Id.*

[67] *Id.* at 1098.

[68] *Id.* at 1099.

[69] American Civil Liberties Union, Inc. v. Florida Bar, No. TCA 90-40163 WS.

[70] American Civil Liberties Union, Inc. v. Florida Bar, 999 F.2d 1486 (11th Circuit 1993).

Amendment challenge moot because the gravamen of the complaint was "a challenge to the Bar's and the JQC's ability to constitutionally prohibit a judicial candidate from publicly discussing legally obtained truthful information about her opponent."[71]

The Supreme Court of Kentucky has also found the same Code provision to be unconstitutionally overbroad in the course of deciding a judicial discipline case.[72] The state's judicial conduct commission had found that a supreme court justice had violated Canon 7B(1) by criticizing certain state laws, judicial standards of review, the Code of Judicial Conduct, a supreme court ruling, and his opponent during the course of his election campaign. The court acknowledged that there is a compelling state interest in protecting and preserving the integrity and objectivity of the judicial system, but stated that the code provision violated constitutional rights in prohibiting *all* discussions of a candidate's views rather than specifically prohibiting speech such as making "promises or predispositions of cases or issues that are likely to come before the court that might reflect upon a judge's impartiality."[73] In this regard, the court expressed a belief that a code provision of narrower scope could be drafted to avoid constitutional concerns and commented favorably on the analogous provision from the 1990 ABA Model Code of Judicial Conduct, which prohibits judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court...."[74]

In a subsequent challenge to a revised Kentucky Canon 7B(1)(c) that had deleted the language struck down by the Kentucky Supreme Court, a federal district court enjoined enforcement of the provision prohibiting a candidate from making pledges or promises of performance in office.[75] The candidate had wanted to make statements that would commit him or appear to commit him with respect to (1) administrative matters in the Kentucky Court of Appeals, and (2) general legal issues that were not then before the court. The court's injunction barred enforcement of the canon provision on constitutional grounds with respect

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[71] *Id.* at 1496.

[72] J.C.J.D. v. R.J.C.R., 803 S.W.2d 953 (Ky. 1991).

[73] *Id.* at 956. *But see* Stretton v. Disciplinary Bd. of Supreme Ct. of Penn., 944 F.2d 137 (3d Cir. 1991) (court held that provision of Pennsylvania Code that prohibited judicial candidates from announcing their views on disputed legal or political issues did not violate a candidate's constitutional rights if the provision is narrowly interpreted to prohibit candidates from expressing their opinions only on issues that might come before them in their judicial capacity).

[74] A.B.A., MODEL CODE OF JUDICIAL CONDUCT (1990), Canon 5A(3)(d)(ii). For a critique of North Carolina's revision of its campaign speech rule in the face of a similar constitutional challenge, *see* Amy M. Craig, *The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*, 33 WAKE FOREST L. REV. 413 (1998).

[75] Ackerson v. Kentucky Judicial Retirement & Removal Comm'n, 776 F. Supp. 309 (W.D. Ky. 1991).

to statements concerning court administrative issues but not legal issues that were likely to come before the court. The court stated that the compelling state interest is in preserving the impartiality of the judiciary, which is an "attribute of the exercise of a court's adjudicatory power, not its administrative function."[76]

The revised Canon 7B(1)(c) has also been upheld by the Supreme Court of Kentucky. In *Deters v. Judicial Retirement and Removal Commission*,[77] the court upheld the constitutionality of 7B(1)(c) in a case involving a First Amendment challenge by a judicial candidate who had been censured for characterizing himself as a "pro-life candidate." The court stated: "there is a compelling state interest in so limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system."[78]

The earlier version of Canon 7B(1)(c) has also been struck down by the U.S. Court of Appeals for the Seventh Circuit in *Buckley v. Judicial Inquiry Board.*[79] In *Buckley,* the Seventh Circuit had ruled the Illinois version of 7B(1)(c) unconstitutional on First Amendment grounds. Although the Illinois rule included a generally worded "pledges or promises" clause and a general prohibition against the candidate's announcing "his views on legal and disputed issues," the federal trial court in *Buckley* had ruled that the rule is constitutional if its scope is narrowly construed and limited to statements made on issues that are likely to come before the judicial candidate when sitting as a judge.[80] The Seventh Circuit viewed the trial judge's construction as a "rewrite," stating that it was not their job to "patch up the rule."[81] In holding the rule unconstitutional, the court stated: "The fact that some of the statements forbidden by the rule, notably promises to rule in particular ways in particular cases or types of case, are within the state's regulatory power cannot save the rule."[82]

Other Code provisions have withstood similar constitutional challenges. In particular, courts have upheld the Canon 7A(1)(a) prohibition against serving as a leader in a political organization,[83] the Canon 7A(1)(b) prohibition against public

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[76] *Id.* at 314.

[77] 873 S.W.2d 200 (Ky. 1994).

[78] *Id.* at 205.

[79] 997 F.2d 224 (7th Circuit 1993).

[80] Buckley v. Illinois Judicial Inquiry Bd., 801 F. Supp. 83 (N.D. Ill. 1992). The trial court had adopted an approach similar to that taken by the Third Circuit in upholding the same provision in the Pennsylvania Code. Stretton v. Disciplinary Bd. of Supreme Ct. of Penn., 944 F.2d 137 (3rd Circuit 1991).

[81] Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 230 (7th Circuit 1993).

[82] *Id.*

[83] *In re* Blauvelt, 801 P.2d 235 (Wash. 1990) (Canon 7A(1)(a) term "leader" not unconstitutionally vague in that it would be reasonable for a person of ordinary intelligence to conclude that standing for election as Democratic party delegate in presidential primary is prohibited).

endorsements of candidates for public office,[84] the Canon 7A(3) requirement that a judge resign from office to run for a non-judicial office,[85] and the Canon 7B(2) prohibition against personal solicitation of campaign funds.[86] However, a federal court in Florida has struck down the Canon 5C(2) prohibition against establishing a campaign committee or soliciting campaign contributions prior to one year before the general election.[87]

§ 11.09. — Statements Relating to Conduct in Office

Judges have been found guilty of ethical improprieties for campaign statements indicating what their conduct in office would be, even where the promised conduct involved general statements concerning the administration of the law. An incumbent Washington judge was censured for campaign statements that he was "tough on drunk driving,"[88] and a Kentucky judge was censured for distributing campaign materials containing the phrases, "solid reputation for law and order" and "does not allow plea bargaining."[89] Another Kentucky judge was suspended from office for ten days without pay for suggesting, in a campaign advertisement, that he would rule favorably toward a particular group if elected.[90]

Ethics advisory opinions have addressed the propriety of numerous statements and pledges candidates have proposed to use in the course of a campaign. The general sense of these opinions is that anything that could be interpreted as a pledge that the candidate will take a particular approach in deciding cases or a particular class of cases is prohibited.[91] It is inappropriate for a candidate to state that he or she could personally throw the switch on anyone convicted of a capital crime.[92] A candidate may not express the view that marijuana should be decriminalized[93] or announce the candidate's views on abortion.[94] A candidate cannot use the slogan "a strict sentencing philosophy," as it gives the impression

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[84] *In re* Code of Judicial Conduct, 603 So. 2d 494 (Fla. 1992).

[85] Morial v. Judiciary Comm'n, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978) (impairment of First Amendment interest in free expression not sufficiently grievous to require strictest constitutional scrutiny); *In re* Buckson, 610 A.2d 203 (Del. Judicial 1992) (agreed with reasoning employed in *Morial* in upholding the resign-to-run requirement).

[86] *In re* Fadeley, 802 P.2d 31 (Or. 1990) (interference with First Amendment rights is minimal, state's interest in protecting the integrity of the judiciary is profound, and means chosen to carry out this state purpose is least intrusive).

[87] Zeller v. The Florida Bar, TCA 95-40073-MM (U.S.N.D. Florida April 19, 1995).

[88] *In re* Kaiser, 759 P.2d 392, 394-96 (Wash. 1988).

[89] *In re* Nolan, Unreported Order (Ky. Comm'n 1984).

[90] *In re* Ehlschide, Unreported Order (Ky. Comm'n 1982).

[91] *In re* Tully, No. 90-CC-2, Complaint Before Ill. Cts. Comm'n (Sept. 25, 1990).

[92] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-6 (1978).

[93] *Id.*

[94] *In re* Butler, Unreported Determination (Ky. Comm'n 1986).

he or she would act in a biased manner in certain cases.[95] At least one state takes the view that statements by a candidate concerning the use of plea bargaining should be avoided, because they may be seen as a pledge of future conduct, and plea bargaining is a controversial (disputed) issue.[96] In Kentucky a candidate cannot even take the position that a particular rule of court should be changed. This, too, constitutes a pledge of conduct in office.[97]

A candidate may also be limited in the extent of his or her activities outside of the campaign if those activities may indicate future conduct in office. A candidate for an Ohio judicial office was advised that he could not remain involved in a political dispute involving a referendum on an income tax law during the course of his candidacy.[98]

A frequent practice by those interested in campaigns for public office, such as the media or special interest groups, is the circulation of questionnaires on specific issues to all candidates. The results may later be used in news stories, or for purposes of formulating an endorsement. Most advisory opinions addressing the use of questionnaires in judicial campaigns strongly disapprove of the practice. Thus, judicial candidates have been advised to refuse to respond to questionnaires from political organizations concerning gun control, abortion, the Equal Rights Amendment, regulation of condominiums, and the right to work.[99] A county bar association was cautioned not to survey the views of candidates for judicial office as to whether they agreed or disagreed with specific decisions of an appellate court.[100] The ethics committee reasoned that such a questionnaire would ask candidates to dispose of complex issues in an overly simplistic manner, and may give the impression that he or she would not be supportive of controlling authority. That is, expression of an intent to disregard precedent would be unethical.[101] However, the same bar ethics committee later ruled that a bar association would be permitted to circulate a questionnaire designed to elicit candidates' criticisms of prior court decisions in a fair and reasonable manner that would not create the impression that a candidate would later act with bias or partiality.[102]

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[95] State Bar of Mich. Comm. on Prof. and Judicial Ethics, Formal Op. C-219 (1980); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1444 (1980).

[96] Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-38. *See also In re* Donovan (Ark. Jud. Discipline & Disability Comm'n, Nov. 16, 1990).

[97] *Id.*

[98] Ohio State Bar Ass'n Comm. on Legal and Prof. Conduct, Informal Op. 82-3 (1982).

[99] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 80-13 (1980).

[100] State Bar of Mich. Comm. on Prof. and Judicial Ethics, Formal Op. C-222 (1982); State Bar of Mich. Comm. on Prof. and Judicial Ethics, Informal Op. CI-696 (1982).

[101] *Id.*

[102] State Bar of Mich. Comm. on Prof. and Judicial Ethics, Informal Op. CI-921 (1983).

The State of Oregon has adopted the view that the candidate must determine whether the questions asked in a survey are political and controversial.[103] The version of Canon 7B(1)(c) in use in Oregon at that time forbade comments on political issues, but permitted comments on legal issues.[104] In attempting to differentiate between the two, this state has indicated that the death penalty, pretrial release of criminal defendants, the purposes to be accomplished by sentencing, and the selection method used to choose judges are all legal issues.[105]

Generally, candidates for judicial office may neither initiate discussion of specific recent cases nor respond to questions concerning such cases. An Alabama judge seeking re-election was instructed that it would be improper for him to comment on specific cases he had been involved in, though he could comment on and explain relevant court procedures and the law governing a judge's duty in particular situations.[106] Comment by an incumbent (including a candidate for retention) about matters pending in court at the time of the campaign is prohibited by Canon 3A(6) of the Model Code of Judicial Conduct.[107] An advisory opinion committee in Florida takes the unique position that, while Canon 3A(6) prohibits incumbent candidates from commenting on a disputed legal issue that *is* presently before them, Canon 4 (allowing judges to speak concerning the law and legal system) permits them to comment on disputed legal issues *not* presently before their court.[108] Several advisory opinions hold that a candidate may not comment about specific concluded cases to explain the basis of rulings or sentences, or to justify the result reached,[109] although a candidate may probably explain that the law dictates some results.[110]

Given the limitations on what a candidate for judicial office may say about disputed issues, and about particular cases, what may a candidate say about his or her past conduct or intentions while in office? Advisory committees have been careful to point out that restrictions on campaign speech are not intended to limit

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[103] Or. Judicial Conf., Judicial Conduct Comm., Ethics Op. 80-1 (1980).

[104] *See* Or. Judicial Conf., Judicial Conduct Comm., Ethics Op. 78-5 (1980).

[105] *Id.*

[106] Ala. Judicial Inquiry Comm'n, Advisory Op. 80-85.

[107] Model Code, Canon 3A(6).

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Id.

[108] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978).

[109] *See* Ala. Judicial Inquiry Comm'n, Advisory Op. 80-85; Ala. Judicial Inquiry Comm'n, Advisory Op. 80-86; Ala. Judicial Inquiry Comm'n, Advisory Op. 82-156; N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 289 (1973).

[110] *See, e.g.,* Ala. Judicial Inquiry Comm'n, Advisory Op. 82-156.

the judicial candidate solely to promises of faithful performance of the duties of the judicial office.[111] However, interpretations of Canon 7B(1) of the 1972 Code do appear to limit the candidate to discussion of judicial system improvements and reforms the candidate wishes to implement, and truthful criticism of the qualifications of an opponent. In *Berge v. Supreme Court of Ohio*,[112] the court found that Code Canon 7B(1)(c) passes constitutional muster in that it does not prohibit a judicial candidate from proposing to implement a pretrial mediation program, or from criticizing the incumbent's frequent use of trial referees. The Kansas Supreme Court in *In re Baker*,[113] considered the propriety of a variety of campaign statements. The court found that Canon 7B(1)(c) permits a candidate to pledge to increase the efficiency of the court, to work hard and to be prompt, to reduce the need for outside judges to sit in the county, to note the incumbent's ill health and the delays it had caused and to refer to his own robust health, and to characterize his campaign pledges as "reforms." The Minnesota Supreme Court, in a decision of a similar tenor, held in *Bundlie v. Christensen*,[114] that a candidate could criticize the incumbent by pointing out that the county's court expenses were higher than in surrounding counties. In Florida, a candidate may say "I will make every effort to see that there is effective discipline of children who become subject to the juvenile powers of the court,"[115] and in Kentucky, candidates may indicate they favor the use of computers to increase the efficiency of the court or propose other methods of improving court procedures.[116]

Questions about an incumbent's record raised in the course of a reelection campaign may be addressed by explanation of legal requirements and procedures. A candidate may, for example, explain that sentences imposed in many criminal cases are based on prosecution recommendations.[117] He or she may also comment on the uses of probation, and the duty of a judge to set reasonable bail and to appoint counsel for indigents.[118] An incumbent is not expected to remain silent in the face of criticism, and may refer to his or her own record, court statistics, and other facts.[119]

The qualifications of a candidate are, of course, a legitimate topic for discussion in the course of a campaign. A candidate may explain his or her

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[111] *See, e.g.*, Ala. Judicial Inquiry Comm'n, Advisory Op. 82-153.

[112] No. C-2-84-1227, slip op. (S.D. Ohio 1984).

[113] 542 P.2d 701 (Kan. 1975).

[114] 276 N.W.2d 69 (Minn. 1979).

[115] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978).

[116] Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-38; Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-45.

[117] Ala. Judicial Inquiry Comm'n, Advisory Op. 82-156.

[118] *Id. See also* Ala. Judicial Inquiry Comm'n, Advisory Op. 80-85.

[119] Ala. Judicial Inquiry Comm'n, Advisory Op. 80-86.

credentials and experience, and indicate areas of expertise and certified specialties, so long as this is not done in a misleading manner.[120]

Advisory opinions reflect the view taken in the *Baker, Berger,* and *Bundlie* cases concerning the legitimacy of candidates' directing fair criticism at opponents. Thus a candidate in Florida was permitted to comment on the incumbent's requirement of physical arrest of all persons charged in minor offenses, and of threatening defendants with a jail term if they did not plea bargain.[121] The challenger was permitted to openly disagree with these practices, and to state that he would look closely at each misdemeanor case before issuing a *capias*, would generally be in favor of using the summons power rather than physical arrest, and would not threaten defendants for exercising their rights.[122] The ethics advisory committee in Kentucky has indicated that, as in *Baker*, a challenging candidate may criticize the incumbent's frequent absences from court.[123] Although, as noted earlier, judicial candidates are generally prohibited from responding to questionnaires seeking their views on controversial topics, at least one ethics committee has indicated that a candidate for an appellate court may appropriately criticize an earlier opinion of the court and the legal philosophy underlying that opinion.[124] Another jurisdiction has permitted a candidate to challenge the current representational balance of the court on which he wished to sit.[125]

Although judicial candidates have some leeway in criticizing their opponents or their opponents' supporters, their criticism may not be of a nature that brings their own impartiality or that of the judiciary into question. In *In re Butler*,[126] The Kentucky Conduct Commission censured a candidate for criticizing his opponent's faithful observation of the dictates of the Code of Judicial Conduct. In *In re Kaiser*, the Supreme Court of Washington censured an incumbent who stated that he was tough on drunk driving and who questioned the motives of DWI defense attorneys in supporting the judge's opponent: "their primary interests are getting their clients off."[127] The court found that the drunk driving statements, "promise exactly the opposite of 'impartial performance of the duties

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[120] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 84-10 (1984); Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-45; N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 289 (1973).

[121] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 84-18 (1984).

[122] *Id.*

[123] Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-45.

[124] State Bar of Mich. Comm. on Prof. and Judicial Ethics, Formal Op. C-227 (1982).

[125] Ohio State Bar Ass'n Comm. on Legal Ethics and Prof. Conduct, Informal Op. 84-4 (1984).

[126] Unreported Determination (Ky. Comm'n 1986).

[127] 759 P.2d 392, 396 (Wash. 1988). *See also, In re* Judicial Campaign Complaint Against Kienzle, 708 N.E.2d 800 (Five Judge Comm'n. Appt. by Ohio Sp. Ct. 1999) (judicial candidate reprimanded and fined for making statements about a ruling of his opponent; the commission found that the statements were disingenuous, inaccurate, and harmful of the judiciary).

of the office.'"[128] However, the court declined to sanction the judge for criticizing his opponent for receiving most of his financial support from drunk driving defense attorneys: "My opponent ... has received the majority of his financial contributions from *drunk driving defense attorneys.* This is the only group involved with Northeast District Court not supporting my re-election."[129] The supreme court ruled that statements concerning an opponent's sources of support are constitutionally protected speech.

§ 11.10. — Accuracy of Campaign Statements

The caselaw and advisory opinions hold candidates for judicial office to a high standard of accuracy in their campaign statements. In the *Baker* case discussed in the preceding section, the respondent judge was censured for issuing a mailing which falsely stated that the incumbent would receive substantial retirement benefits if defeated, thereby implying he would not be harmed by a defeat.[130] The court ruled that this conduct constituted a violation of Canon 7B(1)(c). A Washington state attorney was reprimanded in *In re Donohue,*[131] for violations of DR's 1-102 and 8-102, as well as Code of Judicial Conduct Canon 7B(1), where she engaged in a pattern of making false statements about incumbents on the court to which she aspired, and altered and then reproduced a letter from another attorney and used it as part of her campaign materials. A candidate for a Kentucky judicial post was reprimanded for distributing campaign materials falsely representing that he was the incumbent by using the phrase "John Doe, District Judge."[132] Similarly, a Florida domestic relations commissioner seeking a position as a judge was cautioned, in an advisory opinion, that he could not indicate in campaign literature that he was a judicial officer, although he could cite his "judicial experience."[133] A Michigan candidate for judicial office was

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[128] 759 P.2d at 396.

[129] *Id.* at 395.

[130] *See also* Doyle v. Judicial Retirement and Removal Commission, 885 S.W.2d 917 (Ky. 1994) (court reprimanded a judge for a misrepresentation in a campaign advertisement, but held that two other ads, although arguably in poor taste, did not constitute misrepresentations).

[131] 580 P.2d 1093 (Wash. 1978). *See also In re* Carr, 656 N.E.2d 690 (Ohio Comm'n of Judges, 1995) (judicial candidate fined $1000 for knowingly misrepresenting the qualifications of an opponent, when she inaccurately stated in a letter that her opponent had never handled a case in housing court as an attorney).

[132] Order of Private Reprimand, Accent on Courts Vol. 7, No. 1, p. 23 (Ky. Comm'n 1985).

[133] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 84-17 (1984). *See also In re* Cascio, 683 So. 2d 1202 (La. 1996) (successful judicial candidate censured who had used campaign materials referring to himself as "THE Qualified JUDGE" even though he had only sat previously as an ad hoc judge); *In re* Judicial Campaign Complaint Against Emerich, 665 N.E.2d 1133 (Ohio 1996) ($250 fine as well as a cease and desist order entered against a judge who was running for probate court from using materials, literature, signs, and buttons that implied that he was an incumbent probate judge).

instructed that he could not use the slogan "A Judge for a Change" because it falsely suggested that he was an incumbent judge.[134]

The current law does not resolve the question of whether a candidate for judicial office must fairly represent both sides of an issue relevant to the campaign. In *Bundlie v. Christensen,*[135] a candidate was found not to have violated Canon 7B where he criticized the high level of county court expenses without explaining that there were good reasons that the costs were higher than in surrounding counties. However, a judge in Washington state was publicly admonished for a violation of Canon 7B(1)(c) after issuing a campaign pamphlet, deceptively similar to the official voter's pamphlet, which failed to reveal that he had opposition and that the position sought was contested.[136]

Another area where caselaw concerning the accuracy of campaign materials is inconsistent is the use of campaign polls. A Kentucky judge was suspended without salary for ten days for a violation of Canon 7B(1)(c) after publishing campaign advertising that indicated a professional poll placed him ahead of his opponent when in fact no such poll had been conducted.[137] But in *In re Elward,*[138] the Illinois Courts Commission found that no punishable impropriety had occurred where an incumbent judge excerpted for use in a campaign advertisement a favorable portion of a bar association evaluation that was generally unfavorable to the judge. The Commission found that the total mix of information available to the voters was sufficiently accurate so that no discipline was warranted.

§ 11.11. — Campaign Advertisements and Endorsements

Generally, advisory opinions merely specify that advertisements for a judicial candidate must contain statements that are true, must maintain the dignity appropriate to judicial office, and may not make false statements designed to promote the election or defeat of a candidate.[139] Few opinions limit the forms of

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[134] State Bar of Mich. Comm. on Prof. and Judicial Ethics, Informal Op. CI-556 (1980). *See also In re* Fiore, Determination (N.Y. Comm'n June 28, 1998) (non-lawyer judge admonished for implying to voters that he was a lawyer).

[135] 276 N.W.2d 69 (Minn. 1979).

[136] *In re* McGlothen, Unreported Letter of Admonishment (Wash. Judicial Qualifications Comm'n 1983).

[137] *In re* Jack D. Wood, Unreported Order (Ky. Comm'n 1982).

[138] 1 Ill. Cts. Comm'n 114 (1977).

[139] Ohio State Bar Ass'n Comm. on Legal and Prof. Conduct, Informal Op. 84-4 (1984). In Kentucky, a non-judge candidate for the position of district judge received a private reprimand by identifying himself in campaign materials as "John Doe District Judge." Order of Private Reprimand, 7 Accent on Court 23 (1985). *In re* Tully, No. 90-CC-2, Complaint before Ill. Cts. Comm'n (Sept. 25, 1990). *See also* Order of Private Reprimand (Ky. Judicial Retirement and Removal Comm'n, Aug. 20, 1992) (non-judge candidate reprimanded for distributing campaign materials susceptible to the misimpression that he was representing himself as the incumbent

media that may be used. Thus, most media, including radio, television, newspapers and other publications, posters, and handbills, may be used to convey campaign material.[140]

Some restrictions exist on direct mail contact with voters. Ethics advisory opinions have approved the use, by a lawyer, of his or her law office stationery to advertise the candidacy of the aspirant to office.[141] However, other opinions hold that it is improper for a judge to use his or her court stationery for the same purpose.[142] Judges who wish to send letters of appreciation to those having completed jury service have been cautioned to take care that the timing or content of the letters does not imply an attempt to use the letters to promote a reelection bid.[143] These opinions concerning the use of court stationery are based on the long-standing principle that a judge may not exploit the power and prestige of the office to promote his or her candidacy.

All campaign advertisements are subject to the Canon 5A(3)(a) requirement that a campaign be conducted with dignity. This may be of particular importance to those using the broadcast media. One advisory opinion states that it would be inappropriate for an attorney-candidate to give answers over the radio to specific legal questions sent in by listeners.[144]

All jurisdictions that have addressed the question agree that an incumbent judge may be pictured in his or her robe in campaign materials, so long as the picture is not misleading.[145] A candidate who was not presently a judge, but who had previously served on the bench, was allowed by the Florida ethics advisory committee to use a picture taken during his previous tenure in campaign

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judge); *In re* Harper, 673 N.E.2d 1253 (Ohio 1996) (judge reprimanded for a television advertisement for supreme court justice that included a statement which, although an expression of opinion, implied a false assertion of fact); *In re* Polito, Determination (N.Y. Comm'n Dec. 23, 1998) (judge admonished for graphic and sensational campaign advertisements).

[140] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 84-10 (1984) (T.V. commercial implicitly approved); Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-38(3) (candidate may advertise on television and radio); State Bar of Mich. Comm. on Prof. and Judicial Ethics, Informal Op. CI-545 (1980) (campaign committee may place advertisements in newspapers, on television and radio); N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 289 (1973) (may use any media).

[141] N.Y. Office of Ct. Admin., Judicial Ethics Op. 40 (1975) (part-time lawyer/judge may use law office stationery to advertise campaign); Pa. Bar Ass'n Prof. Guidance Comm., Op. 81-27 (attorney may seek contributions to campaign on law office stationery).

[142] N.Y. Office of Ct. Admin., Judicial Ethics Op. 129 (1978).

[143] Comm. on Judicial Ethics, Judicial Section, State Bar of Tex., Op. 68 (1983); Comm. on Judicial Ethics, Judicial Section, State Bar of Tex., Op. 69 (1983).

[144] ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93 (1933).

[145] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 80-10 (1980); La. Sup. Ct. Comm. on Judicial Ethics, Op. 7 (1972); Md. Judicial Ethics Comm., Op. 18 (1973); N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 289 (1973); N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 558 (1984); ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 1450 (1980).

materials, which clearly explained the source of the picture and the dates when he previously served.[146] Other jurisdictions, however, disagree with this position. A Michigan committee would not permit a former temporary magistrate to use photographs of himself in judicial robes. The advisory committee reasoned that such a picture would misrepresent the candidate as an incumbent.[147] Washington takes the same stance. A candidate there was admonished for publishing a picture of himself in judicial robes when he had merely served as a judge pro tem.[148] Even though text accompanying the photograph explained the candidate's judicial service, the Commission believed that the impression created was to misrepresent the candidate's position.[149]

A few jurisdictions have ruled on the propriety of photographs of a candidate in a courtroom. However, in *Saefke v. VandeWalle,*[150] the court found that there was no impropriety in an incumbent justice's use of campaign materials showing him in his robe in a courtroom. A New York ethics advisory committee takes a narrower view. Although the New York committee approves photographs showing an incumbent in judicial robes, it specifies that the photograph may not show the candidate in court.[151] The rationale for this position is that a picture of an incumbent in court takes unfair advantage of the power and prestige of the candidate's office.

The Code establishes identical standards for the procurement of endorsements and the procurement of campaign funds. Canon 5C(2) forbids a candidate to personally solicit publicly stated support, and requires him or her to establish a campaign committee to perform that task.[152] The predecessor Canons of Judicial Ethics do not contain a specific prohibition of personal solicitation of endorsements, but were interpreted to prohibit such personal solicitation in several advisory opinions.[153] Kentucky has adopted a modified version of this Code provision. It permits a candidate to personally solicit public statements of support from lawyers and others. The state supreme court has informally

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[146] Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 80-10 (1980).

[147] State Bar of Mich. Comm. on Prof. and Judicial Ethics, Informal Op. CI-1007 (1984).

[148] *In re* McGlothen, Unreported Letter of Admonishment (Wash. Judicial Qualifications Comm'n 1983).

[149] *Id.*

[150] 279 N.W.2d 415 (N.D. 1978).

[151] N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 558 (1984).

[152] A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees of responsible persons to solicit and accept reasonable campaign contributions, to manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy....

1990 Model Code, Canon 5C(2).

[153] ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 105 (1934); ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 139 (1935); ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 817 (1965).

Another questionable source of endorsements are special interest groups. Acceptance of the endorsement or nomination of a group such as Right to Life may be construed as a pledge of conduct in office, and therefore place a candidate in violation of Canon 5A(3)(d)(i). A New York State Bar Association opinion states that a judicial candidate may accept the endorsement or nomination of the Right to Life Party provided he or she refrains from expressing a view on abortion and further provided that the endorsement or nomination is not conditioned on the candidate's view on that topic.[161]

Public statements of support may be freely sought from lawyers, so long as the candidate is not personally involved in the solicitation.[162] Because lawyers have a special opportunity to observe and assess the qualifications of judicial candidates, they are encouraged to come forward with their views.[163] An incumbent in a contested election is free to use in the campaign unsolicited complimentary commentary from lawyers, so long as a campaign committee secures permission from the statement' s authors.[164] A candidate may announce that he or she has the support of X number of local bar former presidents, or of X number of local lawyers, if such statements are accurate.[165] A candidate may advertise the fact that he or she has been endorsed by labor unions and fraternal or other civic groups.[166] An attorney or group of attorneys practicing together may publicly endorse a candidate for judicial office by distributing letters printed on professional letterhead.[167]

§ 11.12. — Disqualification Implications of Campaign Support or Opposition

A question may arise concerning whether the relationship between an endorser and an incumbent candidate or successful aspirant to office should lead to the disqualification of the judge when the endorser appears in court. All ethics advisory panels which have addressed this question agree that *per se* disqualification is unnecessary.[168] Some opinions, however, caution that a judge

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[161] N.Y. State Bar Ass'n Comm. on Judicial Election Monitoring, Op. 1 (1983).

[162] A Washington judge was publicly admonished for personally soliciting support from attorneys and law enforcement officers through telephone calls and personal contacts. *In re* Murtland, Unreported Order #86-503 (Wash. Comm'n, 1987).

[163] Ky. Bar Ass'n Ethics Comm., Op. E-277 (1984); State Bar of Mich. Comm. on Prof. and Judicial Ethics, Informal Op. CI-565 (1981).

[164] Wash. Ethics Advisory Comm., Op. 85-2 (1985).

[165] ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 817 (1965).

[166] Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-38.

[167] State Bar of Mich. Comm. on Prof. and Judicial Ethics, Informal Op. CI-565 (1981).

[168] Ala. Judicial Inquiry Comm'n, Advisory Op. 84-213; Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978); Ill. State Bar Ass'n Comm. on Prof. Ethics, Op. 866 (1984). *See also* discussion in § 11.15 at notes 209-211 and accompanying text.

interpreted this provision to prohibit such solicitation of lawyers in or about the courthouse.[154]

In *In re Starcher*,[155] the West Virginia Supreme Court of Appeals admonished a supreme court justice who had sought the endorsement of a labor organization during his campaign. The justice had personally authored, signed, and sent a letter to key individuals in the labor organization seeking the organization's endorsement. In finding that the justice had violated the dictates of Canon 5C(2), the court stressed the phrase, "publicly stated support" is "neither vague, ambiguous or uncertain"[156] and should be "construed broadly, so that if a judicial candidate has any question as to whether or not he or she might be personally soliciting publicly stated support, the candidate should presume that he or she is doing so and allow his or her committee to handle the solicitation."[157]

Theoretically, similar concerns over the solicitation of endorsements should exist in jurisdictions using an appointive system. An advisory opinion issued by a jurisdiction, which then used a code of judicial ethics based on the 1924 Canons of Judicial Ethics, strikes an interesting compromise between a flat prohibition of personal solicitation of endorsements, and the more liberal Kentucky rule. In Maryland, one wishing to be appointed to a judicial office may inform members of the bar of this interest, and advise them that any support they would care to communicate to the appointing authority would be appreciated. Attorneys contacted should not be asked to tell the candidate if they will do as asked, nor to tell the candidate of any action subsequently taken.[158]

A few restrictions apply concerning the source of endorsements. Canon 5A(1)(b) prohibits a judge from publicly endorsing or opposing a candidate for any public office. Thus it is improper for a judge to endorse a judicial candidate (unless the candidate is running for the same judicial office as the judge), or for a judicial candidate to accept such an endorsement if it is offered.[159] An exception may be made in jurisdictions using merit selection. One advisory opinion holds that a judge may properly submit names of potential candidates to a merit selection panel, and submit evaluations to the panel in response to a request for them.[160]

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[154] Ky. Judicial Ethics Comm., Admin. Office of the Cts., Op. JE-45.

[155] 501 S.E.2d 772 (W. Va. 1998).

[156] *Id.* at 782.

[157] *Id.* at 785.

[158] Md. Judicial Ethics Comm., Op. 79 (1980).

[159] *See* N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 289 (1973); Or. Judicial Conf., Judicial Conduct Comm., Ethics Op. 82-3 (1982); ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 719 (1964); *In re* Ovard, Determination (Texas Comm'n, Dec. 17, 1994) (judge reprimanded for publicly endorsing in a primary campaign a candidate to succeed him as justice of the peace).

[160] United States Judicial Conf. Advisory Comm. on Judicial Activities, Op. 59 (1979).

Appendix F
Alaska Formal Judicial Ethics Advisory Opinions

Advisory Opinion 98-3
(adopted September 14, 1998)

Question: *May a judge contribute to another judge's retention campaign fund?*

Opinion: A judge should not contribute to another judge's retention campaign fund. Canon 5 A (1) (b) and (c) of the Alaska Code of Judicial Conduct prohibits judges from engaging in political activity and expressly prohibits judges from financially contributing to political campaigns. The terminology section of the Code defines candidate for public office and judicial candidate separately. Arguably, candidates in a retention election are not necessarily candidates for "public" office under the Code. The purpose of these Code provisions is to insulate judges from the political pressures that campaigns and campaign fundraising necessarily entail. While judicial retention elections do not typically involve political positions and influence, when a judge's retention is contested it necessarily entails an organized opposition with defined issues. While the judge under attack clearly has the right to respond to that opposition, engaging other judges in the dialogue unnecessarily politicizes their positions as well.

ALASKA COMMISSION ON JUDICIAL CONDUCT

Advisory Opinion #97-1

(adopted February 7, 1997 and amended June 6, 1997)

Question: *May a judge write an unsolicited reference letter to the Alaska Judicial Council concerning an applicant for a judgeship?*

Opinion: A judge may write a letter to the Judicial Council concerning the qualities and abilities of an applicant for a judicial position. The letter need not be solicited by the Council, but its content should be limited to addressing those qualities about which the judge has direct knowledge and which relate to the criteria used by the Council in evaluating the applicant. A judge may ethically permit the Council to forward the letter to the governor.

The restriction on content should be extended to all official reference letters by judges, regardless of who the recipient may be. Any use of the judicial office to persuade and influence decision-makers, beyond comments addressing the qualifications of the individual concerned, is not proper. In addition, while sending an unsolicited letter to the Judicial Council is not improper, sending an unsolicited letter to the Governor is improper. The Governor's role in the selection process is political and any written unsolicited comments regarding the selection could be viewed as political.

Appendix G
Informal Alaska Attorney General Opinions

1984 WL 60968
Office of the Attorney General
State of Alaska

File No. 366-350-84
January 5, 1984

Disclosure of correspondence concerning a judicial appointment

Mr. John B. Chenoweth
Office of the Ombudsman
Pouch WO
Juneau, AK 99811

We are responding on Carol Derfner's behalf to your letter of December 21, 1983 inquiring about a letter to former Governor Hammond concerning a judicial appointment. Apparently, in 1982, an attorney wrote Governor Hammond to comment on a candidate for appointment to the superior court bench in Wrangell/Petersburg. In the course of the letter, the attorney made reference to Mr. John E. Longworth, a member of the Alaska Judicial Council which had passed on the qualifications of the candidates. Mr. Longworth wishes to review that letter, believing that it contains a personal attack on him. We have examined the letter and the related correspondence and find that all portions of the letter which refer to Mr. Longworth have been released to Mr. Longworth, once by Governor Hammond, and again, apparently by the attorney/author. The undisclosed portions relate only to a judicial candidate and will not be disclosed. Your letter raised two questions, which we will try to answer in turn.

You first remarked on Governor Sheffield's reluctance to disclose correspondence on judicial appointments addressed to his predecessor in office. In essence, you ask what right and interest the incumbent governor has in maintaining confidentiality of written recommendations to the former governor.

We believe the principle is easily explained. A governor must be able to assure citizens with relevant information about a judicial candidate that their remarks will not result in press accounts, litigation, or harassment. The prospect of public outcry or lawsuits would dissuade some of these citizens from giving a governor the candid information required to make informed appointments to the judiciary.

The assurances a governor gives must stand whether or not the particular incumbent continues in office. Were that not so, the citizens might fear ridicule, legal action, or harassment a week, a month, or a year down the road when the incumbent leaves office and his files are thrown open. To avoid that, the assurance must be institutional, not individual.

Your second inquiry concerns the propriety of denying disclosure of the entire letter in question given the terms of the public information regulations, 6 AAC 95. The

question you pose was held clearly in mind when the regulations were drafted and promulgated in 1982. We direct your attention to the letter of administrative intent to Governor Hammond, dated April 12, 1982, a copy of which is enclosed. Therein, the constitutional principles of privacy and separation of powers were explicitly identified as statutes, privileges, exemptions or principles justifying nondisclosure. See 6 AAC 95.010(b).

Article I, section 22 of the Alaska Constitution provides that:

The right of the people to privacy is recognized and shall not be infringed.

The provision is designed to shield information 'which a person desires to keep private and which, if disseminated, would tend to cause substantial concern, anxiety or embarrassment to a reasonable person.' Falcon v. Alaska Public Offices Commission, 570 P.2d 469, 479 (Alaska 1977).

We believe that a reasonable person could well conclude that support for or opposition to a candidate for judicial office, if known, could cause substantial concern, anxiety or embarrassment. This is especially so where a person is an attorney or litigant and opposed the appointment of the eventual appointee. Similarly, considerable consternation may result where a person is found to have not supported a friend, law partner, or colleague in the profession out of a conviction that another candidate is better qualified.

Considerations of separation of powers also militate against unlimited disclosure. Article IV, section 5 of the Alaska Constitution empowers the governor to make judicial appointments. This is an essential function of the executive that may not be unduly disrupted by the acts of a coordinate branch. Although the U.S. Supreme Court has rejected as 'archaic [the] view of the separation of powers as requiring three airtight departments of government,' the doctrine still imposes a limitation on the legislature's power to mandate that letters to the governor be disclosed where such disclosure would impact his ability to discharge his functions:

Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.

Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1976) (emphasis added, citation omitted).

The test has been articulated even more clearly in Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), aff'd 51 U.S.L.W. 4907 (1983):

The twin purposes of preventing concentrations of power dangerous to liberty and of promoting governmental efficiency are served if we define a constitutional violation of the separation of powers as an assumption by one branch of powers that are central or

essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.

Chadha, 634 F.2d at 425.

The court in Nero v. Hyland, 386 A.2d 846 (N.J. 1978), struck the balance in the following terms:

As head of the Executive Branch of State Government, a New Jersey Governor is responsible for making a staggering number of appointments to public office. . . . It is extremely unlikely that persons who are questioned pursuant to one of these checks would ever be forthright in responding if their anonymity could not be guaranteed. This undesirable 'chilling effect' would be especially pernicious with respect to persons who might otherwise provide information relevant to the prospective appointee's unsuitability for public office.

. . . .

When the danger of possible unjust censure of a candidate for appointment, . . . is balanced against the need for effective pre-appointment screening of prospective appointees, the latter interest is far more compelling. We hold that the public interest in maintaining confidentiality outweighs plaintiff's interest in disclosure . . ..

Id. at 852-853.

In United States v. Nixon, 418 U.S. 683, 705 (1973), the Supreme Court described the role of confidentiality in the executive branch:

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

There is, in the court's view, 'the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.' Id. at 708.

It is our conclusion that these considerations prohibit unlimited disclosure. Such an event would have a 'chilling effect,' Nero v. Hyland, at 852, on the candid expression of recommendations with respect to the most important of the governor's appointments. Such an outcome would unduly disrupt the appointment process in a manner that is unnecessary to the implementation of the legitimate public policy of maximum openness in government, Chadha v. INS, and would be an unconstitutional breach of the separation of powers. See Bradner v. Hammond, 553 P.2d 1, 7-8 (Alaska 1976).

As a final point, we note that Governor Hammond adhered to the same policy in his administration. The same cases cited herein were invoked by this office in mid-1981 in denying press access to letters to the governor concerning the possible appointment of a Juneau attorney to the superior court bench.

We hope this answers your questions. If we may be of further assistance, please do not hesitate to call upon us.

Sincerely yours,

Norman C. Gorsuch

Attorney General

By: Thomas M. Jahnke

Assistant Attorney General

FNa1. Though your office lacks jurisdiction to review or investigate the decisions of the governor, see AS 24.55.330(2), we believe that the public interest is served if you, as a key public representative and arbiter, are fully informed on the law in this area.

1984 WL 61109
Office of the Attorney General
State of Alaska

File No. 366-624-84
July 19, 1984

Residence and practice of law requirements for district judicial appointees

Francis L. Bremson
Executive Director
Alaska Judicial Council

You have requested an interpretation of the language in AS 22.15.160(a) regarding residency and active practice of law requirements for district judge appointees. Specifically, you have presented three factual situations to be addressed. In response to these, we have concluded that: (a) the requirement that a district judge engage in the active practice of law at least three years 'immediately preceding appointment' bars consideration of a candidate who has practiced law only 18 of the 36 months before appointment; (b) the applicant who moved to Alaska in May 1979 and took the Alaska Bar exam in July 1979 should be considered a five-year resident; and (c) the candidate admitted to practice November 6, 1981 may be considered by the council for a district judgeship.

Under state law, one of the qualifications for a person seeking appointment as a district judge is that he or she must be 'a resident of the state for at least five years immediately preceding appointment and (1) have been engaged in the active practice of law for not less than three years immediately preceding appointment . . ..' As 22.15.160(a).

In the first fact situation posed, you have asked whether an applicant who has engaged in the active practice of law for more than three years but concededly not for 18 months of the 36-month period immediately preceding potential appointment is qualified under this statute. We are assuming for purposes of this opinion that the candidate's 18-month employment 'as director of a state agency in a solely administrative capacity' does not meet the definition of the 'active practice of law.' The question presented is whether the applicant's practice of law for at least three years must in fact immediately precede appointment.

Because the statute expressly requires at least three years of legal practice immediately preceding appointment, rather than merely specifying the need for three years of practice, the plain meaning of the statute is rather clear. Nonetheless, the Alaska Supreme Court has indicated that legislative history may be considered in order to determine whether facially clear statutory language is, in fact, unambiguous and

expresses the legislature's intent. State v. Alex, 646 P.2d 203, 208 n.4 (Alaska 1982); State, Department of Natural Resources v. City of Haines, 627 P.2d 1047, 1049 n.6 (Alaska 1981). Therefore, we have examined the background of the practice of law provision in AS 22.15.160(a).

The qualifications for district judges were amended in 1980 by HCSSB 104, published in section 12, chapter 12, SLA 1980. Before the 1980 amendment, the only legal experience requirement was that a district judge be licensed to practice law in Alaska at the time of appointment. The 1980 amendment left that provision intact for attorney applicants, but added a new section that also required attorney applicants to have been engaged in active practice at least three years immediately preceding appointment. (Note: the 1980 amendment provided for the first time that a non-attorney, who had served as a magistrate in Alaska at least seven years, may also become a district judge. That section is not at issue here.)

The original version of SB 104, which had as its initial purpose the establishment of a court of appeals, did not include any changes to AS 22.15.160. The House Committee Substitute for SB 104 is responsible for altering the qualifications for district judges. By January 1980, the bill before the House Judiciary Committee had increased the residency requirement from one to five years. In late January 1980, an amendment was proposed to establish a two-year practice of law requirement instead of imposing the greater residency requirement. The committee opted to keep the five-year residency provision, but also added a three-year practice of law requirement. The bill passed out of the judiciary committee in this form. On the floor of the House, Representative Smith presented an amendment urged by Chief Justice Rabinowitz, on behalf of the supreme court, to lower both the residency and practice requisites to two years. That amendment failed and the new district judge qualifications in the House Committee Substitute passed the Senate and were signed into law.

We found no discussion of the effect of the words 'immediately preceding appointment' in conjunction with the practice of law requirement, or their source. However, it appears safe to assume that this language is derived from the similar provisions for Alaska Supreme Court justices and superior court judges. AS 22.05.070, enacted in 1959, provides that a supreme court justice must 'have been engaged for not less than eight years immediately preceding appointment in the active practice of law . . ..' (Emphasis added.) Similarly, AS 22.10.090 requires superior court judges to 'have been engaged for not less than five years immediately preceding appointment in the active practice of law . . ..' (Emphasis added.) In establishing the qualifications of judges for the court of appeals, the legislature adopted exactly the same language with a minimum eight-year practice requirement. AS 22.07.040. Residency requirements, which were set for all levels of judicial office at five years in 1980, also utilize the 'immediately preceding appointment' phrase.

There is a viable reason implicit in requiring an attorney applicant for a judicial position to be engaged in the practice of law immediately before appointment, rather than simply mandating a basic amount of legal experience. Attorney applicants with recent

experience and a working knowledge of current legal developments are preferred as district judges over those who have been outside the legal arena in the past three years. Since the legislative history does not reveal any indication that the legislature intended the statute to be construed otherwise, the plain meaning of the term 'immediately preceding appointment' must govern. An attorney applicant who has not practiced law for the entire three-year period just prior to potential appointment cannot qualify as a district judge.

Your second situation requires a determination of another applicant's period of residency. Once again the provision in question is found in AS 22.15.160(a), requiring five years' residency in Alaska immediately preceding appointment. In 1983, the legislature codified a definition of residence:

RESIDENCY. (a) A person establishes residency in the state by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.

(b) A person demonstrates the intent required under (a) of this section

(1) by maintaining a principal place of abode in the state for at least 30 days or for a longer period if a longer period is required by law or regulation; and

(2) by providing other proof of intent as may be required by law or regulation, that may include proof that the person is not claiming residency outside the state or obtaining benefits under a claim of residency outside the state.

(c) A person who establishes residency in the state remains a resident during an absence from the state unless during the absence the person establishes or claims residency in another state, territory or country, or performs other acts or is absent under circumstances that are inconsistent with the intent required under (a) of this section to remain a resident of this state.

AS 01.10.055.

The statute sets up a two-prong test for establishing residency: physical presence and an intent to make a home in this state indefinitely. The applicant in question first moved to Alaska in May 1979 and was physically present in the state until sometime in August 1979. This physically present in the state first prong of the residency test. In order to demonstrate the intent required by the second prong, an individual must maintain a principal place of abode in Alaska for at least 30 days, as well as provide other proof. The applicant has maintained a home in the state for the required period of time, so the only remaining inquiry is into the 'other proof' the applicant can provide of his intent.

The applicant contends that he decided to make Alaska his permanent residence shortly after he arrived in May 1979. This subjective intent is borne out by several objective indicators: the fact that he studied for and took the July 1979 Bar exam, that he

had Bar exam results sent to the Alaska firm for which he had clerked, and that he apparently maintained a relationship with that firm and returned to work there in January 1980. Although no mention is made of when the applicant first registered to vote, registered a vehicle, obtained a driver's license, or opened a bank account in this state, he did not vote or receive other benefits of residency in his former jurisdiction during the seven-month period in question. This is imperative under AS 01.10.055(b). The fact that the applicant owned property and left Alaska for a job outside the state would not defeat his claim of residency in these circumstances, since he went back to that state in order to facilitate a permanent move to Alaska. Under AS 01.10.055(c), once the applicant established residency, he remained a resident throughout his approximately four-month departure from Alaska. Therefore, in the absence of additional facts which are inconsistent with a claim of residency, the applicant would qualify as a five-year resident for a district judgeship.

Finally, in your third scenario, you have expressed concern about the possible hardship to prospective judicial appointees 'where the decisive factors in determining eligibility under the statute were outside the candidate's control and subject to administrative discretion.' Specifically, you mentioned a candidate admitted to practice on November 6, 1981 who was concerned that the council's discretionary choice of a meeting date and/or the governor's discretionary exercise of appointment power could preclude his or her consideration under the three-year active practice requirement of AS 22.15.160(a). In our view, the discretion afforded the council and the governor for carrying out their prescribed duties does not present any serious problems.

AS 22.15.170(a) provides that the governor shall fill a district judge vacancy within 45 days after receiving nominations from the judicial council. The council generally must meet within 45 days of the occurrence of an actual vacancy and submit nominations to the governor, although this time period may be extended by the council with the concurrence of the supreme court. AS 22.15.170(e). As has been discussed above, AS 22.15.160(a), requires that district judges establish a minimum of five years' residency and three years' active practice of law by the date of their appointment. Therefore, as a general rule, the judicial council should consider as eligible all candidates who would meet the residency and practice qualifications within the following 45-day period available to the governor for appointment. If the candidate is the governor's first choice, the governor can wait until the individual is in fact qualified before making the appointment.

If the judicial council meets a certain period before 45 days have passed from the occurrence of a vacancy, and that period could make the difference in an otherwise qualified candidate's eligibility, the council can wait until the 45th day to present its nominations to the governor. Again, if the individual is the governor's choice for the vacancy, the governor can delay his appointment of that nominee until the 45th day.

In the instances where the judicial council extends the time period for its deliberations and nominations, the appointment date may be delayed as a result. Additional candidates may become qualified in the extra period of time, which would

work to the advantage of candidates on the borderline of eligibility. This increase in the pool would not unfairly disadvantage other eligible candidates, since it is the judicial council's function to nominate those who are most qualified for the job. Furthermore, those who would not be qualified within 45 days after the council's meeting date would not be discriminated against, since they would not have been eligible in any event if the council had not extended the date of its meeting beyond the statutorily-set period.

Basically, then, those candidates who would be qualified within 90 days of a vacancy, or within 45 days of the judicial council meeting if the meeting takes place more than 45 days after a vacancy, should be considered eligible. It is up to the council to nominate from this pool, and up to the governor, if necessary, to reserve appointment until the desired candidate meets the statutory requirements. Because November 9, 1984 will be the deadline for the governor's appointment if the council submits its nominations on September 25, the candidate admitted to practice on November 6, 1981 may be considered eligible if you determine he or she has actively practiced law in the three years since that date.

Norman C. Gorsuch

Attorney General

Susan D. Cox

Assistant Attorney General

Governmental Affairs-Juneau

Office of the Attorney General
State of Alaska

File No. 366-308-85
January 16, 1985

Dual-office prohibition

Hon. Robin Taylor
Alaska House of Representatives
Pouch V
Juneau, AK 99811

Dear Representative Taylor:

You have asked whether you may place your name in consideration for a position as superior court judge and, if appointed, whether you may accept appointment. As you know, the Honorable Henry Keene, superior court judge sitting in Wrangell and Petersburg, has announced his retirement effective June 1985. We understand that persons interested in being considered for this impending judicial vacancy must file with the Judicial Council on or before January 25, 1985.

Article II, section 5, of the Alaska Constitution provides in part: 'No legislator may hold any office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member . . ..' On two occasions the Alaska Supreme Court has applied the constitutional prohibition in a literal fashion, in each instance reciting that the purpose of the 'dual office holding' prohibition--one common to state constitutions--is to remove improper motives or even the appearance of impropriety where legislators vote on benefit increases or the creation of an office. See Warwick v. state ex rel. Chance, 548 P.2d 384 (Alaska 1976); Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

We first observe that the position of a superior court judgeship is plainly within the ambit of the constitutional prohibition. And while not as clear, we think it possible that a court would conclude that the procedure established by the Alaska Judicial Council for applying for a judgeship is substantially equivalent to 'nomination' for office, and as a consequence, your application for the judicial position may similarly fall within the ambit of the constitutional prohibition. Of course, as a new member of the Fourteenth Alaska State Legislature, the legislature has not as yet considered a bill which relates to the existence of, or the benefits paid to, the holder of the judgeship in question.

Before the enactment of a law which affects the judgeship in the fashion addressed in art. II, sec. 5, it is our view that a legislator may place his or her name into consideration for a vacant judicial position. However, if the legislature, during the period

when the applicant is a member of the legislative body, enacts a measure which increases the salary or emoluments of office, the legislator is ineligible to accept appointment to the judicial position.

In short, we believe you are eligible to apply for the announced judicial vacancy, though you would be ineligible for appointment to the office if the legislature increases the benefits of the office before the date of any gubernatorial appointment.

Sincerely yours,

Norman C. Gorsuch

Attorney General

By: Jonathan B. Rubini

Assistant Attorney General

Appendix H
Disciplinary Enforcement Contact Information

Contact List

Please call or write with questions or concerns

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