

**SUPREME JUDICIAL COURT
COMMITTEE ON JUDICIAL ETHICS**

**PREPARED FOR
NEWLY APPOINTED JUDGES OF THE
MASSACHUSETTS COURTS**

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The Committee on Judicial Ethics

The Committee on Judicial Ethics was created in 1988, pursuant to Supreme Judicial Court Rule 3:11. The Committee is charged with providing advisory opinions and informal advice to judges and individuals nominated to be judges who seek advice with respect to the interpretation of the rules of court governing the ethical and professional conduct of judges. Currently, the five members of the Committee on Judicial Ethics are:

Professor Judith A. McMorrow, Boston College Law School
Hon. Raymond J. Brassard, Superior Court, Chair
Hon. Catherine P. Sabaitis, Probate and Family Court
Hon. Francis R. Fecteau, Appeals Court
Hon. Allen G. Swan, District Court

The Secretary of the Committee is Pamela B. Lyons, Esq., Administrative Attorney at the Supreme Judicial Court.

Whereas the Commission on Judicial Conduct is a disciplinary body that acts in response to complaints against judges and investigates reports of improper judicial conduct, the Committee on Judicial Ethics is strictly an advisory body, providing formal advisory opinions in writing and informal oral advice by telephone.

The Supreme Judicial Court rule creating the Committee and the rules of the Committee itself are reproduced in these materials. The rules deal primarily with the process by which the formal, written opinions of the Committee are obtained -- both regular opinions and emergency opinions. A judge who seeks and receives a formal opinion from the Committee and then follows a course of conduct in reliance on that opinion is protected from disciplinary action, even if the Committee's opinion should later turn out to have been erroneous. The Committee's formal opinions are published, in redacted form so that the identities of the requesting judges cannot be ascertained, on the Committee's web site. Each new opinion is published within approximately thirty days after the opinion is issued, and all judges in Massachusetts are notified by e-mail of the issuance of the opinion.

Although the committee has issued many formal, written opinions in the years since its inception, the bulk of the Committee's work consists of giving informal, oral advice by telephone. Informal advice is commonly given when the answer to the question is reasonably clear under the Code or when an existing formal opinion of the Committee covers the point. Where the answer to an informal request is unclear, the Committee will so advise the requesting judge and suggest to him or her that a definitive answer, and the protection that a definitive answer provides, is available by seeking a formal opinion.

Only a judge, a person who has been nominated to be a judge, or, with respect to compliance with Section 6A(2), a judge who has retired or resigned from judicial office,

may make a request. With the very limited exceptions set forth in Rule 3:11 (6), all requests for opinions and advice are kept strictly confidential.

S.J.C. Rule 3:11

(1) There shall be a Committee on Judicial Ethics (Committee) consisting of five persons appointed by this court, at least three of whom shall be judges or former judges. No Justice currently serving on this court shall be a member of the Committee. The members of the Committee shall serve without compensation but shall be reimbursed for necessary expenses incurred in the performance of their official duties.

When the Committee is first selected, the members shall be appointed respectively to five, four, three, two and one year terms. On the expiration of the term of office of a member, a successor shall be appointed for a term of five years. Members may be reappointed to the Committee, but no member shall be appointed to more than two successive full terms.

(2) The Committee shall render advisory opinions and may provide informal advice with respect to the interpretation of rules of court relating to the ethical and professional conduct of judges. Except for emergency opinions, the opinions of the Committee shall be in writing and shall be rendered only in response to a written request, signed by the judge requesting the opinion. The written request shall set forth fully all facts bearing on the question or questions on which the judge requests advice. The Committee shall not render opinions on hypothetical questions or on issues pending before a court, agency, or commission, including the Judicial Conduct Commission. The Committee may decline to render an opinion for any reasons which it deems sufficient.

(3) Each written opinion shall contain a statement of the facts and a discussion of the application of the relevant rules to the facts. The Committee may publish its opinions but the name of the judge requesting the opinion and any other identifying information shall not be included in a published opinion unless the judge consents to such inclusion. If the judge did not omit or misstate any material fact in his request for an opinion, the judge may rely on a written opinion until and unless revised or revoked. This court shall not subject a judge to discipline where the conduct of the judge at issue in a proceeding was undertaken in reasonable reliance on that opinion. Informal advice provided by the Committee shall not provide the protection from discipline described in this section.

(4) This court shall designate one of the members of the Committee as Chairperson and another as Vice Chairperson. A quorum of the Committee shall consist of three members. The Committee may render written opinions only by an affirmative vote of at least three members. By rule the Committee may delegate particular types of matters, including the issuance of oral opinions on emergency matters, to a lesser number of members or to the secretary to the Committee. This court shall designate one of its employees to serve as the secretary and principal administrative officer of the Committee.

(5) The Committee shall make rules, subject to the approval of this court, implementing this rule. In January of each year, the Committee shall submit to the court a report of its activities, together with any recommendations.

(6) Except to the extent the Committee elects to publish an opinion in the manner prescribed in paragraph (3), all requests for advice made to the Committee under this rule, and all of the Committee's proceedings thereon, shall be strictly confidential unless disclosure is required by court order or unless the Committee determines by majority vote of all members that disclosure is necessary to prevent or remedy a serious injury to person, property or the administration of justice.

Rules of the Committee

1. Requests for Opinions and Informal Advice. Requests for advisory opinions should be made by letter, addressed to Pamela B. Lyons, Esq., Secretary, Committee on Judicial Ethics, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, Massachusetts 02108-1750. Requests for informal advice pursuant to rule 6 may be made by telephone. A request may only be made by a judge, a person who has been nominated to be a judge, or, with respect to compliance with Section 6A(2), a judge who has retired or resigned from judicial office.

2. Form of Request for Advisory Opinion. The letter should be signed by the judge (or nominee) requesting the advice and should set forth fully all facts bearing on the question or questions on which he requests advice. Because Supreme Judicial Court Rule 3:11 (2) precludes the committee from rendering opinions "on issues pending before a court, agency, or commission, including the Judicial Conduct Commission," the request should contain an affirmation that, to the best of the information and belief of the judge (or nominee) requesting the opinion, no issue raised thereby, whether in reference to himself or to any other person, is presently pending before any court, agency, or commission.

3. Scope of Question. Under Supreme Judicial Court Rule 3:11, advisory opinion requests must relate "to the interpretation of rules of court relating to the ethical and professional conduct of judges." The committee will not render opinions on hypothetical questions nor upon questions relating to the conduct of persons other than the requesting judge (or nominee).

4. Advisory Opinions. Opinions of the committee require the affirmative vote of at least three members and, except for emergency opinions, will be rendered in writing. The committee may publish its opinions but the name of the judge (or nominee) requesting the opinion and any other identifying information shall not be included in a published opinion unless the requester consents to such inclusion. Pursuant to Supreme Judicial Court Rule 3:11 (3), if "the judge did not omit or misstate any material fact in his request for an opinion, the judge may rely on a written opinion until and unless revised or revoked."

5. Emergency Opinions. To offer guidance to judges faced unexpectedly with questions within the committee's jurisdiction that require an immediate response, the secretary with the approval of two members of the committee, or the chairperson or vice-chairperson with the concurrence of one other member of the committee, may give advice on an emergency basis. Whenever possible, the request for advice shall be in writing. The emergency advice will be given orally or in writing, as seems appropriate. Emergency advice shall be submitted to the full committee for action. If the committee agrees with the advice given, it will issue a written confirming opinion to the inquirer. If it disagrees, it will issue a written opinion to the inquirer setting forth the emergency advice that was given so that the judge will have the benefit of the protection given by S.J.C. Rule 3:11 (3) as to conduct undertaken in reliance on that advice, but it will also set forth the view of the full committee on the issue presented. The view of the full committee will supersede all inconsistent emergency advice.

6. Informal Advice. To provide informal guidance to judges (or nominees) who orally request advice, the committee may also give advice as follows: (A) Upon receiving an oral request for advice, the secretary shall tell the requesting judge (or nominee) that informal, unwritten advice from the committee does not carry with it the protection described in S.J.C. Rule 3:11 (3), and that the judge (or nominee) is free to submit to the committee a written request for an opinion. If the judge (or nominee) elects to proceed with a request for informal advice, the secretary shall present the request to the committee. (B) If the committee concludes that the answer to the request can be found in one of its previously published opinions or is otherwise reasonably clear, the committee, through the secretary, may respond orally to the requesting judge (or nominee) with informal advice, and shall remind the judge (or nominee) that such advice does not come with the protection described in Rule 3:11 (3). If the committee determines that the answer is unclear, the committee, through the secretary, shall so inform the requesting judge (or nominee) and shall indicate that the committee will act only in response to a written request for an opinion. (C) The secretary shall maintain a record of all requests for informal advice and committee responses thereto. (D) The committee may elect to treat any request for informal advice as a request for an emergency opinion and may proceed in accordance with rule 5.

7. Decision to Refuse Opinion or Advice. In addition to the reasons stated in rules 1, 2, 3 and 6, the committee may decline to render an opinion or provide informal advice for any other reason which it deems sufficient.

8. Confidentiality. All requests to the committee for advisory opinions, emergency opinions, and informal advice, and all committee proceedings thereon, shall be confidential as provided by S.J.C. Rule 3:11 (6).

How to Make a Request

Judges and individuals who have been nominated to be judges can request advice from the Committee on Judicial Ethics in two ways: informally and formally. All

requests for advice are strictly confidential, except in the extraordinary circumstances described in S.J.C. Rule 3:11 (6).

Informal Requests & Advice

Judges and nominees can make informal requests for advice by telephone or via e-mail. Informal advice is given in instances when the answer to the request is reasonably clear. The Committee members will discuss the request and will typically offer advice, by telephone, within a few days. If time is of the essence, the Committee will consider the time-sensitive nature of the request and will attempt to give its advice as promptly as possible.

The preponderance of the Committee's business consists of informal requests and advice. However, informal advice, unlike a formal opinion from the Committee, does not provide the judge with the protection described in S.J.C. Rule 3:11 (3).

In some cases, the Committee may deem the question presented to be such that a formal request is more appropriate. In such a case, the Committee will decline to answer the request informally and will invite the requesting judge to submit a formal request in writing.

Formal Requests & Opinions

Judges and nominees can also make formal requests by writing a letter seeking a formal opinion. The form of the request is prescribed by S.J.C. Rule 3:11 (2) and Rule 2 of the Committee rules, both of which can be found on our web site and in West's Massachusetts Rules of Court. The letter should include all of the pertinent facts so that the Committee can properly assess the situation and provide an appropriate opinion.

The Committee issues its formal opinions in writing, typically within forty-five days of receiving a request, and publishes its formal opinions pursuant to S.J.C. Rule 3:11 (3). Published opinions do not include the requesting judge's name or other identifying information. If the request is time-sensitive, the Committee will make every effort to issue an opinion as promptly as possible.

Judges who receive, and then take action in reasonable reliance on, a formal opinion are protected from disciplinary action even if the Committee's opinion is later found to have been erroneous. S.J.C. Rule 3:11 (3).

Emergency Requests & Opinions

In rare instances, two members of the Committee can dispense with the usual requirements and give advice on an emergency basis.

Internet and Intranet Sites

Before making a request, you might wish to peruse the Committee's web site to determine whether there already exist any opinions on point. In addition to the text of the Committee's opinions, the web site also contains a variety of other information that you may find helpful, including the text of the Code of Judicial Conduct and rules governing the Committee.

The web site can be reached by going to www.mass.gov/courts/sjc and clicking the link to "Judicial and Clerks' Ethics Committees."

The same information is contained on the Committee's site on the judiciary's Intranet. To visit the Intranet site, go to <http://trialcourtweb.jud.state.ma.us/> and then follow the links to "Courts," "Supreme Judicial Court," and "Judicial Ethics Opinions."

Contact Information

Requests for informal advice and formal opinions, and any questions concerning the Committee, should be directed to:

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Secretary, Committee on Judicial Ethics
John Adams Courthouse
1 Pemberton Square, Suite 2500
Boston, MA 02108-1750

Phone: (617) 557-1071
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Some Frequently Arising Ethical Issues ¹

Serving in Civic and Charitable Organizations

- It is generally okay to serve as an officer, director, trustee, or non-legal adviser for civic and charitable nonprofit organizations. 4 C (3). But, note the exceptions and restrictions in 4 C (3) (a)-(b), especially:

- You cannot serve "if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged

¹ Citations are to sections of the Code of Judicial Conduct. The statements made herein are generalized statements made for educational purposes only and should not be taken as advice of the committee for any specific situation. Advice is given only in response to a formal or informal request from a judge or person nominated to be a judge.

frequently in adversary proceedings in any court, state or federal, in the Commonwealth.” 4 C (3) (a) (ii).

- You cannot “participate in the management and investment of the organization’s funds,” and, with very limited exceptions, cannot “assist such an organization in planning fund-raising, and shall not personally participate in the solicitation of funds or other fund-raising activities.” 4 C (3) (b) (i).
- You cannot “personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or . . . if the membership solicitation is essentially a fund-raising mechanism.” 4 C (3) (b) (iii).
- You cannot “use or permit the use of the prestige of judicial office for fund-raising or membership solicitation,” e.g., cannot be listed on the organization’s fundraising letterhead. 4 C (3) (b) (iv).
- Note the slightly relaxed rules on fundraising and management of funds for organizations “composed entirely or predominantly of judges that exist[] to further the educational or professional interests of judges.” 4 C (4).
- All such service is subject to the general rule, applicable to all extrajudicial activities, that you cannot engage in any extrajudicial activities that would “cast reasonable doubt on [your] capacity to act impartially as a judge” or that would “interfere with the proper performance of judicial duties.” 4 A (and see also 2 B).
- Also, you cannot “serve, with or without remuneration, as an officer, director, manager, general partner, advisor or employee of any business.” 4 D (4).
- A judge can also “serve as an officer, director, trustee, or non-legal advisor in an organization or agency devoted to the improvement of the law, the legal system, or the administration of justice.” 4 C (3). But be attentive to potential problems associated with serving in specialty bar associations or advocacy groups, and with holding leadership positions in bar associations.

Governmental Committees, Commissions, and Positions

- Judges cannot serve on a governmental committee or commission, or hold any other governmental position, “that is concerned with matters other than the improvement of the law, the legal system, or the administration of justice.” 4 C (2).
- The Committee has interpreted this to mean that there must be “a direct nexus between what the commission does and how the court system meets its statutory and constitutional responsibilities – in other words, how the courts go about their business.”
- Where not permitted to serve, you may nevertheless be able to “consult” in limited capacity with committees and commissions on discrete matters within their work that relate directly to the business of the courts. 4 C (1).

Personal Financial Affairs

- You may hold and manage your own investments, including real estate, and may receive compensation for same (subject to certain restrictions on compensation and subject to reporting requirements). 4 D (2).
- But you cannot “serve, with or without remuneration, as an officer, director, manager, general partner, advisor or employee of any business.” 4 D (2). Query where to draw the line between “investments” and “business.”
- You must also refrain from financial and business dealings and investments that reflect adversely on impartiality; interfere with proper performance of duties; exploit the judicial position; involve the judge in frequent or continuing business transactions with lawyers and others likely to come before the judge’s court; or require frequent disqualification. 4 D (1) and 4 D (4).

Acting as a Fiduciary

- You may generally serve as an executor, administrator, guardian, etc. for designated family members (“spouse, domestic partner, child, grandchild, parent, or grandparent”). You may also serve for “another relative or person with whom the judge maintains a close familial relationship,” which the Committee has construed narrowly according to certain enumerated criteria. 4 E.
 - Provided that it does not interfere with “the proper performance of judicial duties.” 4 E (1).
 - Provided it is not likely to, and does not, wind up in court. 4 E (2).
 - Provided you comply with the Code’s other restrictions on financial activities. 4 E (3).
 - Provided you do not practice law. 4 G.
 - Provided you comply with the Code’s other requirements on compensation. 4 H.

Political Activity

- Essentially all partisan political activity is off-limits. You cannot publicly support a candidate, fundraise, contribute to a candidate or political organization, attend political gatherings, purchase tickets to political dinners or fundraisers, etc. 5 A (1).
 - This means no political bumper stickers on cars, campaign signs in yard, signing nomination papers for candidates or petitions for ballot questions,

carrying signs, distributing campaign literature, or encouraging others to vote for or contribute to a particular candidate or party.

- But you may register as a member of a political party to vote in its primary, provided you do not publicize it or permit others to do so.
- Political activity of a spouse or other family member – as a candidate, campaign worker, or contributor – presents special difficulties. Judges must generally dissociate from the spouse’s or family member’s activity, e.g., should not be present when political meetings or gatherings are held in the home.
- A judge cannot make political contributions through others. “Political contributions by the judge’s spouse must result from the independent choice of the spouse, and checks by which such contributions are made shall not include the name of the judge.” Commentary to 5.

Gifts

- Judges cannot accept – and shall urge family members in their household not to accept – gifts, bequests, favors, or loans, except as expressly enumerated in the Code. 4 D (5).
- Enumerated categories that are permissible include:
 - Gifts incident to public recognition of the judge, not to exceed \$350, and not from “an organization whose members comprise or frequently represent the same side in litigation (or is not an individual or individuals so situated).” 4 D (5) (a).
 - Complimentary books and other resource materials from publishers, for your official use. 4 D (5) (a).
 - Invitations to bar-related functions, not to exceed \$350, provided it is reported. 4 D (5) (a).
 - Certain business or professional gifts received by your spouse or family member. 4 D (5) (b).
 - “Ordinary social hospitality” and gifts from relatives and friends for special occasions such as weddings and birthdays. 4 D (5) (c)-(d).
 - Gifts, bequests, and loans from relatives and close personal friends, if you would otherwise be required to disqualify yourself from their cases. 4 D (5) (e).

- Regular loans from lending institutions, and regular scholarships and fellowships. 4 D (5) (f)-(g).

- There is also a catch-all provision that allows for any other gifts, bequests, favors, or loans, provided they are not from someone who has (or whose interests have), or likely will, come before you, subject to certain restrictions and a reporting requirement. 4 D (5) (h).

Recusal Situations

- Disqualification is mandatory in any “proceeding in which the judge’s impartiality might reasonably be questioned.” 3 E (1).

- The Code identifies several categories of situations where disqualification is mandatory, such as:

- Where the judge has a personal bias for or against an attorney or party. 3 E (1) (a).

- Where the judge “served as a lawyer in the matter in controversy,” or where a former law partner of the judge “served during such association as a lawyer concerning the matter in controversy.” 3 E (1) (b)-(c).

- Where the judge has been or likely will be a “material witness concerning the matter in controversy,” or “has personal knowledge of disputed evidentiary facts concerning the matter in controversy.” 3 E (1) (d)-(e).

- Where the judge or certain family members are involved as a party, or have an “economic interest,” “relationship interest,” or other type of interest that is more than de minimis and could be substantially affected. 3 E (1) (f)-(h).

- If disqualification is not mandatory under any of the specifically enumerated categories, the judge must decide whether to recuse using the two-part (subjective/objective) analysis set forth in Lena v. Commonwealth, 369 Mass. 571, 575 (1976) (“Faced, then, with a question of his capacity to rule fairly, the judge was to consult first his own emotions and conscience. If he passed the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this was ‘a proceeding in which his impartiality might reasonably be questioned’”).

- The Code does not set forth a per se time period during which newly appointed judges must disqualify themselves from cases involving their former firms, although many judges establish their own period.

- The Code provides for “remittal of disqualification” in some, but not all, of the mandatory disqualification situations. 3 F. If a judge chooses this option, he or she should proceed very carefully.

Writing Letters of Recommendation

- It is generally okay for a judge to write a letter of recommendation or serve as a reference. The Committee has said, however, that any recommendation must be based on the judge's first-hand knowledge and observations of the candidate; that the judge cannot "suggest pressure on the employer or organization to accept the judge's recommendation"; and that "a judge should not follow up his letter with any activity that smacks of a campaign on behalf of the applicant."

- You may write a letter or provide information in behalf of an applicant for a judgeship. Commentary to 2 B.

- But you may not "testify voluntarily as a character witness in an adjudicatory proceeding" -- which would prohibit, e.g., writing a letter to a sentencing judge in behalf of a criminal defendant or writing a letter in behalf of an attorney in a bar discipline proceeding. 2 B

- When writing recommendation letters, query when you can do so on official court stationery and when you cannot.

- And be cautious where you are writing for someone who presently has business pending before you as a judge.

Receiving Awards and Honors

- Judges can and do receive a variety of types of awards and honors. Often there is no problem.

- But be attentive to who is bestowing the award and why you are receiving it. Is it from an "advocacy" organization, or an entity that regularly appears in your court? Are you being offered it because of specific outcomes you have reached in your decisions? Is there anything else about it that might reflect adversely on your impartiality?

- And under no circumstances may a judge be a speaker or guest of honor or receive an award at an organization's fundraising event, though "mere attendance at such an event is permissible if otherwise consistent with [the] Code." Commentary to 4 C (3) (b).

- An event is a fundraiser "where the sponsors' aim is to raise money to support the organization's activities beyond the event itself" – for example, where the cost of the ticket exceeds the cost of the meal. Commentary to 4 C (3) (b).

Attending Events

- As with receiving awards and honors, it is generally okay to attend an organization's events.
- But again be attentive to who is hosting the event and what will be entailed. Is it organized or sponsored by an "advocacy" organization or an entity that regularly appears in your court? Will there be a discussion of matters likely to come before you? Is it a political event?

Membership in Organizations

- Judges are generally free to belong to and participate in a variety of groups and organizations. However, the Code does contain some express restrictions.
- You may not join or contribute to any organization (except a religious organization) "if it is likely that the organization will be engaged frequently in adversary proceedings in the court on which the judge serves." 4 C (3) (a) (i).
- Be cautious about joining if your doing so would impair "public confidence in the integrity and impartiality of the judiciary" or "cast doubt on [your] capacity to act impartially as a judge" 2 A and 4 A.
- "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation." 2 C.
 - New to the Code as of 2003.
 - A complex area. As the Code itself recognizes, it can often be a complex and difficult task determining whether an organization practices "invidious" discrimination. The Commentary to 2 C attempts to provide guidance as to what constitutes "invidious."
 - Joining such organizations is prohibited "whether or not their membership practices are constitutionally protected." Commentary to 2 C.
 - This section prohibits not only a judge's membership in such organizations, but also a judge's arranging a meeting, for example,, at a club that he or she knows or reasonably should know practices invidious discrimination.
 - Exceptions are made for official United States military organizations, religious organizations, and organizations that are, "in fact and effect, . . . intimate, purely private" organizations. 2 C.

Overarching Ethical Considerations

- All ethical issues must be considered in light of Canon 1 and Section 1 A, which require judges to uphold and promote the integrity and independence of the judiciary and to personally observe high standards.

- All ethical issues must also be considered in light of Canon 2 and Section 2 A, which require judges to avoid impropriety and appearances of impropriety, to “respect and comply with the law,” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

- Further, everything must be considered in light of Section 2 B, which states in part that, “A judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.”

Common Transitional Issues for New Judges

- Appearances in court between nomination and swearing-in.
- Receiving compensation (extended payouts) from former firm.
- “Testimonial” events organized by former colleagues and receptions planned by the judge upon swearing-in or “induction.”
- Initial disqualification issues, including special considerations for former government attorneys.
- Special “time for compliance” rules for investment/business activity and fiduciary activities.