

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT**

No. SJC-13077

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In Re: Paul M. Sushchyk

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REVIEW OF THE REPORT AND RECOMMENDATION FOR DISCIPLINE  
OF THE COMMISSION ON JUDICIAL CONDUCT

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**BRIEF FOR THE APPELLANT,  
COMMISSION ON JUDICIAL CONDUCT  
(SUBSTITUTE)**

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Dated: March 22, 2021

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## **STATEMENT OF THE ISSUES**

- I. Does the record support the Hearing Officer's findings and the Commission on Judicial Conduct's reliance on the Hearing Officer's Report.
- II. Whether the Court should give deference to and adopt the Commission on Judicial Conduct's Recommendation for Discipline.

## **STATEMENT OF THE CASE**

### Nature of the Case

This case is before the Supreme Judicial Court ("Court") for review of the Report and Recommendation of the Commission on Judicial Conduct ("Commission") in connection with acts of misconduct that were committed by the Honorable Paul M. Sushchuk ("Judge Sushchuk"), Associate Justice of the Massachusetts Probate and Family Court ("Probate and Family Court").

In its Report and Recommendation, the Commission found that Judge Sushchuk engaged in conduct that violated Rules 1.2, 2.3(A), 2.3(B), 2.8(B), and 3.1(C) of the Massachusetts Code of Judicial Conduct (SJC Rule 3:09) ("Code"). (R.A. I/37-38).<sup>1</sup> The Commission

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<sup>1</sup> Records are referenced to the Appellant's two volumes of Record Appendix as "(R.A. [volume]/[page])."

also found that Judge Sushchyk "engaged in willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer," in violation of G. L. c. 211C, § 2(5). (R.A. I/38-39).

Because of the serious nature of Judge Sushchyk's misconduct, taking into account the aggravating factors cited by the Commission in its Report and Recommendation, and in light of sanctions imposed by this Court in other cases, the Commission has recommended that this Court sanction Judge Sushchyk by publicly censuring him, by ordering him to pay the costs incurred by the Commission in connection with this matter, and by suspending him "without pay from his judicial office, until further order of the Court, for a reasonable time to permit the executive and legislative branches to consider, if they wish, the question of whether he should retain his judicial office, on the basis of such factors as they think appropriate, including the record of evidence before the Commission." (R.A. I/39).

#### Procedural History



This case began when, on or about May 2, 2019, Ms. Emily Deines ("Ms. Deines"), a Field Coordinator for the Administrative Office of the Massachusetts Probate and Family Court, contacted the Chief Justice of the Probate and Family Court, Chief Justice John D. Casey ("Chief Justice Casey"), to report that, on April 25, 2019, Judge Sushchyk had inappropriately touched her buttock without her consent, while both were attending a work-related conference at the Ocean Edge Resort and Golf Club ("Ocean Edge") in Brewster, Massachusetts (R.A. I/50-51, II/377-378). In response, Chief Justice Casey conducted an investigation of Ms. Deines' allegations against Judge Sushchyk, and on May 28, 2019, submitted a written report detailing the results of his investigation to the late Chief Justice of the Supreme Judicial Court, Chief Justice Ralph D. Gants ("Chief Justice Gants"), and to the Chief Justice of the Trial Court, Chief Justice Paula M. Carey. (R.A. I/47-55).

On June 4, 2019, Chief Justice Gants submitted Chief Justice Casey's May 28, 2019 investigation report to the Commission. (R.A. I/43). The Commission then docketed Chief Justice Gants'

submission for investigation as Commission Complaint Number 2019-27. (R.A. I/5-7).

As a result of the Commission's investigation, on July 16, 2019, the Commission issued a Statement of Allegations, pursuant to G. L. c. 211C, § 5(5). (R.A. I/57-60). Judge Sushchyk's response to the Statement of Allegations was filed with the Commission on August 7, 2019, by his attorney, Mr. Michael P. Angelini, Esq. ("Mr. Angelini"). (R.A. I/62-65). On September 10, 2019, Judge Sushchyk appeared before the Commission with Mr. Angelini, pursuant to G. L. c. 211C, § 5(7), in response to the Statement of Allegations. (R.A. I/8).

On November 12, 2019, pursuant to G. L. c. 211C, § 5(12) and Commission Rule 6N, the Commission issued an amended Statement of Allegations to Judge Sushchyk. (R.A. I/67-81). On December 9, 2019, the Commission received a written acknowledgement of the amended Statement of Allegations from Mr. Angelini. (R.A. I/8). Judge Sushchyk did not, pursuant to Commission Rule 6N, file a further response to the amended Statement of Allegations. Id.

On February 5, 2020, the Commission, acting pursuant to G. L. c. 211C, § 5(14) and Commission Rule

7B(4), and having found sufficient cause, issued Formal Charges in Commission Complaint Number 2019-27 and presented those charges to Judge Sushchyk. (R.A. I/83-96). On February 24, 2020, Judge Sushchyk filed his Answer to the Formal Charges with the Commission. (R.A. I/125-127). On February 25, 2020, the Commission filed the Formal Charges and Judge Sushchyk's Answer with the Court and requested the appointment of a Hearing Officer. (R.A. I/9). On February 27, 2020, the Court appointed retired Associate Justice of the Superior Court Bertha D. Josephson ("Judge Josephson," "Hearing Officer"), as Hearing Officer. Id.

On July 7, 2020, the Court issued its "Supplemental Order Regarding Virtual Proceedings and Affirmations" to clarify the scope of the Court's prior orders concerning virtual operations during the COVID-19 pandemic, explicitly permitting the Commission to "elect to conduct any proceeding virtually and [] issue protocols to govern such virtual proceedings." (R.A. I/276-277). On July 9, 2020, the Commission notified Mr. Angelini, Judge Josephson, and other interested parties that the Commission had voted to conduct the Formal Hearing in

this matter virtually, pursuant to the Court's July 7, 2020 order. (R.A. I/11).

On July 10, 2020, the Commission issued its "CJC Temporary Emergency Order on Protocols for Remote Formal Hearings." (R.A. I/279-282). On that same date, counsel for the Commission, Executive Director Howard V. Neff, III, Esq. ("Mr. Neff," "Commission counsel"), also filed five motions in limine with the Hearing Officer, Judge Josephson, including a "Motion In Limine to Preclude the Respondent from Presenting Any In-Court or Out-of-Court Demonstration or Experiment Relating to Respondent's Alleged Improper Touching of the Complaining Witness." (R.A. I/11, II/6-10). In response, on July 13, 2020, Judge Sushchyk's counsel, Mr. Angelini, filed "Respondent's Omnibus Opposition to Commission's Motions In Limine," which addressed all of Commission counsel's motions in limine. (R.A. I/11).

In response to the motions in limine filed by Commission counsel and the July 13, 2020 Omnibus Opposition filed by Mr. Angelini, Judge Josephson conducted a brief closed hearing on July 15, 2020. Id. Because of the ongoing COVID-19 pandemic, the

hearing was conducted remotely through the "Zoom" videoconference platform. Id.

On July 13, 2020, Mr. Angelini also filed an "Emergency Petition to Single Justice Pursuant to M.G.L. c. 211, § 3," seeking an Order that the Formal Hearing scheduled for July 20, 2020 be "continued until such time that it be conducted in person, rather than virtually." (R.A. II/19-41).

On July 15, 2020, Mr. Neff filed the "Commission on Judicial Conduct's Opposition to Judge Paul M. Sushchyk's Petition, Pursuant to G.L. c. 211, sec. 3, to Delay the Formal Hearing on the Charges of Judicial Misconduct Against Him" with the Single Justice Session of the Court. (R.A. II/43-69).

On July 16, 2020, the Commission received a "Notice of Docket Entry" from the Court in response to Judge Sushchyk's July 13, 2020 emergency petition, denying it without prejudice. (R.A. I/12).

On July 17, 2020, Judge Josephson issued a "Memorandum of Decision," ruling on all of the motions in limine filed on behalf of the Commission, by Mr. Neff. Id. In her "Memorandum of Decision," Judge Josephson denied Commission counsel's "Motion In Limine to Preclude the Respondent from Presenting Any

In-Court or Out-of-Court Demonstration or Experiment Relating to Respondent's Alleged Improper Touching of the Complaining Witness" at that time. (R.A. I/12-13).

The Formal Hearing in this matter took place over three days, July 20, 21, and 22, 2020, before the Hearing Officer, Judge Josephson. (R.A. II/71-786). At the Formal Hearing, the Commission was represented by Mr. Neff, and Commission Staff Attorney, Ms. Audrey Cosgrove, Esq. ("Ms. Cosgrove"). (R.A. I/13). Judge Sushchyk was represented by Mr. Angelini. Id. Pursuant to the Court's July 7, 2020 Order permitting virtual hearings during the ongoing COVID-19 pandemic, the three-day hearing was conducted remotely through the "Zoom" videoconference platform and was open to the public. (R.A. I/276-277; II/73, 308, 585). Six witnesses testified under oath: Ms. Deines, Chief Justice Casey, Ms. Evelyn Patsos, Esq. ("Ms. Patsos"), Ms. Jocelynn D. Welsh, Esq. ("Ms. Welsh"), Ms. Noel B. Stern ("Ms. Stern"), and Judge Sushchyk. (R.A. II/270-768). Twelve exhibits were introduced into evidence. (R.A. II/788-810).

On July 22, 2020, the third day of the Formal Hearing, Mr. Angelini filed "Respondent's Motion to

Dismiss" with the Hearing Officer. (R.A. II/812-813). After hearing oral arguments from Mr. Angelini and Mr. Neff, Judge Josephson denied the motion. (R.A. II/590-601).

On July 22, 2020, Judge Josephson also conducted a hearing in connection with Commission's counsel's July 10, 2020 "Motion In Limine to Preclude the Respondent from Presenting Any In-Court or Out-of-Court Demonstration or Experiment to Respondent's Alleged Improper Touching of the Complaining Witness." (R.A. II/946-953). Judge Josephson then sustained Commission counsel's objection to Mr. Angelini's proposed in-court demonstration, allowing the motion in limine. (R.A. II/670-679).

The Formal Hearing in this matter concluded on July 22, 2020. (R.A. II/756). Judge Josephson then advised the parties that she planned to submit the Hearing Officer's Report to the parties within thirty days. (R.A. II/756-757). Judge Josephson also inquired about when she would receive a copy of the transcript of the Formal Hearing and requested access to the audiovisual recording of the Formal Hearing while preparing her Hearing Officer's Report. (R.A. II/757-759).

On July 29, 2020, Mr. Angelini filed "Respondent's Proposed Findings of Fact" with Judge Josephson. (R.A. II/815-822). On July 30, 2020, Mr. Angelini filed a "Post-Hearing Memorandum of Law," with Judge Josephson, arguing that, in connection with the findings in the Hearing Officer's Report, Judge Josephson should apply a legal standard for "clear and convincing" evidence, which would require corroboration of witness testimony. (R.A. II/824-827). On August 3, 2020, Mr. Neff filed a "Post-Hearing Memorandum of Law," with Judge Josephson, arguing that Judge Josephson should apply the legal standard for "clear and convincing" evidence established through past precedent in Massachusetts. Id.

On August 17, 2020, Judge Josephson issued a "Ruling on Respondent's Request for Findings of Fact." (R.A. II/836-841). On August 17, 2020, Judge Josephson also issued her "Report of the Hearing Officer to the Commission on Judicial Conduct" ("Hearing Officer's Report"). (R.A. II/843-864).

In the Hearing Officer's Report, Judge Josephson ruled that the definition of "clear and convincing" evidence established by Massachusetts precedent was



applicable to her findings and that evidence to corroborate Ms. Deines' testimony was not necessary. (R.A. II/855-856). However, Judge Josephson also made findings that, by either the established Massachusetts standard of evidence or the standard proposed by Mr. Angelini, "the allegation that Judge Sushchyk engaged in an intentional, nonconsensual touching of Ms. Deines as detailed in the complaint against him has been proved by clear and convincing evidence." (R.A. II/858).

In the Hearing Officer's Report, Judge Josephson also found that Judge Sushchyk had violated Rules 1.2; 2.3(A); 2.3(B); 2.8(B); and 3.1(C) of the Code and had engaged in "willful judicial misconduct, conduct prejudicial to the administration of justice and unbecoming a judicial officer, and br[ought] the judicial office into disrepute, in violation of G. L. c. 211C[, § 2]." (R.A. II/858-859). Judge Josephson did not make any findings in connection with the charge in the Formal Charges that Judge Sushchyk violated Rule 1.1 of the Code. See Hearing Officer's Report (R.A. II/843-864).

In the Hearing Officer's Report, Judge Josephson recommended that the appropriate discipline for Judge

Sushchyk's misconduct should be "retirement from office pursuant to G.L. c. 211C, section 8(4)(b) or removal from office pursuant to G.L. c. 211C, section 8(4)(a)." (R.A. II/864).

On September 8, 2020, Mr. Angelini filed "Hon. Paul M. Sushchyk's Objections to Hearing Officer's Findings and Recommendations" ("Judge Sushchyk's Objections") with the Commission, pursuant to Commission Rule 11C. (R.A. II/866-877). Counsel for the Commission did not file any objections to the Hearing Officer's Report.

On October 5, 2020, the Commission held a public hearing, pursuant to Commission Rule 11E, after being notified that both Judge Sushchyk and Ms. Deines wished to be heard before the Commission regarding its recommendation for discipline to the Court in this matter. (R.A. II/879-915). Pursuant to the Court's July 7, 2020 Order permitting virtual hearings during the ongoing COVID-19 pandemic, the hearing was conducted remotely through the "Zoom" videoconference platform. (R.A. I/276-277; II/881). At this hearing, Ms. Deines made a statement, as a complainant in this matter. (R.A. II/887-888). Mr. Angelini made a

statement on behalf of Judge Sushchyk. (R.A. II/888-904).

Following that hearing, the Commission voted to recommend to the Court that the appropriate discipline for Judge Sushchyk's misconduct should be public censure, an order that he pay the costs incurred by the Commission in connection with this matter, and suspension "without pay from his judicial office, until further order of the Court, for a reasonable time to permit the executive and legislative branches to consider, if they wish, the question of whether he should retain his judicial office, on the basis of such factors as they think appropriate, including the record of evidence before the Commission." (R.A. I/39).

#### **STATEMENT OF FACTS**

Judge Sushchyk was appointed an Associate Justice of the Probate and Family Court on February 28, 2018 and, as of the date of the Formal Hearing of this matter, had served continuously in that capacity since his appointment. (R.A. II/618).

Ms. Deines is employed as a Field Coordinator for the Administrative Office of the Probate and Family Court. (R.A. II/98-99). Ms. Deines has been

continuously employed by the Administrative Office of the Probate and Family Court since 2004. (R.A. II/98). As part of her position, Ms. Deines was responsible for helping to plan a two-day judicial conference for judges of the Probate and Family Court at Ocean Edge in Brewster, Massachusetts, on April 25 and 26, 2019. (R.A. I/100-101) Ms. Deines attended both days of that conference. (R.A. II/104). Judge Sushchuk also attended both days of that conference. (R.A. II/619-620, 657).

On April 25, 2019, after the training portion of the conference was complete, but prior to a dinner for conference participants at 7:00 p.m. on that same day, there was an informal event for judges in a "hospitality suite" at Ocean Edge. (R.A. II/343-344). Judge Sushchuk consumed alcohol at that hospitality suite event. (R.A. II/622).

Ms. Deines, Judge Sushchuk, and other participants in the judicial conference then attended the dinner at Ocean Edge, which was scheduled to begin at approximately 7:00 p.m. (R.A. II/112). During a brief interaction at the dinner, Judge Sushchuk appeared to Chief Justice Casey to be tired, "not as energetic" as Chief Justice Casey had observed him to

be in the past, and to have had red or dry eyes.

(R.A. II/351-352).

Following that dinner, Ms. Deines left the dining area and entered Bayzo's Pub, which is also part of Ocean Edge. (R.A. II/118). Ms. Deines sat on a round, backless bar stool with a cushioned top. (R.A. II/127-128). Ms. Deines sat at a table at Bayzo's Pub with three co-workers from the Probate and Family Court: Ms. Patsos, Ms. Welsh, and Ms. Christine Yurgelun. (R.A. II/124-125).

While Ms. Deines was seated at Bayzo's Pub with those co-workers on April 25, 2019, Judge Sushchyk entered Bayzo's Pub and walked to the table at which Ms. Deines was seated. (R.A. II/135-137). During Judge Sushchyk's approach to the table, he passed directly behind Ms. Deines. (R.A. II/145). While passing behind Ms. Deines, Judge Sushchyk slid his hand under Ms. Deines' left buttock intentionally, without justification or excuse, and without invitation or consent from Ms. Deines, and "grabbed" Ms. Deines' buttock. Id. Judge Sushchyk was the only person behind Ms. Deines at the time that Ms. Deines felt her buttock being grabbed. (R.A. II/145). As Judge Sushchyk passed behind Ms. Deines at

approximately 8:50 p.m., he was not required to make any sharp turns to get past any groups of people.

(R.A. II/370).

After arriving at the table, Judge Sushchuk showed Ms. Deines and other parties at the table that he was carrying a silver flask in his coat. (R.A. II/153-154). Judge Sushchuk then told the parties at that table that the silver flask he was carrying contained whiskey. (R.A. II/154).

After Judge Sushchuk inappropriately touched her left buttock, Ms. Deines remained at the table for 10-15 minutes "processing" what Judge Sushchuk had just done to her, before she left the table. (R.A. II/155-156). Before leaving the table, Ms. Deines tried to give Ms. Patsos some "nonverbal cues that something had happened." (R.A. II/157). Ms. Patsos noticed Ms. Deines trying to get her attention, but at that time, did not know why. (R.A. II/489-492).

A short time after leaving Bayzo's Pub, at 9:25 p.m., Ms. Deines sent a text message to her sister, Ms. Allison Deines, reporting that Judge Sushchuk had grabbed her buttock. (R.A. II/161-162, 792).

After speaking with family and friends about how to respond to Judge Sushchuk grabbing her buttock, Ms.

Deines contacted an attorney and then reported Judge Sushchyk's inappropriate touching of her buttock to Chief Justice Casey, on or about May 2, 2019. (R.A. I/49-51, II/174-175).

On May 10, 2019, as part of his investigation of Ms. Deines' complaint against Judge Sushchyk, Chief Justice Casey interviewed Judge Sushchyk and asked him to review a written statement Ms. Deines had prepared, describing Judge Sushchyk inappropriately touching her buttock on April 25, 2019. (R.A. II/416-417, 793). During that interview, Chief Justice Casey discussed Ms. Deines' allegations with Judge Sushchyk, and at the conclusion of the interview, it was not clear to Chief Justice Casey that Judge Sushchyk had denied Ms. Deines' allegations against him. (R.A. II/449). During the interview, Chief Justice Casey told Judge Sushchyk that it would be "advisable" for him to prepare a written statement in response to Ms. Deines' report. (R.A. II/430).

Judge Sushchyk then prepared a written statement, dated May 20, 2019. (R.A. II/808). In that written statement, Judge Sushchyk admitted that, on April 25, 2019, while at Bayzo's Pub, he was "somewhat unsteady on [his] feet, feeling the effects of past hip

replacement surgery, the long day . . . , the evening meal and the alcohol consumed”, and “as [he] began to pass behind Ms. Deines [at Bayzo’s Pub], to steady [himself], [he] placed [his] hand in the direction of her chair and came in momentary contact with a portion of her lower body.” Id. However, in his subsequent sworn testimony, Judge Sushchuk denied that he had any such physical contact with Ms. Deines on April 25, 2019. (R.A. II/665). Judge Sushchuk also subsequently testified under oath that the portion of the May 20, 2019 written statement that he had provided to Chief Justice Casey, admitting that his hand had come into contact with Ms. Deines on April 25, 2019, was not true. (R.A. II/665-667).

#### **SUMMARY OF ARGUMENT**

##### **I.**

The Hearing Officer decided the legal and evidentiary issues in this matter correctly. In the Hearing Officer’s Report, Judge Josephson made findings that are well-supported by clear and convincing evidence, which the Commission appropriately relied upon in its own findings, and which also deserve the deference of the Court. [pp. 26-36].



## **II.**

The Court should give substantial deference to the Commission's recommendation for discipline against Judge Sushchuk. The Commission's recommendation was based on appropriate factors, including the particular circumstances of the present case and the impact of Judge Sushchuk's misconduct on the judiciary, and the public's perception of the judiciary. The Commission's decision also properly considered aggravating factors, including Judge Sushchuk's lack of honesty in connection with Chief Justice Casey's investigation of Ms. Deines' report and during his sworn testimony at the Formal Hearing in this matter.

The Court should adopt the Commission's recommendation for discipline as the recommendation is appropriate to the particular circumstances of the present case and is proportional, considering the sanctions imposed by the Court in other cases of professional discipline. [pp. 36-56].

### **ARGUMENT**

- I. THE HEARING OFFICER'S LEGAL AND EVIDENTIARY RULINGS ARE CONSISTENT WITH THE LAW. THE FINDINGS IN THE HEARING OFFICER'S REPORT ARE WELL-SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND DESERVE SUBSTANTIAL DEFERENCE, AS THE CREDIBILITY OF THE WITNESS TESTIMONY WAS AN ESSENTIAL FACTOR IN DETERMINING WHETHER JUDGE**

**SUSHCHYK VIOLATED THE CODE AND THE HEARING OFFICER WAS IN THE BEST POSITION TO ASSESS THE CREDIBILITY OF WITNESSES.**

The Hearing Officer's legal and evidentiary rulings are consistent with the law, and the Commission properly considered and fully responded to Judge Sushchyk's objections to the Hearing Officer's Report.

The Hearing Officer and the Commission applied the correct standard for clear and convincing evidence in Massachusetts, and the evidence admitted during the Formal Hearing in this matter supports the Hearing Officer's findings and the Commission's reliance on the Hearing Officer's Report in making findings and reaching conclusions in its Report and Recommendation, pursuant to G. L. c. 211C § 7(9).

**A. The Hearing Officer's legal and evidentiary decisions are consistent with the credible evidence and the law, and the Commission correctly decided Judge Sushchyk's objections to the Hearing Officer's Report.**

On September 8, 2020, pursuant to G. L. c. 211C, § 7(8), Mr. Angelini filed written objections, on behalf of Judge Sushchyk, to the findings made by Judge Josephson, in the Hearing Officer's Report. (R.A. II/866-877). Commission counsel did not file any objections to the Hearing Officer's Report.

In its Report and Recommendation, the Commission made detailed findings in response to each of Judge Sushchyk's objections, including Judge Sushchyk's objections to the Hearing Officer's findings that Ms. Deines' testimony was credible and that her observations were sufficient to establish, by clear and convincing evidence, that Judge Sushchyk inappropriately grabbed her left buttock as he passed behind her at Bayzo's Pub on April 25, 2019. (R.A. I/15-26). The Commission's responses to Judge Sushchyk's objections cited to specific portions of the transcript of the Formal Hearing and/or exhibits introduced into evidence, when appropriate. Id. In its response to Judge Sushchyk's objections, the Commission found that all of Judge Josephson's findings were "supported by the weight of the credible evidence." Id.

In his objections to the Hearing Officer's Report, Mr. Angelini also "preserved" Judge Sushchyk's objections to the Formal Hearing being conducted virtually and to Judge Josephson's ruling relating to a motion in limine filed by Mr. Neff, regarding "demonstrative" evidence. (R.A. II/6-10, II/873).

In its Report and Recommendation, the Commission responded to Judge Sushchuk's "preserved" objection to the virtual hearing, maintaining its position that the Court's July 7, 2020 "Supplemental Order Regarding Virtual Proceedings and Affirmations" granted the Commission authority to conduct the Formal Hearing in this matter virtually. (R.A. I/26). The Commission also cited the Court's July 16, 2020 Order, which upheld the Commission's decision to hold the hearing in this matter virtually. Id.

In its Report and Recommendation, the Commission also responded to Judge Sushchuk's objection to Judge Josephson's ruling on demonstrative evidence, agreeing with and adopting the Hearing Officer's findings and legal ruling. Id.

**B. The Commission and the Hearing Officer applied the correct standard for "clear and convincing" evidence in their respective findings, based on Massachusetts precedent.**

In the present matter, the Commission was required, pursuant to G. L. c. 211C, § 7(4), to present clear and convincing evidence to establish that Judge Sushchuk engaged in willful judicial misconduct that brings the judicial office into disrepute, as well as conduct prejudicial to the

administration of justice and unbecoming a judicial officer, in violation of G. L. c. 211C, § 2. The Commission was also required to satisfy the same burden of proof to establish that Judge Sushchuk violated the Code, as charged in the Formal Charges.

On July 30, 2020, Mr. Angelini filed a "Post-Hearing Memorandum of Law" with Judge Josephson. (R.A. II/824-827). Relying on cases from other jurisdictions, Mr. Angelini's memorandum proposed that Judge Josephson adopt a standard for clear and convincing evidence that deviated from the established precedent of Massachusetts. Id.

In response to Mr. Angelini's proposed standard, Judge Josephson wrote in the Hearing Officer's Report:

"Conceding that the state of the law does not require it, the defense suggest that independent collaboration should be necessary to satisfy the [clear and convincing] standard. In support of its argument, the defense relies on cases from other jurisdictions and one Massachusetts case. None are applicable to this case. Cases from outside the Commonwealth provide no precedential effect and the ones relied on by the defense offer no persuasive value as they involve claims far different than the type of claim here."

(R.A. II/856).

The definition of clear and convincing evidence is well-settled in Massachusetts. "Clear and convincing proof involves a degree of belief greater

than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases." (citations omitted) Callahan v. Westinghouse Broadcasting Co., 372 Mass. 582, 584 (1977).

In one of the first Massachusetts cases applying the standard of "clear and convincing" evidence to a civil matter, the Court held:

"Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases (citations omitted). It has been said that the proof must be 'strong, positive and free from doubt' (citations omitted), and 'full, clear and decisive' (citations omitted). See generally, Wigmore Evidence, sec. 2498(3) (3d ed. 1940)."

Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871 (1975). The Court has also held that findings must be "specific and detailed findings demonstrating that close attention has been given to the evidence." Adoption of Quentin, 424 Mass. 882, 886 (1997).

In Adoption of Iris, the Appeals Court held:

"The evidence must be sufficient to convey to 'a high degree of probability'" that the proposition is true. Tosti v. Ayik, 394 Mass. 482, 493 n.9 (1985), cert. denied, 484 U.S. 964 (1987). The requisite proof must be strong and positive; it must be "full, clear and decisive." Callahan v.

Westinghouse Broadcasting Co., 372 Mass. at 584.  
See Liacos, Massachusetts Evidence s.s. 5.2.2 -  
5.2.3 (6th ed. 1994); Ireland, Juvenile Law sec.  
107 (1993)."

Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997).

Accordingly, both the Commission and the Hearing Officer correctly applied the standard for clear and convincing evidence established by the precedent of this Court.

**C. The nature of the misconduct and of the evidence in this matter requires that the Court defer to the findings of the Hearing Officer, as the Commission appropriately did in its Report and Recommendation.**

There is no question that the Hearing Officer appointed to this matter, Judge Josephson, is a highly experienced and respected jurist. The Hearing Officer's Report reflected Judge Josephson's thoughtful observations and assessments of the credibility of the witnesses who testified before her, and a diligent review of the evidence. (R.A. II/843-864).

Since the current version of G. L. c. 211C went into effect in 1988,<sup>2</sup> this Court has nearly always

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<sup>2</sup> Chapter 211C was added to the General Laws of Massachusetts by St.1978, c. 478. The current version of c. 211C was amended by St.1987, c. 656, and was approved on January 4, 1988.

deferred to the findings of Hearing Officers in judicial misconduct matters reaching the Court for review. In one prior matter after 1988, this Court found that the Commission properly and correctly reached a conclusion regarding the state of mind of the judge which differed from the conclusion of the Hearing Officer. See Matter of Markey, 427 Mass. 797 (1998).

However, the Court in Markey still relied upon the factual findings of the Hearing Officer in that matter, and merely disagreed with the reasonable inference of the judge's intent, which should be drawn from those facts. Id. at 804. ("The Judge's testimony, in combination with the hearing officer's findings, supports the conclusion that the expected consequence of Judge Markey's ex parte communication to Judge McGregor was that she would vacate or alter the 209A order. In fact, the inference drawn by the Commission regarding Judge Markey's intent was manifestly justified by the evidence. 'One would have to be wearing blinders not to draw the strong and reasonable inference' that the ex parte communication

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was intended to influence the outcome of a judicial proceeding." citing Matter of Orfanello, 411 Mass. 551, 556 (1992)).

Unlike Markey, the findings in the present matter hinge on an assessment of the credibility of the witnesses. This Court has held that, in matters where an assessment of the credibility of witnesses is essential to a determination of the issue(s) before the court, deference should be given to the trier of fact. Cf. New England Canteen Service, Inc. v. Ashley, 372 Mass. 671, 675 (1977) ("In deciding whether a judge's subsidiary finding of fact is clearly erroneous, it must be emphasized that it is the trial judge who, by virtue of his firsthand view of the presentation of evidence, is in the best position to judge the weight and credibility of the evidence." citing Oberg v. Burke, 345 Mass. 596, 598 (1963)).

In the Hearing Officer's Report, Judge Josephson made detailed findings and demonstrated that she gave close attention to the evidence, including careful observation of the witnesses' testimony to assess their credibility. (R.A. II/843-864).

Judge Josephson also carefully considered Judge Sushchyk's post-hearing proposed findings of fact. In her "Ruling on Respondent's Request for Findings of Fact," many of her rulings included explanations and detailed citations to specific portions of the transcript of the Formal Hearing and/or exhibits introduced into evidence, when appropriate. (R.A. II/836-841).

Regarding the credibility of Ms. Deines' testimony, in the Hearing Officer's Report, Judge Josephson cited, in detail, her direct observations of Ms. Deines' testimony during the Formal Hearing, the consistency of Ms. Deines' reporting, and the credible steps that Ms. Deines took before making a report to Chief Justice Casey. (R.A. II/853-857). Judge Josephson found, as follows: "Ms. Deines gave a cogent, credible, consistent account of what occurred. Based on her testimony and my observations of her over the hours she testified, including during rigorous cross-examination, I believe her." (R.A. II/856).

Regarding the credibility of Judge Sushchyk's denial, in the Hearing Officer's Report, Judge Josephson cited, in detail, her direct observations of Judge Sushchyk's testimony during the Formal Hearing,

his inconsistent statements regarding whether he felt the effects of alcohol at the time of the incident, and the contradiction between Judge Sushchuk's admission to touching Ms. Deines in his written statement to Chief Justice Casey and his subsequent sworn testimony denying that he had touched Ms. Deines. (R.A. II/857). Judge Josephson found, as follows:

" . . . Judge Sushchuk has not been honest in his accounts. He was not forthright in his written statement. He generated a statement he knew to be false in which he invented out of whole cloth a version of events in which Ms. Deines' very clear perception of what happened to her person was to be dismissed as misimpression or an exaggeration. He admitted under oath that, in truth, what he wrote had happened simply had not. He falsely claimed to the Court administration investigating the matter that he had a recollection of incidental contact, a falsehood he knowingly provided in an attempt to exculpate himself. Such misdirection during the investigation not only evinces a consciousness of guilt, but is wholly inconsistent with the oath of office and ethical conduct required of a judge.

"Judge Sushchuk's explanation of why he wrote a false account is equally problematic. In essence, he says he did not think Ms. Deines would lie so he did. One problem with lying is once it begins, it's hard to know when it ends. Judge Sushchuk's lack of candor at the inception of this matter undermines his credibility at hearing. His initial response suggests that he did what he was accused of doing and sought to minimize his culpability for it. I do not find Judge Sushchuk's testimonial denials of intentional contact with Ms. Deines reliable or believable. Ms. Deines' immediate, consistent and credible

complaint that she was grabbed by Judge Sushchuk is not only more believable than his reworked denials, it is bolstered by them. I find Judge Sushchuk's testimony at hearing is a further instance of his failure to be truthful in this matter."

Id.

Accordingly, the Commission appropriately deferred to the Hearing Officer's Report in making the findings and conclusions in its Report and Recommendation to the Court. The Commission respectfully submits that, for the above-stated reasons, the Court should also defer to the findings in the Hearing Officer's Report.

**II. THE DISCIPLINE RECOMMENDED BY THE COMMISSION IN THIS CASE IS WARRANTED.**

In its Report and Recommendation, the Commission recommended that this Court sanction Judge Sushchuk by publicly censuring him, ordering him to pay the costs incurred by the Commission in connection with this matter, and suspending him "without pay from his judicial office, until further order of the Court, for a reasonable time to permit the executive and legislative branches to consider, if they wish, the question of whether he should retain his judicial office, on the basis of such factors as they think appropriate, including the record of evidence before the Commission." (R.A. I/39).

In her Hearing Officer's Report, Judge Josephson recommended that the appropriate discipline for Judge Sushchuk's misconduct should be "retirement from office pursuant to G.L. c. 211C, § 8(4)(b) or removal from office pursuant to G.L. c. 211C, § 8(4)(a)." (R.A. II/864).

While this Court has ruled that those provisions of G. L. c. 211C, § 8 are not within the constitutional authority of the Commission or the Court (see In the Matter of Robert M. Bonin, 375 Mass. 680 (1978)), the Commission's Report and Recommendation agrees with the Hearing Officer that the disposition of this matter must include a sanction that prevents Judge Sushchuk from continuing to serve and receive compensation as a judge.

- A. In determining its recommendation for discipline in this matter, the Commission properly considered the merits and specific circumstances of the present matter, weighing the effect of Judge Sushchuk's misconduct upon the judiciary and the public's perception of the judiciary.**

This Court has stated that the purpose of the Code is "to preserve the integrity, independence, and impartiality of the judiciary and, moreover, to preserve public confidence in the integrity, independence, and impartiality of the judiciary."

Matter of Killam, 388 Mass. 619, 622 (1983). This Court has also observed that, "[b]ecause of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and there should be strict adherence to them." Matter of Morrissey, 366 Mass. 11, 16-17 (1974). In Morrissey, the Court also stated that public "assurance" is an important factor in what "disciplinary measures" are appropriate. Id. at 17 ("[T]he resulting disciplinary measures have served to give assurance to the public that such conduct will not be tolerated and that the judiciary itself is ever ready to carry out the corrective process when necessary.").

To achieve such public "assurance," the Court has historically considered the following factors in connection with determining the appropriate sanction for judicial misconduct:

1. Did "the judge's misconduct bring undeserved discredit to the administration of justice in the Commonwealth" (Matter of Larkin, 368 Mass. 87, 91-92 (1975)).
2. Do the charges relate to misconduct of a judge in acting in his official capacity (Matter of DeSaulnier (No. 4), 360 Mass. 787 (1972)).

3. Did the judge commit a wide variety of improprieties, both on and off the bench, occurring over an extended period of time. Matter of Troy, 364 Mass. 15 (1973).
4. Are there any aggravating or mitigating circumstances. See Matter of Killam, 388 Mass. at 624. See also Matter of Scott, 377 Mass. 364 (1979) and Matter of Markey, 427 Mass. at 808.

The Commission respectfully submits that the Court should adopt its recommendation for discipline in this matter, because that recommendation considered the above factors drawn from the Court's established precedent in cases of judicial discipline, as follows:

**1. Judge Sushchyk's misconduct brought undeserved discredit to the judiciary.**

By clear and convincing evidence, the Commission adopted the findings of the Hearing Officer and found, as follows:

"By engaging in an intentional, nonconsensual, and unwelcome touching of Ms. Deines' buttock, while attending a work-related conference of the Probate and Family Court . . . Judge Sushchyk engaged in 'willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer,' in violation of M.G.L. c. 211C, sec. 2(5)."

(R.A. I/39). Given the nature and seriousness of Judge Sushchyk's violations of the Code, the Commission respectfully submits that Judge Sushchyk's misconduct has clearly brought "undeserved discredit

to the administration of justice in the Commonwealth.”  
Matter of Larkin, 368 Mass. at 91-92.

Moreover, as in In re: Thomas Estes, the nature of Judge Sushchyk’s misconduct has not only brought undeserved discredit to the administration of justice in the Commonwealth; it will prevent him from ever again “command[ing] the respect and authority essential to the performance of his judicial function.” In re: Thomas Estes, Supreme Judicial Court, SJC No. OE-136 (May 24, 2018). (R.A. II/917-922)<sup>3</sup>.

In the Estes matter, the Court’s Order suspending Judge Thomas Estes indefinitely without pay included the following reasoning:

“Clearly, the Judge’s misconduct has damaged the esteem of the judicial office in the public’s eye. The sanction we impose is severe not because we seek to punish the Judge severely, but because, like the Commission, we seriously question whether he can command the respect and authority essential to the performance of his judicial function. In furtherance of our duty to assure the public that Massachusetts judges are held to high standards of conduct and that the Commonwealth’s judiciary is worthy of their trust and confidence, we conclude that Judge Estes shall be and hereby is publicly censured, and that effective June 15, 2018, he shall be suspended without pay indefinitely or until

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<sup>3</sup> The Court’s Order in the Judge Thomas Estes matter is reprinted in the Addendum to this brief at page 95.



further order of this court, and it is so ORDERED. A copy of this order shall be delivered to the Governor and the Legislature.”

Id. at 921.

The Commission respectfully submits that the Court’s reasoning in the Estes matter also applies to the present matter, in which Judge Sushchyk has been found, by clear and convincing evidence, to have inappropriately touched Ms. Deines, while at a work-related conference, in violation of the Code.

**2. Judge Sushchyk’s misconduct relates to actions he took in his official capacity as a judge. Matter of DeSaulnier (No. 4), 360 Mass. at 812-814.**

By clear and convincing evidence, the Commission found that, while attending a Probate and Family Court conference, Judge Sushchyk engaged in an intentional, nonconsensual, and unwelcome touching of Ms. Deines’ buttock on April 25, 2019. (R.A. I/31).

In connection with the Hearing Officer’s recommendation for discipline, Judge Josephson also weighed the fact that Judge Sushchyk’s misconduct took place at a work-related event, finding, as follows:

“That the incident occurred at a Court event, sponsored and conducted by the Court, makes it even more troubling. The judicial and other court-employed attendees at the conference were there because of their official positions, whether or not they were then performing their

usual job responsibilities. The group seated at the table was part of a structure in which a judge occupies a position of unique power. In that structure, the people who provide support function as subordinates, in that their role is mainly defined by what a judge needs to perform her/his/their duties. Ms. Deines and the staff attorneys at the table are high-level professionals who must be afforded the respect, courtesy and deference due them and owed all Trial Court employees. Judge Sushchuk's conduct was not in keeping with the dignity, regard and professionalism he owed them and his position.

"G.L. c. 214, section 1C, provides in pertinent part, '[a] person shall have the right to be free from sexual harassment, as defined in' G.L. c. 151B and 151C. G.L. c. 214, section 1C, provides, 'all employees are protected against sexual harassment in the workplace.' See, Lowery v. Klemm, 446 Mass. 572 (2006). In any work place, a supervisor engaging in such misconduct toward a subordinate could reasonably be expected to be removed from his position. The public can expect at least as much of the Court as a work place."

(R.A. II/860-861).

It is worth noting that the current version of the Trial Court's Personnel Policies and Procedures Manual and the prior version in effect at the time of Judge Sushchuk's misconduct, both call for zero tolerance of sexual and gender harassment at work, and in any work-related settings, including conferences. See Massachusetts Trial Court Personnel Policies and Procedures Manual, Section 5.000, Policy Prohibiting Discrimination, Harassment, Retaliation, and Complaint

Resolution Procedure, (effective November 4, 2019), p. 5-2;<sup>4</sup> and Massachusetts Trial Court Personnel Policies and Procedures Manual, Appendix E, Policy and Procedure for the Elimination of Sexual and Gender Harassment in the Workplace, (effective January 7, 2013), p. E-8.<sup>5</sup>

The Commission respectfully submits that Judge Sushchyk's violation of the Trial Court's sexual and gender harassment policy should receive zero tolerance from the Court and the Commission's recommendation for discipline should be adopted.

**3. Judge Sushchyk did not commit a wide variety of improprieties on and off the bench, nor did his misconduct take place over an extended period of time.**

Although this matter does not involve a wide variety of improprieties, both on and off the bench, occurring over an extended period of time, the Commission agrees with the reasoning of the Hearing Officer that that does not diminish the serious nature of Judge Sushchyk's misconduct. (R.A. I/43). In the

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<sup>4</sup> The Trial Court's Personnel Policies and Procedures Manual, effective November 4, 2019, is reprinted in the Addendum to this brief at page 101.

<sup>5</sup> The Trial Court's Personnel Policies and Procedures Manual, effective January 7, 2013, is reprinted in the Addendum to this brief at page 135.

Hearing Officer's Report to the Commission, Judge Josephson wrote, "That the misconduct was confined to a single act of short duration neither excuses it nor diminishes its impact or serious nature. The touching engaged in here was offensive and an affront to one's bodily integrity and dignity." (R.A. II/860).

**4. Aggravating factors.**

In connection with its recommendation for discipline, the Commission considered the following aggravating circumstances:

- a. Judge Sushchuk's misconduct was related to his judicial office and was "willful," in violation of G. L. c. 211C, § 2(5)(b).

Both the Commission and the Hearing Officer found, by clear and convincing evidence, that Judge Sushchuk engaged in an intentional or "willful," nonconsensual touching of the left side of Ms. Deines' buttocks, while attending a Probate and Family Court conference, as described in the above findings. Judge Sushchuk's conduct was not an accident. (R.A. I/39, II/858).

- b. Following Ms. Deines' complaint against him, Judge Sushchuk responded by providing Chief Justice Casey with an inaccurate written statement.

The Commission and the Hearing Officer also found, by clear and convincing evidence, that Judge Sushchuk "knowingly and intentionally submitted a statement [to Chief Justice Casey that] he knew to be untrue in an effort to affect the outcome" and that his sworn testimony during the Formal Hearing in this matter was "a further instance of his failure to be truthful in this matter." (R.A. I/34-37; II/854, 857). See Matter of Scott, 377 Mass. at 369 (The Court has considered the judge's conduct subsequent to the filing of the complaint against her, "especially the judge's willingness to accept that she has been seriously at fault, and her apparently improved behavior in the more recent past.") Compare with Matter of Sleeper, 251 Mass. 6, 20 (1925) ("It requires no discussion to demonstrate that the commission of perjury by an attorney at law is sufficient ground for disbarment"), and (citations omitted) Matter of Kevin P. Curry, 450 Mass. 503, 532 (2008) (In determining the appropriate discipline for an attorney, the Court found that a "separate aggravating factor was the 'marked lack of candor' Curry showed during the disciplinary proceedings" and that "[f]alse representations to bar counsel are

'comparable to making false representations to a court.'").

In connection with its recommendation for discipline, the Commission agrees with the findings and reasoning of Judge Josephson in connection with her recommendation for discipline in this matter:

"While the range of sanctions is broad, in this case, there are few appropriate ones available, not only because of the nature of of [sic] the misconduct, but also because it has been compounded by Judge Sushchuk's misrepresentations during the investigation. His written account to the Chief Justice contained deliberate falsehoods, as Judge Sushchuk admitted at hearing. The suggestion that his initial account of inadvertent, fleeting touching was concocted in deference to his belief in Ms. Deines' veracity, fails to recognize that his written version of events was a fiction that excuses his wrong-doing and falsely attacks Ms. Deines' perception of reality. If Judge Sushchuk indeed knew he did not do as Ms. Deines claimed, he was required to tell that truth rather than invent a tale. The path he chose supports the conclusion that he was attempting evade responsibility for his act.

"Further, Judge Sushchuk tried to bolster his lie by manufacturing details that were not true either. He denied contact at a time that would support Ms. Deines version of events, instead inventing a trip away from and back to the table while Ms. Deines was present when that simply was not true. He offered that he was 'unsteady in his feet' owing, in part, to alcohol, and then denied under oath that he had difficulty or was affected by alcohol. He initially admitted touching Ms. Deines inadvertently, but under oath denied he had any unintentional contact. He presented his written account as his specific recollection when, in fact, he had no such recollection of

events he recounted because they never occurred. The lapses here are intentional and were designed to mislead the authority investigating the claim. His testimony at hearing also was contrary to the facts proven by clear and convincing evidence."

(R.A. I/44-45, II/861-862).

**5. Mitigating factors.**

The Commission did not consider any mitigating factors in connection with its recommendation for discipline. (R.A. I/45).

**B. The Commission's Recommendation for Discipline to the Court is appropriate and proportional considering the sanctions imposed by the Court in other cases of discipline.**

In the present case, the Commission considered the merits and specific circumstances of this matter, weighing the effect of Judge Sushchyk's misconduct upon the judiciary and the public's perception of the judiciary. Based on the factors cited above, the Commission submitted its recommendation for discipline to the Court.

What remains for the Court is to ensure that the sanctions imposed in this case are not "markedly disparate from judgments in comparable cases" (Matter of Barrett, 447 Mass. 453, 462 (2006)) and that the sanction imposed will "adequately give assurance to the public that such conduct [as Judge Sushchyk's]

will not be tolerated" (Matter of Morrissey, 366 Mass. at 17).

In the present case, the Commission's recommendation for discipline was taken directly from the Court's past decisions in In the Matter of Robert M. Bonin and In re: Thomas Estes. (R.A. I/39-40).

In Matter of Bonin, former Chief Justice of the Superior Court Robert M. Bonin was charged with misconduct in relation to his attendance at an event for which the ticket sales were intended to fund the defense of criminal defendants with matters then pending before the Superior Court. Matter of Bonin, 375 Mass. at 710-711. Although the facts in Bonin were very different, the concerns about the impact of that misconduct were similar to those present in this matter. The Court held:

"The Chief Justice's conduct was improper and created the appearance of impropriety, bias, and special influence. A judge, particularly a chief justice, must be sensitive to the impression which his conduct creates in the minds of the public. The Chief Justice has manifested an unacceptable degree of insensitivity to those special obligations which are imposed on a person in his position. He has failed to perceive that the public often does not distinguish between a chief justice as a judge and a chief justice as a person."

Id. at 711.



The Court went on to publicly censure Chief Justice Bonin and to decide, as follows:

"We recognize that the question whether the Chief Justice should continue to serve and to receive compensation as such is one which is not assigned to the judicial department under the Constitution of the Commonwealth. See Matter of Troy, 364 Mass. 15, 21-22 (1973); Matter of DeSaulnier (No. 4), 360 Mass. 787, 807-809 (1972). But we deem it appropriate, pursuant to our constitutional and statutory powers of supervision over the courts of the Commonwealth, that the suspension of the Chief Justice should extend for a reasonable time to permit the executive and legislative branches to consider, if they wish, the question of the continuance of the Chief Justice in office, on the basis of such factors as they think appropriate, including, perhaps, the record before us and the conclusions we have drawn from it. A transcript of this proceeding and the exhibits are available to the Governor and the Legislature on request. The order of suspension shall continue in effect until further order of this court, but that order will be continued only for a reasonable period, as described above."

Id. at 711-12. Cf. Matter of Markey, 427 Mass. at 808.

(Publicly reprimanding the judge and suspending him for three months without pay for engaging in an improper ex parte communication with another judge who was presiding over a restraining order matter involving the subject judge's neighbor, the Court held that "[the judge's] misconduct. . . is most serious, and no amount of good behavior can negate the damage it inflicts on the judicial system which depends for

its institutional independence on the bedrock principle that all disputes coming before a judge should be decided solely on their merits, openly presented, without extraneous influences.”)

Though, in the present matter, the problems of impact and public perception may be similar to those in Bonin, as noted above, the facts of Bonin are very different from those in the complaint against Judge Sushchuk.

The Commission respectfully submits that the prior judicial discipline matter decided by the Court that is most similar to the present matter is In re: Thomas Estes. In re: Thomas Estes, Supreme Judicial Court, SJC No. OE-136 (May 24, 2018); (R.A. II/917-922). In the Estes matter, the Court’s Order suspending Judge Thomas Estes indefinitely without pay included the following reasoning:

“Clearly, the Judge’s misconduct has damaged the esteem of the judicial office in the public’s eye. The sanction we impose is severe not because we seek to punish the Judge severely, but because, like the Commission, we seriously question whether he can command the respect and authority essential to the performance of his judicial function. In furtherance of our duty to assure the public that Massachusetts judges are held to high standards of conduct and that the Commonwealth’s judiciary is worthy of their trust and confidence, we conclude that Judge Estes

shall be and hereby is publicly censured, and that effective June 15, 2018, he shall be suspended without pay indefinitely or until further order of this court, and it is so ORDERED. A copy of this order shall be delivered to the Governor and the Legislature."

(R.A. II/921). Like in the Estes matter, Judge Sushchik's misconduct has not only brought undeserved discredit to the administration of justice in the Commonwealth; it will prevent him from ever again "command[ing] the respect and authority essential to the performance of his judicial function." Id.

In Judge Sushchik's Objections, Mr. Angelini argued that "[t]he Hearing Officer's recommended discipline is excessive by the standards of other cases, as reviewed below." (R.A. II/873).

Judge Sushchik's Objections then proceeded to cite several cases not available for public comment by the Commission. However, it is worth generally noting that, in cases of attorney misconduct, this Court has held that "[f]undamentally, . . . '[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'" Matter of Foley, 439 Mass. 324, 333 (2003) (quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984)). The Commission

respectfully submits that this matter must also be decided on its own merits and Judge Sushchuk should receive the discipline most appropriate to the present circumstances.

One of the cases cited in support of Judge Sushchuk's objection to Judge Josephson's recommended discipline, as "excessive," was Matter of Brown, 427 Mass. 146 (1998) (R.A. II/875-876). However, the Commission respectfully submits that the misconduct in Matter of Brown bears no resemblance to Judge Sushchuk's misconduct in the present case.

In that case, Justice Frederick L. Brown was found to have made intemperate comments toward parties appearing before him during an appellate argument, comments which also created the appearance that Justice Brown was not impartial. Id. In deciding the appropriate sanction for this single instance of charged misconduct, the Court considered two prior incidents in which "Justice Brown [had] been called to order for his injudicious and intemperate remarks" resulting in the Commission issuing a confidential "letter of concern" and a confidential "informal adjustment." Id. at 154.

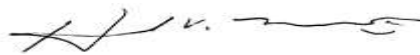
However, Judge Sushchuk attempts without success to compare his misconduct with Justice Brown's. Judge Sushchuk's misconduct was far more egregious and willful than an isolated "display of temper" made in the course of oral argument. Id. at 152. Unlike Justice Brown's misconduct, Judge Sushchuk's misconduct was not "largely a matter of appearances." Id. at 154. The Commission respectfully submits that Judge Sushchuk's misconduct has far more potential to have a damaging effect upon the judiciary and the public's perception of the judiciary.

#### **CONCLUSION**

For the above stated reasons, the Commission respectfully submits that this Court should adopt the Commission's findings in connection with Judge Sushchuk's misconduct and its recommendation for the disposition of this matter.

Respectfully Submitted,  
For the Commission on Judicial Conduct,

By:



---

Howard V. Neff, III  
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Commission on Judicial Conduct  
11 Beacon Street, Suite 525  
Boston, MA 02114  
(617) 725-8050

Dated: March 22, 2021

**CERTIFICATE OF COMPLIANCE**

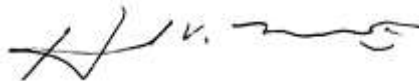
Re: In Re: Paul M. Sushchyk,  
Supreme Judicial Court No. SJC-13050

---

I, Howard V. Neff, III, Attorney for the Appellant, the Commission on Judicial Conduct, hereby certify, in accordance with Rule 16(k) of the Massachusetts Rules of Appellate Procedure, that, to the extent that they appear applicable to these proceedings, and/or this brief, this brief substantially complies with the rules of court that pertain to the filing of briefs, including, but not limited to, the following: Rule 16(a)(13) (addendum), Rule 16(e) (references to the record), Rule 18 (appendix to the briefs), Rule 20 (form and length of briefs, appendices, and other documents), and Rule 21 (redaction).

I further certify that the brief complies with the applicable length limit of Rule 20 ascertained by use of Courier New size 12 font which produced not more than 10.5 characters per inch on a total of 46 non-excluded pages.

By:



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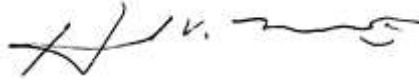
Dated: March 22, 2021

CERTIFICATE OF SERVICE

I, Howard V. Neff, III, attorney for the Appellant, the Commission on Judicial Conduct, hereby certify that I have this day served a copy of **this Brief and two volumes of Record Appendix upon the attorney of record for the subject judge**, by delivering through electronic means, the same to the subject judge's attorney, as follows:

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Dated: March 22, 2021

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**Section 2. Investigations, hearings and recommendations.**

Section 2. (1) All judges of the trial court, the appeals court and the supreme judicial court shall be subject to discipline pursuant to this chapter. The commission on judicial conduct shall have the authority to receive information, investigate, conduct hearings, and make recommendations to the supreme judicial court concerning allegations of judicial misconduct and allegations of mental or physical disability affecting a judge's performance.

(2) The commission shall have jurisdiction over investigations and recommendations regarding discipline arising from the conduct of all judges, including any retired judge who is assigned to perform the duties of a judge for a temporary period. This jurisdiction shall include all conduct that occurred prior to a judge's assuming judicial office, and conduct of a lawyer who is no longer a judge that occurred while he held judicial office; provided, however, that in evaluating such conduct, the commission shall give substantial weight to relevant decisions of the supreme judicial court and the board of bar overseers regarding bar discipline. The foregoing shall not be construed to derogate the inherent authority of the supreme judicial court to supervise and discipline judges, the authority of the governor with the consent of the council to remove a judge upon the address of both houses of the legislature or to retire a judge involuntarily because of advanced age or mental or physical disability, the authority of the legislature to remove a judge through impeachment, or the supervisory authority of the chief justices of the appeals and supreme judicial courts or of the chief and department administrative justices of the trial court.

(3) Except where the commission determines otherwise for good cause, the commission shall not deal with complaints arising out of acts or omissions occurring more than one year prior to the date commission proceedings are initiated pursuant to section five; provided, however, that, when the last episode of an alleged pattern of recurring judicial conduct arises within the one year period, the commission may consider all prior acts or omissions related to such alleged pattern of conduct.

(4) In the absence of fraud, corrupt motive, bad faith, or clear indication that the judge's conduct violates the code of judicial conduct, the commission shall not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. Commission proceedings shall not be a substitute for an appeal.

(5) Grounds for discipline shall include:

- (a) conviction of a felony;
- (b) willful misconduct in office;
- (c) willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute;
- (d) conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the judicial office into disrepute; or
- (e) any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.

*(Amended by 1987, 656, Sec. 1.)*

**Section 5. Initiation of proceedings; inquiry, investigation and evaluation; detailed complaint or statement of allegations; formal charges.**

Section 5. (1) Commission proceedings relating to the conduct of a judge may be initiated by an oral or written complaint stating facts that, if true, would be grounds for discipline, or by the commission's own motion when the commission receives reasonable information, including reports in the news media, as to conduct that appears to constitute grounds for discipline. Upon receipt of such complaint or adoption of such motion, the commission shall promptly notify the judge, except as provided in subdivision (2), and shall conduct a prompt, discreet and confidential inquiry, investigation and evaluation.

(2) The commission shall notify the judge of the proceedings and their subject matter before commencing any inquiry, investigation or evaluation in all cases except as follows:

(a) where, because of the nature of the complaint, delay is necessary in order to preserve evidence, notice may be delayed until such evidence is obtained, until the matter is dismissed, or until the sworn complaint or statement of allegations is served pursuant to subdivision (6), whichever occurs first;

(b) where the identity of the complainant could be readily determined by the judge from the nature of the complaint and there is a danger of reprisal against the complainant, notice may be delayed until the danger of reprisal ends, until the matter is dismissed, or until the sworn complaint or statement of allegations is served pursuant to subdivision (6), whichever occurs first; provided, however, that in any such case where there is an ongoing danger of reprisal, the notice and the statement of allegations may be drafted so as to conceal the complainant's identity.

(3) The commission shall discourage and shall promptly dismiss complaints which are frivolous, unfounded or outside commission jurisdiction. The commission shall notify the judge and the complainant, if any, of such dismissal in accordance with the provisions of subdivisions (1), (2) and (10).

(4) At any stage of the proceeding, the commission shall be entitled within the time limits established by commission rule to compel by subpoena the attendance and testimony of witnesses, including the judge, and to provide for the inspection of documents, books, accounts, and other records.

(5) After a thorough inquiry, investigation and evaluation, the executive director shall recommend to the commission, and the commission shall determine, by majority vote, whether there is adequate reason to proceed to the preparation of a detailed complaint or statement of allegations. If so, the commission shall request that the complainant file a detailed sworn complaint against the judge. When a sworn complaint is not obtained, the executive director shall prepare a clear statement of the allegations against the judge and the alleged facts forming their basis. Said complaint or statement of allegations shall clearly set forth each act of misconduct where more than one act of misconduct is alleged, and shall state clearly the provision of statute, code of judicial conduct or code of professional responsibility alleged to have been violated by each alleged act of misconduct.

(6) The judge shall be served promptly with a copy of the sworn complaint or statement of allegations.

(7) The judge shall have twenty-one days after receipt of the sworn complaint or statement of allegations to respond in writing to the charges and, if he wishes, to file a written request for a personal appearance before the commission.

(8) The judge shall be entitled to counsel of his own choice. After the judge is served with the sworn complaint or statement of allegations, he shall be entitled before the issuance of formal charges and within the time limits established by commission rule to compel by subpoena the attendance and testimony of witnesses through depositions, and to provide for the inspection of documents, books, accounts, written or electronically recorded statements, and other records. The judge may file written material for commission consideration before the issuance of formal charges.

(9) If the judge requests a personal appearance before the commission, he may be accompanied by counsel, his statement and that of his counsel shall be recorded, and the commission shall not issue formal charges until after such personal appearance.

(10) If at any time prior to the issuance of formal charges the commission determines that it does not have sufficient cause to proceed, the commission shall terminate the proceedings by closing the investigation or dismissing the complaint or the statement of allegations. In that event, the commission shall give notice to the complainant, if any, and to the judge that it has found insufficient cause to proceed. The file in any matter so terminated shall be closed.

(11) The commission may not refer subsequently to a file closed before the issuance of formal charges except in the following circumstances:

(a) in a subsequent proceeding that raises similar allegations against the judge and indicates a pattern of recurring judicial misconduct;

(b) in a subsequent proceeding alleging conduct in violation of conditions imposed as part of an informal adjustment pursuant to subdivision (1) of section eight;

(c) in connection with a decision as to the recommended sanction to be imposed in a subsequent proceeding.

(12) The commission may, upon notice to the judge, amend the allegations prior to a finding of sufficient cause to issue formal charges. The judge may amend his written response or submit additional written material for commission consideration before such finding.

(13) After the judge's personal appearance pursuant to subdivision (9), if any, and after the expiration of any time limit upon written submissions by the judge pursuant to subdivisions (8) and (12), the commission shall determine whether there is sufficient cause to issue formal charges. A finding of sufficient cause to issue formal charges shall require the concurrence of the majority of all commission members that there is a preponderance of credible evidence that the judge's conduct constitutes grounds for discipline.

(14) When sufficient cause is found, the commission shall issue formal charges stating those allegations as to which sufficient cause is found. A copy of the formal statement of charges shall be served promptly upon the judge and the judge shall have ten days to respond. Immediately thereafter, a copy of such formal statement of charges and of the judge's written response shall be filed with the supreme judicial court, which shall promptly appoint a hearing officer. Confidentiality shall cease upon this filing, as provided in section six, and after this filing the proceedings shall be governed by the provisions of section seven. (*Added by 1987, 656, Sec. 2.*)

**Section 7. Hearing; recommendation for discipline; attorneys' fees.**

Section 7. (1) The commission shall schedule a hearing without undue delay after the appointment of the hearing officer by the supreme judicial court. The commission shall schedule the time and place of the hearing, and shall notify the judge and all counsel of the hearing. The judge shall be afforded ample opportunity to prepare for the hearing and may amend his written response to the charges.

(2) The judge and the commission shall each be entitled to discovery to the extent available in civil proceedings, within the time limits provided by commission rules. The judge and the commission shall each be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge, and to provide for the inspection of documents, books, accounts, and other records.

(3) The formal hearing shall be public and shall be conducted before the hearing officer appointed by the supreme judicial court. At the hearing, all testimony shall be under oath, the rules of evidence applicable to civil proceedings shall apply, and the judge shall be accorded due process of law.

(4) An attorney or attorneys of the commission staff, or special counsel retained for the purpose, shall present the matter to the hearing officer. The commission shall have the burden of proving the charges by clear and convincing evidence. The judge and the commission shall be permitted to present evidence and cross-examine witnesses, subject to the rules of evidence applicable to civil proceedings.

(5) The raising of mental or physical condition as a defense constitutes a waiver of medical privilege.

(6) By leave of the commission or with the consent of the judge, the statement of charges may be amended after commencement of the hearing only if the amendment is technical in nature and the judge and his counsel are given adequate time to prepare a response.

(7) Every hearing shall be transcribed.

(8) The hearing officer shall submit to the commission and to the judge a report containing proposed findings and recommendations, the transcripts of testimony and all exhibits. Counsel for the judge and commission shall have twenty days after receipt of such report to submit written objections to the findings and recommendations, and said objections shall become part of the record.

(9) Before the commission reaches its decision, the judge and the complainant, if any, shall have the right to be heard before the commission regarding its recommendation for discipline, and their statements shall be transcribed. Such hearing shall be public, but commission deliberations regarding such recommendation shall be conducted in executive session. The commission shall reach a decision on the basis of the full record within ninety days after such hearing, unless there is good cause for delay. Its conclusions may differ from those proposed by the hearing officer. Its decision shall state specific reasons for all conclusions and recommendations.

(10) A recommendation for discipline shall be reported to the supreme judicial court only if a majority of all members of the commission concur that discipline should be recommended. Any dissent as to the need for or the form of discipline shall be transmitted with the majority decision. A copy of said recommendation and dissent shall be given to the judge and shall become part of the public record. The entire record, including transcripts, exhibits and the hearing officer's report, shall be transmitted to the supreme judicial court.

(11) If a majority of the members of the commission concur that discipline should not be recommended, the matter shall be dismissed, and the judge and complainant, if any, shall be notified of such dismissal.

(12) The provisions of subdivisions (10) and (11) shall not be construed to prohibit the commission from disposing of the matter by informal adjustment pursuant to section eight as a result of commission deliberations regarding a recommendation for discipline.

(13) The expense of witnesses shall be borne by the party that calls them unless:

(a) 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; or

(b) the supreme judicial court determines that the imposition of costs and expert witness fees will work a financial hardship or injustice upon him and orders that those fees be reimbursed.

(14) All witnesses shall receive fees and expenses in the same manner as witnesses in civil actions before the courts. A transcript of all proceedings shall be provided to the judge without cost. Except as provided in subdivision (13), costs of all proceedings shall be at public expense.

(15) With the approval of the supreme judicial court, a judge shall be entitled to the payment of reasonable attorneys' fees by the commonwealth in any case where the matter is dismissed by the commission at any stage after the filing of a sworn complaint or statement of charges, where the supreme judicial court determines despite a commission recommendation for discipline that no sanction is justified, or where the supreme judicial court determines that justice will be served by the payment of such fees. (*Added by 1987, 656, Sec. 2.*)



**Section 8. Informal adjustment; sanctions.**

Section 8. (1) With the agreement of the judge, the commission may by informal adjustment dispose of a complaint at any stage of the proceedings by:

- (a) informing or admonishing the judge that his conduct is or may be cause for discipline;
- (b) directing professional counseling and assistance for the judge;
- (c) imposing conditions on the judge's conduct; or
- (d) persuading a judge to retire voluntarily.

(2) The commission may dismiss a sworn complaint, a statement of allegations or a formal statement of charges as unjustified or unfounded at any stage during the proceedings.

(3) The commission may issue a private reprimand with the consent of the judge.

(4) The commission may recommend to the supreme judicial court one or more of the following sanctions:

- (a) removal;
- (b) retirement;
- (c) imposition of discipline as an attorney;
- (d) imposition of limitations or conditions on the performance of judicial duties;
- (e) public or private reprimand or censure;
- (f) imposition of a fine;
- (g) assessment of costs and expenses;
- (h) imposition of any other sanction which is reasonable and lawful. (*Added by 1987, 656, Sec. 2.*)

## **RULE 3:09. CODE OF JUDICIAL CONDUCT**

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### **Preamble**

[1] An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of persons of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and must strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety\* and the appearance of impropriety\* in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence,\* impartiality,\* integrity,\* and competence.

[3] The Code of Judicial Conduct establishes standards for the ethical conduct of judges. It is not intended as an exhaustive guide for the conduct of judges, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and to assist judges to maintain the highest standards of judicial and personal conduct, and to provide a basis for regulation of their conduct through disciplinary authorities.

Adopted October 8, 2015, effective January 1, 2016.

### **Scope**

[1] The Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They include explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment includes the term "must," it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5] The Rules of the Code of Judicial Conduct are rules of reason that should be applied consistently with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence\* of judges in making judicial decisions.

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Some conduct that literally may violate a Rule may not violate the policy behind the prohibition, or the violation may be de minimis. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7] The Code is not designed or intended to be a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

Adopted October 8, 2015, effective January 1, 2016.

## Terminology

Whenever any term listed below is used in the Code, it is followed by an asterisk (\*).

"Close personal friend" means a friend whose relationship to the judge is such that the friend's appearance or interest in a proceeding pending\* or impending\* before the judge would require disqualification of the judge. See Rule 3.13.

"Court personnel" means court employees subject to the judge's direction and control. See Rules 2.3, 2.5, 2.8, 2.9, 2.10, 2.11, 2.12, 2.13, and 3.5.

"Domestic partner" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 2.13, and 3.13.

"Economic interest" means ownership of more than a de minimis legal or equitable interest. Unless the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner,\* parent, or child serves as a director, an officer, an advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in government securities held by the judge.

See Rules 1.3, 2.11, and 3.2.

"Fiduciary" includes relationships such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative. See Rules 2.11, 3.2, and 3.8.

"Fundraising event" means an event for which the organizers' chief objectives include raising money to support the organization's activities beyond the event itself. See Rule 3.7.

"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties or their representatives, as well as maintenance of an open mind in considering issues that may come before a judge. See Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.4, 3.6, 3.7, 3.12, 3.13, 3.14, and 4.1.

"Impending matter" is a matter that is imminent or expected to occur in the near future. A matter is impending if it seems probable that a case will be filed, if charges are being investigated, or if someone has been arrested although not yet charged. See Rules 2.9, 2.10, 3.2, and 3.13.

"Impropriety" means conduct that violates the law,\* including provisions of this Code, conduct that constitutes grounds for discipline under G. L. c. 211C, § 2(5), and conduct that undermines a judge's independence,\* integrity,\* or impartiality.\* See Rules 1.2, 2.10, and 3.13.

"Independence" means a judge's freedom from influences or controls other than those established by law.\* See Rules 1.2, 2.7, 2.10, 3.1, 3.2, 3.4, 3.7, 3.12, and 3.13.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Rules 1.2, 2.7, 2.10, 2.15, 3.1, 3.2, 3.4, 3.7, 3.12, and 3.13.

"Judicial applicant" means any person who has submitted an application for appointment as a judge in any court of the Commonwealth. See Rule 2.11.

"Judicial nominee" means any person who has been nominated by the Governor to judicial office but who has not assumed judicial office. See Rule 2.11.

"Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 1.3, 2.5, 2.9, 2.11, 2.15, 2.16, 3.3, 3.5, and 3.6.

"Law" includes court rules and standing orders issued by the Supreme Judicial Court, the Appeals Court, the Chief Justice of the Trial Court, or a Chief Justice of a Trial Court Department, as well as statutes, constitutional provisions, and decisional law. Chapter 268A §§ 3 and 23(b)(2) provide that conduct explicitly recognized by another statute or regulation may supersede certain provisions of Chapter 268A. The Rules of the Supreme Judicial Court are considered regulations for this purpose. In several instances, provisions of this Code supersede provisions of Chapter 268A. See Rule 1.1.

"Member of the judge's family" means any of the following persons: a spouse or domestic partner\*; a child, grandchild, parent, grandparent, or sibling, whether by blood, adoption, or marriage; or another relative or person with whom the judge maintains a close family-like relationship. Residence in the household of a judge may be relevant but is not dispositive when determining whether a judge maintains a close family-like relationship with another relative or person. See Rules 3.7, 3.8, 3.10, and 4.1.

"Member of the judge's family residing in the judge's household" means any of the following persons who resides in the judge's household: a relative by blood, adoption, or marriage; a domestic partner\*; or a person with whom the judge maintains a close family-like relationship. See Rules 2.11 and 3.13.



"Nonpublic information" means information that is not available to the public. Nonpublic information includes information that is sealed or expunged by statute or court order, or information that is impounded or communicated in camera. See Rule 3.5.

"Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.2, and 3.13.

"Political organization" means a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office or the passage or defeat of ballot questions. See Rule 4.1.

"Specialty court" means a specifically designated court session that focuses on individuals with underlying medical, mental health, substance abuse, or other issues that contribute to the reasons such individuals are before the courts. Specialty court sessions integrate treatment and services with judicial case oversight and intensive court supervision. Examples include drug courts, mental health courts, veterans' courts, and tenancy preservation programs. See Rule 2.9.

"Substantial value" means a dollar value determined by the State Ethics Commission in 930 C.M.R. 5.05. See Rules 3.13 and 3.15.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

Adopted October 8, 2015, effective January 1, 2016.

## Application

The Application section establishes when the various Rules apply to a judge.

### I. APPLICABILITY OF THIS CODE

(A) Active Judges: The provisions of the Code apply to all judges of the Trial Court, the Appeals Court, and the Supreme Judicial Court until resignation, removal, or retirement, except as provided in Paragraph (B) below.

(B) Retired Judges: A judge whose name has been placed upon the list of retired judges eligible to perform judicial duties, pursuant to G. L. c. 32, §§ 65E-65G, shall comply with all provisions of this Code during the term of such eligibility.

### II. TIME FOR COMPLIANCE

A person to whom this Code becomes applicable shall comply immediately with all its provisions except Rules 3.8 and 3.11(B), and shall comply with those sections as soon as reasonably possible and in any event within one year.

Adopted October 8, 2015, effective January 1, 2016.

## COMMENT

[1] A judge who has retired or resigned from judicial office shall not, for a period of six months following the date of retirement, resignation, or most recent service as a retired judge pursuant 32, §§ 65E-65G, perform dispute resolution services with a court-connected program except on a pro bono publico basis, or enter an appearance, or accept an appointment to represent any party, in any court of the Commonwealth.

[2] Judges should be aware that their conduct prior to assuming judicial office may have consequences under the law.\* See, e.g., G. L. c. 211C, § 2(2), Rule 2.11(A)(4).

[3] This Code does not apply to judicial applicants\* and judicial nominees.\* Historically, by Executive Order, the Governor of the Commonwealth has created a code of conduct for judicial applicants\* and judicial nominees.\*

[4] An active judge who becomes an applicant or candidate for a different judicial office, state or federal, must comply with the requirements of any appointing authority in addition to this Code.

**CANON 1. A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE,\* INTEGRITY,\* AND IMPARTIALITY\* OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY\* AND THE APPEARANCE OF IMPROPRIETY\***

## Rule 1.1. Compliance With the Law

A judge shall comply with the law,\* including the Code of Judicial Conduct.

Adopted October 8, 2015, effective January 1, 2016.

## COMMENT

[1] A judge's obligation to comply with the law\* ordinarily includes the obligation to comply with the State

conflict of interest law, G. L. c. 268A and c. 268B. However, the unique role of judges requires that judges on occasion follow rules that may be more or less restrictive than those followed by other public employees. In many instances, this Code imposes more stringent restrictions on judges' activities because of their obligation to act at all times in a manner that promotes public confidence in the judiciary. Thus, for example, the Code regulates aspects of a judge's personal conduct, including a judge's participation in extrajudicial activities unrelated to the law,\* and prohibits judges from political and Campaign activities open to many other public employees. See, e.g., Rules 3.7 and 4.1. However, in a few instances, this Code creates exemptions from particular restrictions imposed by G. L. c. 268A §§ 3 and 23(b)(2) so that judges may more fully participate in activities related to the law,\* the legal system, and the administration of justice. See, e.g., Rules 3.1(E) and 3.13(D)--(E).

#### Rule 1.2. Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,\* integrity,\* and impartiality\* of the judiciary, and shall avoid impropriety\* and the appearance of impropriety.\*

Adopted October 8, 2015, effective January 1, 2016.

##### COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.\* This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence,\* integrity,\* or impartiality\* of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] A judge is encouraged to participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Improprieties include violations of law\* or this Code, or other conduct for which the judge could be disciplined pursuant to G. L. c. 211C, § 2(5). The test for appearance of impropriety\* is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality,\* temperament, or fitness to serve as a judge.

[6] A judge is encouraged to initiate and participate in appropriate community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code. See, e.g., Rules 3.1 and 3.7.

#### Rule 1.3. Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests\* of the judge or others, or allow others to do so. Adopted October 8, 2015, effective January 1, 2016.

##### COMMENT

[1] It is improper for a judge to use or attempt to use the judge's position to gain personal advantage or preferential treatment of any kind. For example, a judge must not refer to the judge's judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting personal business.

[2] A judge may provide an educational or employment reference or recommendation for an individual based on the judge's personal knowledge.\* The judge may use official letterhead and sign the recommendation using the judicial title if the judge's knowledge\* of the applicant's qualifications arises from observations made in the judge's judicial capacity. The recommendation may not be accompanied by conduct that reasonably would be perceived as an attempt to exert pressure on the recipient to hire or admit the applicant. Where a judge's knowledge\* of the applicant's qualifications does not arise from observations made in the judge's judicial capacity, the judge may not use official letterhead, court email, or the judicial title, but the judge may send a private letter stating the judge's personal recommendation. The judge may refer to the judge's current position and title in the body of the private letter only if it is relevant to some substantive aspect of the recommendation.

Court hiring policies may impose additional restrictions on recommendations for employment in the judicial branch, and the law\* may impose additional restrictions on recommendations for employment in state government. See, e.g., G. L. c. 66, § 3A; G. L. c. 276, § 83; G. L. c. 211B, § 10(D). See also Trial Court Personnel Policies and Procedures Manual § 4.000, et seq. See Rule 3.3 for instances when a judge is asked to provide a character reference on behalf of a bar applicant or provide information for a background investigation in connection with an application for public employment or for security clearance.

[3] Judges may participate in the process of judicial selection by cooperating with screening, nominating, appointing, and confirming authorities. Judges may make recommendations to and respond to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office. Judges also may testify at confirmation hearings.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law.\* A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law.\* In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

## CANON 2. A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY,\* COMPETENTLY, AND DILIGENTLY

### Rule 2.1. Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law,\* shall take precedence over all of a judge's personal and extrajudicial activities.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law,\* judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system. See Rule 3.7.

[3] With respect to time devoted to personal and extrajudicial activities, this Rule must be construed in a reasonable manner. Family obligations, illnesses, and emergencies may require a judge's immediate attention. Attending to those obligations and situations is not prohibited by this Rule.

### Rule 2.2. Impartiality and Fairness

A judge shall uphold and apply the law,\* and shall perform all duties of judicial office fairly and impartially.\*

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] To ensure impartiality\* and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law\* without regard to whether the judge approves or disapproves of the law\* in question.

[3] When applying and interpreting the law,\* a judge sometimes may make good-faith errors of fact or law.\* Errors of this kind do not violate this Rule. In the absence of fraud, corrupt motive, or clear indication that the judge's conduct was in bad faith or otherwise violates this Code, it is not a violation for a judge to make findings of fact, reach legal conclusions, or apply the law as the judge understands it.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants are provided the opportunity to have their matters fairly heard. See Rule 2.6(A).

### Rule 2.3. Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias, prejudice, or harassment.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment, including bias, prejudice, or harassment based upon a person's status or condition. A judge also shall not permit court personnel\* or others subject to the judge's direction and control to engage in such prohibited behavior.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice or engaging in harassment against parties, witnesses, lawyers, or others, including bias, prejudice, or harassment based upon a person's status or condition.

(D) This rule does not preclude judges or lawyers from making legitimate reference to a person's status or condition when it is relevant to an issue in a proceeding.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] A judge who manifests bias or prejudice or engages in harassment in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. A judge must avoid words or conduct that may reasonably be perceived as manifesting bias or prejudice or engaging in harassment.

[2] As used in this Rule, examples of status or condition include but are not limited to race, color, sex, gender identity or expression, religion, nationality, national origin, ethnicity, Citizenship or immigration status, ancestry, disease or disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[3] As used in this Rule, examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; improper suggestions of connections between status or condition and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey an appearance of bias or prejudice to parties and lawyers in the proceeding, jurors, the media, and others.

[4] As used in this Rule, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as those listed in Comment [2].

[5] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

#### Rule 2.4. External Influences on Judicial Conduct

(A) A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] An independent judiciary requires that judges decide cases according to the law\* and facts, without regard to whether particular laws\* or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences.

#### Rule 2.5. Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently, diligently, and in a timely manner.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge,\* skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary resources to discharge all adjudicative and administrative responsibilities.

[3] Timely disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under advisement, and to take reasonable measures to ensure that court personnel,\* litigants, and lawyers cooperate with the judge to that end.

[4] In disposing of matters efficiently and in a timely manner, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

#### Rule 2.6. Ensuring the Right to be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.\* A judge may make reasonable efforts, consistent with the law,\* to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

(B) A judge may encourage parties and their lawyers to resolve matters in dispute and, in accordance with applicable law,\* may participate in settlement discussions in civil proceedings and plea discussions in criminal proceedings, but shall not act in a manner that coerces any party into settlement or resolution of a proceeding.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] The right to be heard is an essential component of a fair and impartial\* system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. In the interest of ensuring fairness and access to justice, judges may make reasonable accommodations that help self-represented litigants to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law.\* The judge should be careful that accommodations do not give self-represented litigants an unfair advantage or create an appearance of judicial partiality. In some circumstances, particular accommodations for self-represented litigants are required by decisional or other law.\* In other circumstances, potential accommodations are within the judge's discretion. By way of illustration, a judge may: (1) construe pleadings liberally; (2) provide brief information about the proceeding and evidentiary and foundational requirements; (3) ask neutral questions to elicit or clarify information; (4) modify the manner or order of taking evidence or hearing argument; (5) attempt to make legal concepts understandable; (6) explain the basis for a ruling; and (7) make referrals as appropriate to any resources available to assist the litigants. For civil cases involving self-represented litigants, the Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (April 2006) provides useful guidance to judges seeking to exercise their discretion appropriately so as to ensure the right to be heard.

[2] A judge may encourage parties and their lawyers to resolve matters in dispute. A judge's participation in settlement discussions in civil proceedings and plea discussions in criminal proceedings must be conducted in accordance with applicable law.\* Judicial participation may play an important role, but the judge should be careful that the judge's efforts do not undermine any party's right to be heard according to law.\* The judge should keep in mind the effect that the judge's participation may have not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if these efforts are unsuccessful and the case remains with the judge. Other factors that a judge should consider when deciding upon an appropriate practice for a case include: (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge; (2) whether the parties and their counsel are relatively sophisticated in legal matters; (3) whether the case will be tried by the judge or a jury; (4) whether the parties participate with their counsel in the discussions; (5) whether any parties are self-represented; (6) whether the matter is civil or criminal; and (7) whether there is a history of physical or emotional violence or abuse between the parties. See Rule 2.9(A)(4).

[3] Judges must be mindful of the effect settlement or plea discussions can have not only on their objectivity and impartiality,\* but also on the appearance of their objectivity and impartiality.\* Despite a judge's best efforts, there may be instances when information obtained during such discussions could influence a judge's decision-making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11.

#### Rule 2.7. Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.\*

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence,\* integrity,\* and impartiality\* of the judiciary, judges must be available to decide matters that come before the court. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

#### Rule 2.8. Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court personnel,\* and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court personnel,\* and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] The duty to conduct all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict, other than in a court order or opinion, may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial\* in a subsequent case. Such commendations or criticisms of verdicts could also be perceived as calling into question the judge's ability to rule impartially\* on any post-trial motions, or on remand, in the same case.

[3] A judge who is not otherwise prohibited by law\* from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

#### Rule 2.9. Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending\* or impending matter,\* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may engage in ex parte communications in specialty courts,\* as authorized by law.\*

(3) A judge may consult with court personnel\* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, subject to the following:

(a) a judge shall take all reasonable steps to avoid receiving from court personnel\* or other judges factual information concerning a case that is not part of the case record. If court personnel\* or another judge nevertheless brings information about a matter that is outside of the record to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and an opportunity to respond. Consultation is permitted between a judge, clerk-magistrate, or other appropriate court personnel\* and a judge taking over the same case or session in which the case is pending with regard to information learned from prior proceedings in the case that may assist in maintaining continuity in handling the case;

(b) when a judge consults with a probation officer, housing specialist, or comparable court employee about a pending\* or impending\* matter, the consultation shall take place in the presence of the parties who have availed themselves of the opportunity to appear and respond, except as provided in Rule 2.9(A)(2);

(c) a judge shall not consult with an appellate judge, or a judge in a different Trial Court Department, about a matter that the judge being consulted might review on appeal; and

(d) no judge shall consult with another judge about a pending matter\* before one of them when the judge initiating the consultation knows\* the other judge has a financial, personal or other interest that would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows\* he or she has such an interest.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle civil matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when authorized by law\* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication.

(C) A judge shall consider only the evidence presented and any adjudicative facts that may properly be judicially noticed, and shall not undertake any independent investigation of the facts in a matter.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court personnel.\*

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[1A] "Ex parte communication" means a communication pertaining to a proceeding that occurs without notice to or participation by all other parties or their representatives between a judge (or court personnel\* acting on behalf of a judge) and (i) a party or a party's lawyer, or (ii) another person who is not a participant in the proceeding.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is self-represented, the party, who is to be present or to whom notice is to be given, unless otherwise required by law.\* For example, court rules with respect to Limited Assistance Representation may require that notice be given to both the party and the party's limited assistance attorney.

[3] The proscription against ex parte communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] Paragraph (A)(2) permits a judge to engage in ex parte communications in conformance with law,\* including court rules and standing orders, governing operation of specialty courts.\*

[4A] Ex parte communications with probation officers, housing specialists, or other comparable court employees are permitted in specialty courts\* where authorized by law.\* See Paragraph (A)(2) and Comment [4]. Where ex parte communications are not permitted, a judge may consult with these employees ex parte about the specifics of various available programs so long as there is no discussion about the suitability of the program for a particular party.

[5] A judge may consult with other judges, subject to the limitations set forth by this Rule. This is so whether or not the judges serve on the same court. A judge must avoid ex parte communications about a matter with a judge who has previously been disqualified from hearing the matter or with an appellate judge who might be called upon to review that matter on appeal. The same holds true with respect to those instances in which a judge in one department of the trial court may be called upon to review a case decided by a judge in a different department; for example, a judge in the Superior Court may be required to review a bail determination made by a judge in the District Court. The appellate divisions of the Boston Municipal Court and of the District Court present a special situation. The judges who sit as members of these appellate divisions review on appeal cases decided by judges who serve in the same court department. However, the designation of judges to sit on the appellate divisions changes quite frequently; every judge on the Boston Municipal Court will, and every judge on the District Court may, serve for some time as a member of that court's appellate division. Judges in the same court department are not barred from consulting with each other about a case, despite the possibility that one of the judges may later review the case on appeal. However, when a judge is serving on an appellate division, the judge must not review any case that the judge has previously discussed with till judge who decided it; disqualification is required. Consults tion between or among judges, if otherwise permitted, appropriate only if the judge before whom the matter L pending\* does not abrogate the responsibility personally t decide it.

[6] The prohibition in Paragraph (C) against a judge inde pendentlly investigating adjudicative facts applies equally t( information available in all media, including electronic media

[7] A judge may consult the Committee on Judicial Ethics the State Ethics Commission, outside counsel, or legal ex perts concerning the judge's compliance with this Code

#### Rule 2.10. Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any statement that might reasonably be expected to affect the outcome of impair the fairness of a matter pending\* or impending\* in any Massachusetts court.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before any Massachusetts court, make pledges, promises, or commitments that are inconsistent with the impartial\* performance of the duties of judicial office.

(C) A judge shall require court personnel\* to refrain from making statements that the judge would be prohibited from making by Paragraphs (A) and (B).

(D) Subject to the restrictions in Paragraphs (A) and (B), a judge may make statements that explain the procedures of the court, general legal principles, or what may be learned from the public record in a case. A judge may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the restrictions in Paragraphs (A) and (B), a judge may respond directly or through a third party to public criticisms of the judge's behavior, but shall not respond to public criticisms of the substance of the judge's rulings other than by statements consistent with Paragraph (D).

(F) Subject to the restrictions in Paragraphs (A) and (B), a judge may speak, write, or teach about issues in pending\* or impending\* matters, but not matters pending\* or impending\* before that judge, when such comments are made in legal education programs and materials, scholarly presentations and related materials, or learned treatises, academic journals, and bar publications.

Adopted October 8, 2015, effective January 1, 2016.

## COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence,\* integrity,\* and impartiality\* of the judiciary.

[2] Paragraph (A) does not apply to any oral or written statement or decision by a judge in the course of adjudicative duties. A judge is encouraged to explain on the record at the time decisions are made the basis for those decisions or rulings, including decisions concerning bail and sentencing. By helping litigants to understand the basis for decisions in cases, the judge also promotes public understanding of judicial proceedings.

[3] "[A]ny Massachusetts court" for purposes of this Rule means any state or federal court within the Commonwealth of Massachusetts.

[4] The requirement that a judge abstain from statements regarding a pending\* or impending\* matter continues throughout the appellate process and until final disposition.

[5] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. However, even in such instances, a judge must act in a manner that promotes public confidence in the independence,\* integrity,\* and impartiality\* of the judiciary, and shall avoid impropriety\* and the appearance of impropriety.\*

[6] Paragraph (D) permits the dissemination of public information to educate and inform the public, while assuring the public that cases are tried only in the judicial forum devoted to that purpose. A judge may explain to the media or general public the procedures of the court and general legal principles such as the procedures and standards governing a "dangerousness hearing" under G. L. c. 276, § 58A, or restraining orders under G. L. c. 209A. A judge may also explain to the media or the general public what may be learned from the public record in a particular case. For example, a judge may respond to questions from a reporter about a judicial action that was taken and may correct an incorrect media report by referring to matters that may be learned from pleadings, documentary evidence, and proceedings held in open court. Paragraph (D) permits similar responsive comments or explanations by a judge acting in accordance with the judge's administrative duties.

[7] As used in Paragraph (E), "behavior" does not include the substance of a judge's rulings. For example, a judge may respond to criticism that the judge is disrespectful to litigants, but may not respond to criticism that the judge made an incorrect ruling other than by statements allowed by Paragraph (D).

[8] The authorizations to comment in this Rule are permissive, not suggestive. A judge is not required to respond to statements in the media or elsewhere. Depending on the circumstances, the judge should consider the timing of any response and whether it may be preferable for a third party, rather than the judge, to respond.

[9] When speaking, writing, or teaching about issues in cases or matters, a judge must take care that the judge's comments do not impair public confidence in the independence,\* integrity,\* or impartiality\* of the judiciary.

[10] When a judge orally renders a decision and intends to explain the judge's reasons in a written memorandum, the judge should simultaneously inform the parties that an explanatory memorandum will be forthcoming. When a judge has not indicated at the time the judge issues the underlying order that a written explanatory comment will be forthcoming and such a memorandum has not been requested by a party or by an appellate single justice or court, a judge has the discretion to issue an explanatory memorandum. The exercise of that discretion should be informed by the following guidance:

(i) A judge should weigh, at a minimum, the following factors: the importance of avoiding or alleviating the parties' or the public's misunderstanding or confusion by supplementing the record to reflect in more detail the reasons in support of the judge's earlier decision;

- o the amount of time that has elapsed since the order was issued and the extent to which the judge's reasons for the decision remain fresh in the judge's mind;
- o the risk that an explanatory memorandum may unfairly affect the rights of a party or appellate review of the underlying order; and
- o the danger that the issuance of an explanatory memorandum would suggest that judicial decisions are influenced by public opinion or criticism voiced by third parties, and would not promote confidence in the courts and in the independence,\* integrity,\* and impartiality\* of judges.

(ii) An explanatory memorandum is appropriate only if issued within a reasonable time of the underlying order and if the judge clearly recalls the judge's reasons for the decision. An explanatory memorandum should not rely on any information that was not in the record before the judge at the time of the underlying order.

(iii) A judge may not issue an explanatory memorandum if the court no longer has authority to alter or amend the underlying order. For example, a judge may not issue an explanatory memorandum when:

- o the underlying order is the subject of an interlocutory appeal, report, or other appellate proceeding that has already been docketed in the appellate court, unless such a memorandum has been requested by an appellate single justice or court;
- o the case has been finally adjudicated in the trial court, no timely-filed post-judgment motions are



pending,\* and the time within which the court may modify its orders and judgments on its own initiative has passed;  
or

o an appeal has been taken from a final order or judgment, and the appeal has been docketed in the appellate court.

#### Rule 2.11. Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge cannot be impartial\* or the judge's impartiality\* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge\* of facts that are in dispute in the proceeding.

(2) The judge knows\* that the judge, the judge's spouse or domestic partner,\* or a person within the third degree of relationship\* to either of them, or the spouse or domestic partner\* of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis financial or other interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows\* that he or she, individually or as a fiduciary,\* or the judge's spouse, domestic partner,\* parent, or child, or any other member of the judge's family residing in the judge's household,\* has an economic interest\* in the subject matter in controversy or is a party to the proceeding.

(4) The judge, while a judge or a judicial applicant\* or judicial nominee,\* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary\* economic interests,\* and make a reasonable effort to keep informed about the personal economic interests\* of the judge's spouse or domestic partner\* and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under Paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of and without participation by the judge and court personnel,\* whether to waive disqualification. If, following a consultation that is free from coercion, express or implied, the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] A judge is disqualified from any matter if the judge cannot satisfy both a subjective and an objective standard. The subjective standard requires disqualification if the judge concludes that he or she cannot be impartial.\* The objective standard requires disqualification whenever the judge's impartiality\* might reasonably be questioned by a fully-informed disinterested observer, regardless of whether any of the specific provisions of Paragraphs (A)(1) through (5) apply. By way of example, a judge must disqualify himself or herself from any proceeding in which the judge is a client of a party's lawyer or the lawyer's firm. Whether a judge must continue to disqualify himself or herself after this attorney-client relationship has concluded should be determined by considering all relevant factors, including the terms on which the lawyer provided representation, the length of time since the representation concluded, the nature and subject matter of the representation, and the extent of the attorney-client relationship, including the length of the relationship and the frequency of contacts between the judge and the lawyer. A judge must also bear in mind that social relationships may contribute to a reasonable belief that the judge cannot be impartial.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, under the circumstances, the judge's impartiality\* might reasonably be questioned under Paragraph (A), then the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] The filing of a judicial discipline complaint during the pendency of a matter does not necessarily require disqualification of the judge presiding over the matter. The judge's decision to disqualify in such circumstances must be resolved on a case-by-case basis.

#### Rule 2.12. Supervisory Duties

(A) A judge shall require court personnel\* and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] A judge may not direct court personnel\* to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that those under the judge's supervision administer their workloads promptly.

#### Rule 2.13. Administrative Appointments

(A) In making administrative appointments, a judge shall:

- (1) exercise the power of appointment impartially\* and on the basis of merit; and
- (2) avoid nepotism, favoritism, and unnecessary appointments.

(B) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] Appointees of a judge may include assigned counsel, guardians ad litem, special masters, receivers, and any court personnel\* subject to appointment by a judge. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this Rule. Compliance with court rules pertaining to fee-generating appointments satisfies the judge's obligations under Paragraph (A). See SJC Rule 1:07.

[2] Unless otherwise defined by law,\* nepotism is the appointment or hiring of any relative within the third degree of relationship\* of either the judge or the judge's spouse or domestic partner,\* or the spouse or domestic partner\* of such relative. See also Trial Court Personnel Policies and Procedures Manual, § 4.304.

#### Rule 2.14. Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] Taking appropriate action to address disability or impairment pursuant to this Rule is part of a judge's judicial duties. This Rule requires a judge to take appropriate action even if the disability or impairment has not

manifested itself in a violation of the Rules of Professional Conduct or the Code of Judicial Conduct. See Rule 2.15, which requires a judge to take action to address violations of the Rules of Professional Conduct or the Code of Judicial Conduct.

[2] Appropriate action means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program. If the lawyer is appearing before the judge, a judge may defer taking action until the matter has been concluded, but must do so as soon as practicable thereafter. However, immediate action is compelled when a lawyer is unable to provide competent representation to the lawyer's client.

[3] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action. See Rule 2.15.

#### Rule 2.15. Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge\* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, integrity,\* trustworthiness, or fitness as a judge in other respects shall inform the Chief Justice of the Supreme Judicial Court, the Chief Justice of the court on which the judge sits, and if the judge is a Trial Court judge, the Chief Justice of the Trial Court.

(B) A judge having knowledge\* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, integrity,\* trustworthiness, or fitness as a lawyer in other respects shall inform the Office of Bar Counsel.

(C) A judge having knowledge\* of or receiving credible information indicating a substantial likelihood that another judge has otherwise violated this Code shall take appropriate action.

(D) A judge having knowledge\* of or receiving credible information indicating a substantial likelihood that a lawyer has otherwise violated the Rules of Professional Conduct shall take appropriate action.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] Taking action to address known\* misconduct is part of a judge's duties. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate authority the known\* misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, integrity,\* trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known\* misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent. If the lawyer is appearing before the judge, a judge may defer making a report until the matter has been concluded, but the report should be made as soon as practicable thereafter. However, an immediate report is compelled when a person will likely be injured by a delay in reporting, such as where the judge has knowledge\* that a lawyer has embezzled client or fiduciary\* funds and delay may impair the ability to recover the funds.

[2] A judge who has knowledge\* or receives credible information indicating a substantial likelihood that a judge has otherwise violated this Code, or that a lawyer has otherwise violated the Rules of Professional Conduct, is required to take appropriate action under Paragraph (C) or (D). Appropriate action pursuant to Paragraph (C) may include communicating directly with the judge, reporting to the first justice or regional administrative justice of the court where the violation occurred or where that judge often sits, reporting to the Chief Justice of that judge's court, and/or calling the judicial hotline maintained by Lawyers Concerned for Lawyers. Appropriate action pursuant to Paragraph (D) may include communicating directly with the lawyer, reporting to the lawyer's supervisor or employer, and/or reporting to the Office of Bar Counsel. These lists of actions are illustrative and not meant to be limiting. If the lawyer is appearing before the judge, a judge may defer taking action until the matter has been concluded, but action should be taken as soon as practicable thereafter. Reporting a violation is especially important where the victim is unlikely to discover the offense, and an immediate report is compelled when a person will likely be injured by a delay in reporting.

#### Rule 2.16. Cooperation With Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary authorities.

(B) A judge shall not retaliate, directly or indirectly, against a person known\* or suspected to have assisted or

cooperated with an investigation of a judge or a lawyer.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline authorities, as required in Paragraph (A), instills confidence in judges' commitment to the integrity\* of the judicial system and the protection of the public.

### CANON 3. A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

#### Rule 3.1. Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law\* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that are reasonably likely to interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that are reasonably likely to lead to recurrent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality\*;

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for use that is reasonable in scope, not prohibited by law,\* and incidental to activities that concern the law,\* the legal system, or the administration of justice.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] To the extent that time permits, and judicial independence\* and impartiality\* are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law,\* the legal system, and the administration of justice. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.\* Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system. See Rule 3.7.

[2] This Rule emphasizes that when engaging in any extrajudicial activity, a judge must consider the obligations of judicial office and avoid any activities that are reasonably likely to interfere with those obligations.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's independence,\* integrity,\* or impartiality.\* Examples include jokes or other remarks that demean individuals based upon their race, color, sex, gender identity or expression, religion, nationality, national origin, ethnicity, citizenship or immigration status, ancestry, disease or disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, a judge's urging a lawyer who appears in the judge's court to assist on a time-consuming extrajudicial project would create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

[5] Paragraph (E) recognizes that reasonable use of public resources to support a judge's law-related activities advances the legitimate interests of the public and the court system.

#### Rule 3.2. Appearances Before Governmental Bodies and Consultation With Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law,\* the legal system, or the administration of justice; or

(B) when the judge is acting pro se in a matter involving the judge's legal or economic interests,\* or when the judge is acting in a fiduciary\* capacity pursuant to Rule 3.8.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] Judges possess special expertise in matters of law,\* the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials by, for example, proposing new legislation, commenting on new legislation proposed by others, or proposing or commenting on amendments to existing law.\* The types of topics that a judge may address include but are not limited to court facilities, funding, staffing, resources, and security; terms of employment, compensation, and other benefits of judges and court personnel\*; personal safety of judges and court personnel\*; court jurisdiction and procedures; the work of specialty courts\*; the admissibility or inadmissibility of evidence; judicial discretion in sentencing; funding for the legal representation of indigents; access to justice; and similar matters.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, which prohibits judges from abusing the prestige of office to advance their own or others' interests; Rule 2.10, which governs public comment on pending\* and impending matters\*; and Rule 3.1(C), which prohibits judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\*

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid abusing the prestige of judicial office.

#### Rule 3.3. Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] A judge who, without being subpoenaed, testifies as a character witness lends the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

[2] This Rule does not preclude a judge from voluntarily testifying or otherwise vouching for the qualifications, including the character, of an applicant or nominee for judicial or court-related office, as long as the judge's observations are based on the judge's personal knowledge.\* See Rule 1.3.

[3] This Rule does not preclude a judge from providing a character reference based on personal knowledge\* for an applicant to the bar of any state.

[4] This Rule does not preclude a judge from responding based on personal knowledge\* to an inquiry from any state or federal entity, or a contractor for such an entity, conducting a background investigation in connection with an application for public employment or for security clearance.

#### Rule 3.4. Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law,\* the legal system, or the administration of justice.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] This Rule implicitly acknowledges the value of judges accepting appointments to entities that concern the law,\* the legal system, or the administration of justice. However, a judge must assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment, see Rule 3.2, and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the importance of respecting the separation of powers, upholding the independence,\* integrity,\* and impartiality\* of the judiciary, and minimizing judicial disqualification. Furthermore, acceptance of extrajudicial appointments is subject to applicable restrictions relating to multiple office holding set forth in the Constitution of the Commonwealth. See Part 2, Chapter 6, Article II and Article VIII of the Amendments to the Constitution. A judge should regularly reexamine the propriety of continuing in the appointed position, as the composition and/or mission of any such committee, board, or commission may change.

[2] A judge may represent the United States, the Commonwealth of Massachusetts, or the judge's county, city or town on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

#### Rule 3.5. Use of Nonpublic Information

A judge shall not knowingly\* disclose or use nonpublic information\* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to the performance of judicial duties.

[2] This Rule is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of the judge's family,\* court personnel,\* or any other person if consistent with other provisions of this Code.

#### Rule 3.6. Affiliation With Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows\* or should be aware that the organization practices invidious discrimination. A judge's attendance at an event in a facility of such organization is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] A judge's public manifestation of approval of invidious discrimination diminishes public confidence in the integrity\* and impartiality\* of the judiciary. A judge's membership in an organization that practices invidious discrimination similarly diminishes public confidence in the integrity\* and impartiality\* of the judiciary.

[2] Whether an organization practices invidious discrimination is a complex question to which judges must be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members that do not stigmatize any excluded persons as inferior and therefore unworthy of membership. The purpose of this Rule is to prohibit judges from joining organizations practicing invidious discrimination, whether or not an organization's membership practices are constitutionally protected. When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[3] Whether an organization engages in invidious discrimination is a threshold issue but not the end of the judge's inquiry. Even an organization that does not engage in invidious discrimination may engage in practices such that a judge's membership in the organization might erode public confidence in the impartiality\* of the judiciary. Before holding membership in any organization, a judge must consider whether membership would appear to undermine the judge's impartiality\* in the eyes of a reasonable litigant. See Rules 3.1 and 3.7.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5] This Rule does not apply to national or state military service.

#### Rule 3.7. Participation in Legal, Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities of or sponsored by or on behalf of (i) legal, educational, religious, charitable, fraternal, or civic organizations, which are not conducted for profit, or (ii) governmental entities concerned with the law,\* the legal system, or the administration of justice. Permitted participation includes but is not limited to the following:

(1) A judge may serve as a member of the organization.

(2) A judge may plan and attend events and activities of the organization.

(3) A judge may participate in internal discussions related to fundraising. However, a judge shall not otherwise

participate in fundraising, and shall not manage or invest funds belonging to or raised by the organization unless the organization is composed entirely or predominantly of judges and exists to further the educational or professional interests of judges.

(4) A judge shall not solicit contributions or members for the organization, except that a judge may solicit contributions or members from members of the judge's family\* or from judges over whom the judge does not exercise supervisory or appellate authority.

(5) A judge may serve as an officer, director, trustee, or nonlegal advisor of the organization, unless it is likely that the organization:

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(6) A judge may serve as a keynote or featured speaker at, receive an award or other comparable recognition at, be featured on the program of, and permit the judge's title to be used in connection with the promotion of an organization's event that is not a fundraising event,\* but shall not do so at a fundraising event\* except as permitted in Paragraph (6A).

(6A) A judge may serve as a keynote or featured speaker at, receive an award or other comparable recognition at, be featured on the program of, and permit the judge's title to be used in connection with the promotion of a fundraising event\* only if the event is sponsored by an organization concerned with the law,\* the legal system, or the administration of justice, and that organization promotes the general interests of the judicial branch of government or the legal profession, including enhancing the diversity and professionalism of the bar.

(7) A judge may make recommendations to public or private fund-granting organizations or agencies for programs and projects, but only on behalf of organizations that are concerned with the law,\* the legal system, or the administration of justice.

(B) A judge may encourage lawyers to provide pro bono publico legal services.

(C) A judge may, as a parent or guardian, assist minor children in their fundraising activities if the procedures employed are not coercive and the sums solicited are modest.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] This Rule governs a judge's participation in a variety of activities sponsored by organizations not conducted for profit, whether public or private, and by governmental entities (collectively referred to as "organizations"). Paragraph (A) identifies the types of organizations covered by this Rule. Examples include bar associations, other not-for-profit private organizations, and court-created commissions. The first clause of Paragraph (A), "subject to the requirements of Rule 3.1," emphasizes that even with respect to activities that are explicitly permitted by Rule 3.7, a judge must always consider whether participation would violate Rule 3.1.

[1A] In considering whether participation in any extrajudicial activity would violate Rule 3.1, a judge should consider all relevant factors, including the membership and purposes of the organization, the nature of the judge's participation in or association with the organization or event, whether the organization or its members typically advocate on one side of issues before or likely to come before the court of which the judge is a member or any court subject to the appellate jurisdiction of the court of which the judge is a member, and the number, diversity, and identity of the financial supporters of the organization or sponsors of a particular event. Although activities permitted under this Rule must be of or sponsored by an organization not conducted for profit, this requirement does not preclude the judge from participating in events of an organization that receives sponsorship or financial support from for-profit entities. A judge must avoid giving the impression that the organization, its members, or an event's sponsors are in a special position to influence the judge, and, where appropriate, a judge must avoid giving the impression that the judge favors the organization's mission.

[1B] The Code explicitly encourages certain activities where the nature of a judge's participation will promote public understanding of and confidence in an independent\* judiciary, foster collegiality among the bar and communication and cooperation between the judiciary and the bar, enhance the judge's ability to perform judicial or administrative duties, or otherwise further the goals of the courts. See, e.g., Rule 1.2, Comments [4] and [6]. So, for example, judges are encouraged to speak about the administration of justice to not-for-profit groups, including business and community groups and bar associations. Such speaking engagements ordinarily will not raise an issue under Rule 3.1 even when an event or program is held in space provided by a law firm or is financially supported or sponsored by one or more for-profit entities, such as law firms or legal vendors, that do substantial business in the court on which the judge sits. If, however, fundraising is a chief objective of the event or program, Paragraph (A)(6A) governs whether a judge may be a keynote or featured speaker. Giving a presentation at an educational conference where the judge's involvement would help to further the goals of the court system is another example of

encouraged participation. Such participation would not ordinarily raise an issue under Rule 3.1 even when the conference is financially supported or sponsored by organizations or vendors that do business in the court on which the judge sits.

[2] The restrictions in Paragraph (A)(4) are necessary because, depending on the circumstances, a judge's solicitation of contributions or members for an organization might create the risk that the person solicited would feel obligated to respond favorably or would do so to curry favor with the judge. However, a judge may be identified by name and title as an organization's officer, director, trustee, non-legal advisor, or member on websites, emails, letterhead, and any other communication materials created and issued by others within the organization to solicit or accept donations or to enroll members so long as comparable designations are used for other persons.

[3] As used in Paragraphs (A)(6) and (A)(6A), a fundraising event\* is one for which the organizers' chief objectives include raising money to support the organization's activities beyond the event itself. Unless that is the case, an event is not a fundraising event,\* even if the revenues ultimately exceed the cost. A judge may attend a fundraising event\* but may not participate in additional activities except as permitted by Paragraph (A)(6A). However, a judge who attends a fundraising event\* is not in violation of this Rule merely because a laudatory reference to or about the judge, not announced in advance, is made at the event.

[4] Paragraph (A)(6A) permits a judge to participate in additional activities (e.g., being a featured speaker or receiving an award) at fundraising events\* of or sponsored by organizations concerned with the law,\* the legal system, or the administration of justice that serve the general interests of the judicial branch of government and the legal profession, including organizations that enhance the diversity and professionalism of the bar. The nature of such organizations makes it unlikely that a judge's involvement would reflect adversely upon that judge's independence,\* integrity,\* or impartiality.\* Organizations concerned with the general interests of the judicial branch of government and the legal profession include general purpose and affinity bar associations (e.g., county bar associations, bar associations composed exclusively or primarily of members of an ethnic group, bar associations specializing in particular practice areas but whose members take positions on both sides of disputed issues), organizations dedicated to enhancing the professionalism of the judicial branch (e.g., the National Center for State Courts), and organizations composed entirely or primarily of judges (e.g., the Massachusetts Judges Conference, the Flaschner Judicial Institute), but exclude organizations composed exclusively or primarily of lawyers who typically take one side of contested issues (e.g., plaintiffs' personal injury bar associations, insurance defense bar associations), organizations dedicated to influencing opinion on contested legal or constitutional issues, or organizations that represent one constituency (e.g., prosecutors, criminal defense counsel).

[5] In addition to the types of participation expressly contemplated by this Rule, a judge's permissible extrajudicial activities often involve teaching or writing on law-related subjects and, on occasion, non-law-related subjects. See Rule 1.3 for special considerations that arise when a judge writes or contributes to publications of a for-profit entity. Similar considerations also may arise if a judge teaches for a for-profit entity.

[6] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases as authorized by law,\* a judge may promote broader access to justice by encouraging lawyers to provide pro bono publico or reduced fee legal services, if in doing so the judge does not employ coercion or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

[7] Paragraph (C) is intended to allow a judge to participate in a child's normal, daily activities. Thus, for example, a judge may accompany the judge's child while the child sells Girl Scout cookies or collects UNICEF donations, or may work at a refreshment stand at a school-sponsored sports event intended to raise money to finance a class trip. On the other hand, this provision does not permit a judge to participate in fundraising activities for the primary or exclusive benefit of the judge's own child, such as raising funds so that the judge's child may participate in a school-sponsored trip. The word "assist" is intended to convey that a judge should not engage in direct solicitations on behalf of the child other than from members of the judge's family.\* A judge may not, for example, sell Girl Scout cookies in the workplace.

### Rule 3.8. Appointments to Fiduciary Positions

(A) A judge shall not accept appointment to serve in a fiduciary\* position, except for the estate, trust, or person of a member of the judge's family,\* and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary\* position if the judge as fiduciary\* will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary\* capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.



(D) If a person who is serving in a fiduciary\* position becomes a judge, he or she must comply with this Rule as soon as reasonably possible and in any event within one year.

Adopted October 8, 2015, effective January 1, 2016.

COMMENT

[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary.\* In such circumstances, a judge should resign as fiduciary\* as soon as reasonably possible and in any event within one year. For example, serving as a fiduciary\* might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest\* in shares of stock held by a trust if the amount of stock held is more than de minimis.

Rule 3.9. Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.\*

Adopted October 8, 2015, effective January 1, 2016.

COMMENT

[1] This Rule does not prohibit a judge from participating in mediation, conciliation, or settlement conferences performed as part of judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.\*

Rule 3.10. Practice of Law A judge shall not practice law,\* except that:

(A) A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,\* but is prohibited from serving as the family member's lawyer in any forum, and

(B) A judge may serve as a judge advocate general in the context of a judge's service in the United States Armed Forces, the reserve components of the United States Armed Forces, or the National Guard.

Adopted October 8, 2015, effective January 1, 2016.

COMMENT

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies.

[2] A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

[3] While performing legal services in the context of a judge's military service, the judge must confine that conduct to authorized activities.

Rule 3.11. Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.\*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.\*

(C) A judge shall not engage in financial activities permitted under Paragraphs (A) and (B) if they will:

- (1) interfere with the proper performance of judicial duties;
- (2) lead to frequent disqualification of the judge;
- (3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
- (4) result in violation of other provisions of this Code.

Adopted October 8, 2015, effective January 1, 2016.

COMMENT

[1] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

[2] Under this Rule, a judge must consider the difference between the permitted management of an investment

and the prohibited management of a business. For example, a judge who owns residential or commercial properties as investments may establish policy and participate in decisions regarding the purchase, sale, and use of land, but must leave the actual day-to-day management to others.

#### Rule 3.12. Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law\* unless such acceptance would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\*

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] A judge is permitted to accept wages, salaries, royalties, or other compensation for teaching, writing, and other extrajudicial activities, provided the compensation is commensurate with the task performed and the judge's qualifications to perform that task. A judge must ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. See Rule 1.3. In addition, the source, amount, and timing of the payment, alone or in combination, must not raise any question of undue influence or undermine the judge's ability to act independently,\* impartially,\* and with integrity.\* The judge should also be mindful that judicial duties must take precedence over other activities. See Rule 2.1.

[2] A teaching activity may include lecturing in educational programs sponsored by non-profit organizations and associations including but not limited to educational institutions, bar associations, professional associations, providers of continuing legal education, and governmental entities concerned with the law,\* the legal system, or the administration of justice. A judge is not permitted to accept an honorarium or fee for a speaking engagement other than a teaching activity, but may accept reimbursement of expenses. See Rule 3.14.

[3] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

#### Rule 3.13. Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value ("gifts" or "benefits") if acceptance is prohibited by law\* or would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\*

(B) Unless otherwise prohibited by Paragraph (A), a judge may accept the following gifts or benefits provided that they are not given for or because of the judge's official position or action, without publicly reporting them:

- (1) gifts or benefits not of substantial value\* as that term is defined by the State Ethics Commission, see 930 C.M.R. 5.05;
- (2) gifts or benefits from close personal friends\* or relatives whose appearance or interest in a matter pending\* or impending\* before the judge would in any event require disqualification of the judge under Rule 2.11;
- (3) ordinary social hospitality;
- (4) gifts or benefits given in connection with a judge's participation in the organizations described in Rule 3.7, so long as the same gifts, benefits, and opportunities are made available on the same terms to similarly situated persons who are not judges;
- (5) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
- (6) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
- (7) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria; and
- (8) gifts or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,\* or other family member of a judge residing in the judge's household,\* but that incidentally benefit the judge.

(C) Unless otherwise prohibited by Paragraph (A), a judge may accept any other gift or benefit provided that it is not given for or because of the judge's official position or action, but the judge must publicly report the gift or benefit in the manner required under Rule 3.15.

(D) Unless otherwise prohibited by Paragraph (A), a judge may accept the following gifts or benefits given for or because of the judge's official position or action, without publicly reporting them:

- (1) a gift, award, or other benefit incident to public recognition of the judge, provided the gift is not of substantial value\* as that term is defined by the State Ethics Commission, see 930 C.M.R. 5.05;

- (2) invitations to the judge to attend without charge a luncheon, dinner, reception, award ceremony, or similar event, held in Massachusetts, of a bar association or other non-profit organization concerned with the law, the legal system, or the administration of justice;
- (3) discounted or free membership to a bar association or other nonprofit organization concerned with the law,\* the legal system, or the administration of justice; and
- (4) books, magazines, journals, and other resource materials supplied by publishers on a complimentary basis for official use.

(E) Unless otherwise prohibited by Paragraph (A), a judge may accept the following gifts or benefits given for or because of the judge's official position or action, but the judge must publicly report the gift or benefit in the manner required under Rule 3.15:

- (1) a gift, award, or other benefit incident to public recognition of the judge, if the gift is of substantial value\* as that term is defined by the State Ethics Commission, see 930 C.M.R. 5.05; and
- (2) a complimentary invitation for a spouse or domestic partner,\* or other guests, to attend an event of a bar association or other non-profit organization concerned with the law, the legal system, or the administration of justice where a judge is being honored.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] This Rule addresses whether and in what circumstances a judge may accept gifts or other items of value ("gifts" or "benefits") without paying fair market value. Judges, like other public employees, are governed by the conflict of interest laws set forth in G. L. c. 268A and c. 268B and by associated regulatory exemptions that establish exclusions for certain situations that do not present a genuine risk of a conflict of interest or the appearance of a conflict of interest. This Code is largely consistent with c. 268A and regulations adopted by the State Ethics Commission. However, Rule 3.13 differs from those provisions in two important respects. First, because judges are always obligated to uphold and promote the independence,\* integrity,\* and impartiality\* of the judiciary, a judge may not accept any gift or benefit, even if available to other public employees and unrelated to the judge's official position or action, if acceptance would appear to a reasonable person to undermine the judge's independence,\* integrity,\* and impartiality.\* Second, this Rule carves out a few limited exceptions where a judge may accept a gift or benefit given for or because of the judge's official position or action even if such gift or benefit would ordinarily be prohibited by G. L. c. 268A, §§ 3 and 23(b)(2). See Rule 1.1. These exceptions are intended to allow judges to participate more fully in activities and organizations dedicated to the law, the legal system, and the administration of justice.

[2] Paragraph (A) recognizes that whenever a judge accepts a gift without paying fair market value, even one not given for or because of a judge's official position or action, there is a risk that the public may regard the gift as an attempt to influence the judge in the performance of judicial duties. Paragraph (A) therefore requires a judge to reject any gift if acceptance would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\* Paragraphs (B) and (C) address instances when a gift is not given for or because of a judge's official position or action. Paragraph (B) identifies limited circumstances in which a gift may be accepted and not disclosed, while Paragraph (C) allows for additional instances when a judge may accept but must publicly report a gift. Paragraphs (D) and (E) identify limited instances where, after making a threshold determination that acceptance of a gift or benefit would not appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality,\* a judge may accept a gift or benefit given for or because of the judge's official position or action. Paragraph (D) identifies instances when the judge may accept such a gift or benefit without public disclosure while Paragraph (E) identifies instances when public reporting is required to foster public confidence in the judiciary.

[3] A judge's acceptance of a gift from a lawyer or law firm who is appearing before the judge is an example of a gift prohibited by Paragraph (A), as such a gift would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\* A judge's acceptance of a gift or other thing of value from a party when the party's interests are before the judge raises the same concerns. The same concerns also are raised when the lawyer or law firm has appeared before, or the party's interests have come before, the judge in the reasonably recent past or are likely to come before the judge in the future.

[4] Paragraph (B)(1) provides that a judge may accept and not publicly report a gift or benefit not of substantial value\* if it is not prohibited by Paragraph (A) and is not given because of a judge's official position or action.

[5] Gift-giving between close personal friends\* and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety\* or cause a reasonable person to believe that the judge's independence,\* integrity,\* or impartiality\* has been compromised even when the close personal friend\* or relative is a lawyer. In

addition, because the appearance of close personal friends\* or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift or other thing of value to influence the judge's decision making; nor would a reasonable person believe that the gift was given due to the judge's official position. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances and does not require public reporting.

[6] "Ordinary social hospitality" consists of those social events and routine amenities, gifts, and courtesies which are normally attended by or exchanged between friends, colleagues, and acquaintances, and which would not create an appearance of impropriety\* to a reasonable, objective observer. The test is objective, not subjective. Paragraph (B)(3) permits that type of social event or gift which is so common among people in the judge's community that no reasonable person would believe that: (i) the host/giver was intending to or would obtain any advantage; or (ii) the guest/recipient would believe that the host/giver intended to obtain any advantage.

[7] Paragraph (B)(4) recognizes that a judge's participation in organizations and activities, such as those permitted under Rule 3.7, may lead to the judge's being offered a gift or benefit. A judge may accept such a gift or benefit so long as the same gift or benefit is made available on the same terms to similarly situated persons who are not judges. For example, a local professional performer may offer the members of a neighborhood chorus complimentary tickets of substantial value\* to attend a concert. A judge who sings in the chorus may accept a ticket because the gift is offered on the same terms to all of the members.

[8] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. Paragraphs (B)(5)-(B)(7) provide that a judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at a below-market interest rate unless the same rate was being made available to the general public for a certain period of time or to borrowers with specified qualifications that the judge also possesses.

[9] This Rule applies only to acceptance of gifts or benefits by a judge. Nonetheless, if a gift or benefit is given to the judge's spouse, domestic partner,\* or member of the judge's family residing in the judge's household,\* it may be viewed as an attempt to evade this Rule and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced and Paragraph (B)(8) does not require disclosure. A judge should remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

[10] Paragraph (C) allows a judge to accept any other gift of substantial value\* that is not given because of the judge's official position or action and is not prohibited by Paragraph (A), provided that the judge publicly reports the gift.

[11] In general, the receipt by a judge of free or discounted legal services carries a significant risk that such a gift would appear to a reasonable person to be given because of the judge's official position or action and to undermine the judge's independence,\* integrity,\* or impartiality.\* There are, however, certain circumstances when that risk is sufficiently abated that a judge may accept and not disclose a gift of free or discounted legal fees pursuant to Paragraphs (B)(2) or (B)(5) or may accept but must disclose the gift pursuant to Paragraph (C).

Paragraph (B)(2) permits a judge to accept and not disclose free or discounted legal services from a relative or close personal friend\* whose appearance in a matter would require the judge's disqualification if the lawyer is a sole practitioner or at a firm where all the lawyers are relatives or close personal friends\* of the judge (e.g., a firm composed of two siblings who are both close personal friends\* of the judge). Because a gift of legal services is always a gift from both the lawyer providing the services and that lawyer's firm, Paragraph (B)(2) does not apply if the lawyer providing the services is a sole practitioner but not a relative or close personal friend\* of the judge, or if that lawyer works at a firm where not all of the lawyers are relatives or close personal friends\* of the judge.

Paragraph (B)(5) permits a judge to accept and not disclose free or discounted legal services when a lawyer or law firm has offered special pricing or a discount as part of a commercial opportunity or marketing strategy to a group of similarly situated persons who are not judges. For example, a law firm may have different rate structures for individual and corporate clients. Another example is a law firm that offers a reduced rate for estate planning services to all persons over 65. Paragraph (B)(5) does not apply if the special pricing is offered as a professional courtesy only to judges.

Paragraph (C) provides for instances when a judge may accept but must disclose free or discounted legal services. A reasonable person would not believe the gift or benefit undermines the judge's independence,\* integrity,\* or impartiality\* when the same discount is extended to non-judges in comparable circumstances, and the lawyer, the lawyer's firm, and their interests are not before the judge, have not come before the judge in the reasonably recent past, and are not likely to come before the judge in the reasonably near future. Examples of

comparable circumstances include the following: a law firm's policy is to extend professional courtesies to all former partners, and the judge is a former partner; a law firm's policy is to extend professional courtesies to the relatives of partners, and the judge's sibling is a partner at the firm; a lawyer's policy is to offer discounted legal services both to lawyers facing proceedings before the Board of Bar Overseers and to judges facing proceedings before the Commission on Judicial Conduct. Nevertheless, disclosure is necessary to maintain public confidence in the judiciary by making readily identifiable any potential for compromise to the judge's independence,\* integrity,\* or impartiality.\*

[11A] Where a judge retains legal representation due to a matter before the Commission on Judicial Conduct, a judge may be entitled to the payment of reasonable attorneys' fees by the Commonwealth with the approval of the Supreme Judicial Court as provided by G. L. c. 211C, § 7(15). See SJC Standing Order Regarding Procedure for Judges Seeking a Determination Concerning Attorneys' Fees for Representation in a Matter Before the Commission on Judicial Conduct.

[11B] A judge may accept free or discounted legal representation due to a matter before the Commission on Judicial Conduct upon a determination by the Supreme Judicial Court that such representation would serve the public interest. See SJC Standing Order Regarding Procedure for Judges Seeking a Determination Concerning Attorneys' Fees for Representation in a Matter Before the Commission on Judicial Conduct.

[12] Paragraphs (D) and (E) identify limited instances when, after making a threshold determination that, in the particular circumstances, acceptance of a gift or benefit would not appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality,\* a judge may accept a gift or benefit given for or because of the judge's official position or action. Paragraph (D) identifies instances where the risk of the appearance of a conflict of interest is so slight that public reporting is not required, while Paragraph (E) identifies instances in which public reporting is required.

[13] Paragraph (D)(1) permits a judge to accept gifts not of substantial value\* that are incident to public recognition of the judge. Examples might include plaques, trophies, and certificates. Gifts that are inscribed or personalized may have little market value.

[14] Paragraphs (D)(2) and (D)(3) are intended to encourage judicial participation in the activities of bar associations and other non-profit organizations concerned with the law,\* the legal system, and the administration of justice. Judicial participation in such activities promotes professionalism within the legal profession and public confidence in the administration of justice. See, e.g., Rules 1.2, 3.1, and 3.7.

Paragraph (D)(2) encourages judicial participation in bar association activities by permitting judges to attend without charge luncheons, dinners, receptions, award ceremonies, or similar events held in Massachusetts. Unlike the invitations addressed in Rule 3.14, invitations under Paragraph (D)(2) may be accepted without obtaining a determination by the Chief Justice of the court on which the judge sits that acceptance will serve a legitimate public purpose, and that such public purpose outweighs any non-work related benefit to the judge or to the organization providing the waiver of expenses. That is because the judge's attendance at these types of events is presumed to serve such a public purpose.

[15] Paragraph (D)(4) provides that a judge may accept for official use books and other electronic and non-electronic resource materials supplied by publishers on a complimentary basis.

[16] Paragraph (E)(1) permits a judge to accept a gift of substantial value\* incident to public recognition of the judge, but requires the judge to publicly report the gift.

[17] Paragraph (E)(2) recognizes that there are instances when it may be appropriate for a judge to accept complimentary invitations for family members or guests so long as the judge publicly reports the gift. For example, a judge receiving an award from a bar association may accept an offer of complimentary tickets to be used by the judge's spouse and children.

#### Rule 3.14. Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,\* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge.

(C) If the invitation to the judge is connected to the judge's official position or official action and is not covered by Rule 3.13(D)(2), a judge is required to notify the Chief Justice of the court on which the judge sits and obtain a determination that acceptance of the reimbursement or waiver serves a legitimate public purpose and such purpose outweighs any non-work related benefit to the judge or to the person or organization providing the payment or waiver of expenses.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] This Rule applies specifically to a judge's attendance at tuition-waived and expense-paid seminars and similar events that may be sponsored by law-related organizations or by educational, civic, religious, fraternal, and charitable organizations, and is intended to apply to events not described in Rule 3.13(D)(2).

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\* This decision involves consideration of the totality of circumstances, including but not limited to the nature of the sponsor, the source of the funding, whether the sponsor or source of the funding frequently takes positions on issues before or likely to come before the court where the judge sits, and the content of the program or event, including whether differing viewpoints are presented. Where the invitation is associated with any of the judge's non-law-related activities, including educational, religious, fraternal, or civic activities, the judge may accept reimbursement or fee waiver only if the same invitation is offered to similarly-situated non-judges who are engaged in similar ways as the judge.

[4] Paragraph (C) is intended to ensure that a judge obtains a determination from the Chief Justice of the court on which the judge sits that a legitimate public purpose is served by the judge's acceptance of the reimbursement or waiver when the invitation is connected to the judge's official position or official action. In contrast, no such determination is required in the circumstances covered by Rule 3.13(D)(2) because a legitimate public purpose is presumed.

#### Rule 3.15. Reporting Requirements

(A) A judge shall annually complete the Public Report of Extra-Judicial Income in the form promulgated by the Supreme Judicial Court and the Statement of Financial Interests in the form promulgated by the Massachusetts State Ethics Commission.

(B) The Public Report of Extra-Judicial Income shall require the public reporting of the following items if they are of substantial value\*:

- (1) compensation received for extrajudicial activities permitted under Rule 3.12; and
- (2) gifts and other things of value where disclosure is required by Rule 3.13.

Adopted October 8, 2015, effective January 1, 2016.

#### CANON 4. A JUDGE SHALL REFRAIN FROM POLITICAL ACTIVITY INCONSISTENT WITH THE INDEPENDENCE,\* IMPARTIALITY,\* OR INTEGRITY,\* OF THE JUDICIARY

##### Rule 4.1. Political and Campaign Activities

(A) A judge shall not:

- (1) act as a leader in, or hold an office in, a political organization\*;
- (2) make speeches on behalf of a political organization\* or candidate;
- (3) publicly endorse or oppose a candidate for any public office;
- (4) solicit funds for, pay an assessment to, or make a contribution to a political organization\* or a candidate for public office; or
- (5) attend or purchase tickets for dinners or other events sponsored by a political organization\* or a candidate for public office or intended to raise money or gather support for or against a political organization\* or candidate.

(B) A judge may engage in activity in support or on behalf of measures to improve the law,\* the legal system, or the administration of justice, provided that the judge complies with the other provisions of this Code.

(C) On assuming a judicial office, a judge shall resign any elective public office then held.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] While judges have the right to participate as citizens in their communities and not be isolated from the society in which they live, judges must at all times act in a manner that promotes public confidence in their independence,\* integrity,\* and impartiality.\* This Rule imposes restrictions on a judge's political activities because public confidence in the judiciary is eroded if judges are perceived to be subject to political influence or give the impression of favoring the interests of a political organization\* or candidate.

[2] The restrictions in Paragraph (A) prohibit a judge from engaging in any public display in support of or opposition to a political candidate, including displaying a bumper sticker on an automobile the judge regularly uses, posting a campaign sign outside the judge's residence, signing nomination papers for a political candidate or ballot issue, carrying a campaign sign, distributing campaign literature, or encouraging people to vote for or give money to a particular candidate or political organization.\*

[3] A judge may not avoid the restrictions imposed by this Rule by making contributions or endorsements through a spouse, domestic partner,\* or other member of the judge's family.\* Political contributions by the judge's spouse or domestic partner\* must result from that person's independent choice, and checks by which contributions are made must not include the name of the judge.

[4] Although members of the judge's family\* are free to engage in their own political activity, including running for public office, a judge must not endorse, appear to endorse, become involved in, or publicly associate with any family member's political activity or campaign for public office.

[5] A judge may register as a member of a political party. A judge may also attend non-partisan events, such as a forum that is open to all candidates and is intended to inform the public.

#### Rule 4.2. Activities of Judges Who Become Candidates for Nonjudicial Office

(A) Upon becoming a candidate in a primary or general election for elective office, a judge shall resign from judicial office.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

Adopted October 8, 2015, effective January 1, 2016.

#### COMMENT

[1] The "resign to run" rule set forth in Paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the "resign to run" rule.

[2] Upon being appointed to any nonjudicial office except as permitted by Rule 3.4, a judge must resign from judicial office.

End of Rule

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#### **RULE 6. COMMISSION PROCEEDINGS: INITIAL STAGES; GENERAL PROVISIONS**

**A. Initiation of Proceeding.** A Commission proceeding relating to the conduct of a judge is initiated when the Commission receives a written or oral complaint, or when the Commission by motion creates its own complaint, on the basis of reasonable information.

**B. Screening.** The Executive Director shall cause each complaint to be screened promptly upon its receipt. The screening may include communication with the complainant, if any, to clarify the contents of the complaint, but shall not include any investigation of the allegations set forth in the complaint.

#### **C. Docketing and Notification.**

- (1) If the Executive Director determines after screening that the complaint does not set forth facts concerning a judge's conduct which, if true, would constitute misconduct or disability within the Commission's jurisdiction, the Executive Director shall notify the complainant that the complaint will not be docketed or investigated by the Commission.
- (2) If the Executive Director determines after screening a complaint that it alleges specific facts which, if true, would constitute misconduct or disability within the Commission's jurisdiction, the Executive Director shall docket the complaint.
- (3) Except as provided in Rules 6D, 6E, 6F and 6G, the Executive Director shall notify the judge of the complaint promptly after it is docketed. Notification shall be by certified mail or registered mail, addressed to the judge's last known place of residence, unless the judge has requested a different mailing address or the use of regular mail. Except where notice of the complaint is delayed or withheld pursuant to Rule 6G, the Executive Director shall not conduct any inquiry into or investigation of the complaint until notice has been sent to the judge.

**D. Frivolous or Unfounded Complaints.** If, on the basis of screening, the Executive Director is of the opinion that a docketed complaint is frivolous or unfounded, the Executive Director shall promptly recommend its dismissal to the Commission before notifying the judge of the complaint. If a majority of the Commission votes to dismiss the complaint, the Executive Director shall promptly notify the complainant of the dismissal and the judge of both the complaint and its dismissal. If a majority of the Commission does not vote to dismiss the complaint, except as provided in Rule 6G, the Executive Director shall promptly notify the judge of the complaint in accordance with Rule 6C(3).

**E. Stale Complaints.** When a complaint is docketed in which the allegations arise out of acts or omissions all occurring more than one year prior to the date the complaint was filed, the Executive Director shall, before notifying the judge of the complaint and before undertaking any inquiry or investigation of its allegations, make a recommendation to the Commission as to



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whether there exists good cause to investigate the complaint. If a majority of the Commission determines that there is not good cause to investigate the complaint, the complaint shall be dismissed without investigation, and the complainant, if any, as well as the judge, shall be so notified. If a majority of the Commission determines that there is good cause to investigate the complaint, except as provided in Rule 6G, the Executive Director shall notify the judge of the complaint pursuant to Rule 6C(3). When a complaint alleges a pattern of recurring misconduct the last episode of which is alleged to have occurred less than one year prior to the filing of the complaint, a determination by the Commission of “good cause” pursuant to this Rule is not necessary.

**F. Anonymous Complaints.** Following the docketing of an anonymous complaint pursuant to Rule 6C(2), the Executive Director shall not conduct any inquiry or investigation of it unless the Commission, upon the recommendation of the Executive Director, determines by majority vote that the allegations of the anonymous complaint would, if true, constitute misconduct or disability within the jurisdiction of the Commission, and the seriousness or the notoriety of the misconduct alleged outweighs the potential prejudicial effect of an investigation into the merits of the complaint. If the Commission does not make such a determination, the complaint shall be dismissed, and the Executive Director shall promptly notify the judge of both the complaint and its dismissal. If the Commission does make such a determination, except as provided in Rule 6G, the Executive Director shall promptly notify the judge of the anonymous complaint in accordance with Rule 6C(3).

**G. Withholding Notification.** If the Executive Director is of the opinion that, because of the nature of the complaint or the identity of the complainant, notification to the judge would create a substantial risk that evidence material to its investigation might be lost or destroyed, or that there is a substantial danger of reprisal or retaliation by the judge against the complainant or any other person mentioned in the complaint, the Executive Director shall recommend to the Commission that notice of the complaint to the judge be delayed or that notice of certain information in the complaint be delayed. No inquiry or investigation into the complaint beyond the screening process shall take place until the Commission has voted on the Executive Director’s recommendation.

- (1) If a majority of the Commission does not vote to approve any delay in notifying the judge of the complaint in whole or in part, the Executive Director shall promptly notify the judge of the complaint in accordance with Rule 6C(2).
- (2) If a majority of the Commission determines that notice to the judge of the complaint in its entirety would create a substantial risk of lost or destroyed evidence or of reprisal, the Commission shall vote to approve the delay in notifying the judge of the complaint in whole or in part. If the Commission approves a delay in providing notice to the judge of any portion of the complaint, the Executive Director shall proceed with an investigation of the complaint pursuant to Rule 6H. If the Commission approves a delay in providing notice to the judge of certain information in the complaint such as the identity of the complainant, the Executive Director shall

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promptly notify the judge in accordance with Rule 6C(3) of all portions of the complaint for which no delay was approved before proceeding with any investigation.

- (3) Notice of a complaint may be delayed pursuant to this paragraph only until the Commission obtains the necessary evidence or the risk of reprisal ends.
- (4) The Commission shall take reasonable steps to insure that as much notice as possible of the complaint's allegations is provided to the judge at the earliest time feasible in accordance with this Rule.

**H. Investigation.** Unless a complaint is dismissed pursuant to Rule 6D, 6E or 6F, and except as provided in Rule 6G, after notice is given to the judge pursuant to Rule 6C(3), the Executive Director shall initiate a discreet and confidential investigation and evaluation of the complaint.

**I. Request for Special Counsel.** If in the course of an investigation the Executive Director concludes that Special Counsel is required, the Executive Director shall recommend that the Commission request the appointment of a Special Counsel by the Supreme Judicial Court. The Commission may also take such action upon its own motion.

**J. Sworn Complaint or Statement of Allegations.** Within ninety (90) days after the initiation of proceedings, the Executive Director shall recommend to the Commission whether there is adequate reason to proceed to the preparation of a Sworn Complaint or Statement of Allegations.

- (1) The Commission shall so decide by majority vote.
- (2) If the Executive Director recommends that further investigation is necessary before making this determination, the Commission may vote to continue the investigation on a month-to-month basis.
- (3) If the Commission finds that there is sufficient cause to proceed, the complainant, if any, shall be asked to file a detailed, signed, Sworn Complaint against the judge. The Sworn Complaint shall state the facts constituting the alleged misconduct. Immediately upon receipt of the Sworn Complaint, the Executive Director shall make written acknowledgment thereof to the complainant.
- (4) When a Sworn Complaint is not obtained, a Statement of Allegations against the judge and the alleged facts forming their basis shall be prepared by the Executive Director. Where more than one act of misconduct is alleged, each act should be clearly set forth in the Sworn Complaint, or in the Statement of Allegations, as the case may be.
- (5) In any case where the judge has not yet been notified of the entire complaint pursuant to Rule 6G, if the Commission determines by majority vote that there remains an

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ongoing danger of reprisal, the Sworn Complaint or the Statement of Allegations may be drafted so as to conceal the complainant's identity.

**K. Same; Service.** The judge shall immediately be served with a copy of the Sworn Complaint or Statement of Allegations.

**L. Same; Answer.** Within twenty-one (21) days after the service of the Sworn Complaint or the Statement of Allegations, the judge may file a written answer with the Executive Director and may request a personal appearance before the Commission, in lieu of or in addition to a written response. If the judge elects to appear personally, his or her statement shall be recorded.

**M. Same; Dismissal.** After the judge's answer and personal appearance, if any, the Commission may terminate the proceeding and dismiss the complaint and, in that event, shall give notice to the judge and the complainant that it has found insufficient cause to proceed.

**N. Same; Amendment.** Amendment of the allegations regarding the misconduct of a judge, whether presented to the Commission in a Sworn Complaint or in a Statement of Allegations, shall be permitted prior to a finding of sufficient cause, provided that notice thereof and an opportunity further to respond within twenty-one (21) days is given to the judge.

**O. Right to Counsel.** The judge shall be entitled to counsel of the judge's own choice.

**P. Right to Compel Attendance of Witnesses and Inspection of Records.** At any stage of the proceeding, the Commission or its designee may administer oaths or affirmations and shall be entitled to compel the attendance and testimony of witnesses, including the judge himself or herself, and the production of papers, books, accounts, documents, electronic recordings, other tangible things, or any other relevant evidence or testimony.

(1) Upon receiving the Sworn Complaint or Statement of Allegations, the judge shall become entitled to compel by subpoena the attendance and testimony of witnesses through depositions, and to provide for the inspection of documents, books, accounts, written or electronically-recorded statements, and other records.

(2) Witnesses may be interviewed, whether or not under oath and whether or not their statements are memorialized, without the presence of other participants. In other circumstances, statements may be taken as depositions, in accordance with Rule 9.

**Q. Privilege.** A complaint submitted to the Commission or its staff, or testimony with respect thereto, shall be absolutely privileged. No civil action predicated on the complaint shall be instituted against a complainant or a witness, or against counsel to either of them.

**R. Recommendation Concerning Assignment.** At any time the Commission may recommend to the Supreme Judicial Court, or to the Chief Justice of the Trial Court and the appropriate Chief Justice, the non-assignment or special assignment of a judge, pending the final disposition of a

## **Professional Conduct Rules**

### **Commission on Judicial Conduct Rule 6: Commission proceedings: Initial stages; general provisions**

proceeding. The Commission shall state the reasons for its recommendation. A copy of any such recommendation shall be sent by the Commission to the judge.

**S. Consultation.** In the course of a proceeding, the Commission may consult with the Chief Justice of the Trial Court and the appropriate Chief Justice about administrative matters.

**T. Record of Commission Proceedings.** The Commission shall keep a record of all proceedings concerning a judge. The Commission's findings, conclusions and recommendations shall be entered in the record.

**U. Extensions of Time.** The Chairman of the Commission may for good cause extend the time for the filing of an answer, discovery, commencement of a hearing, or transmittal of the Hearing Officer's report, and any other time limit set herein.

**V. Enforcement of an agreement for Informal Adjustment** shall be by the Commission, or, upon application by the Commission to the Supreme Judicial Court, by the Court.

Amended September 14, 1999, effective October 1, 1999; amended May 8, 2007, effective July 1, 2007; amended January 29, 2015, effective March 1, 2015.

## **Professional Conduct Rules**

### **Commission on Judicial Conduct Rule 7: Sufficient cause for formal charges**

#### **RULE 7. SUFFICIENT CAUSE FOR FORMAL CHARGES**

A. Following the expiration of the twenty-one (21) days allowed for the judge's response, for any proceeding not dismissed, the Commission shall thereafter hold a formal meeting which shall be conducted in private, at which the rules of evidence need not be observed. The judge shall have the right to make a personal appearance with his attorney, but not to be present during the Commission deliberations.

B. At this meeting the Commission shall vote to dispose of the case in one of the following ways:

- (1) If it finds that there has been no misconduct, the Executive Director shall be instructed to send the judge and the complainant notice of dismissal.
- (2) If it finds that there has been misconduct for which a private reprimand constitutes adequate discipline, and if the judge consents, it shall issue the reprimand. The complainant shall be notified that the matter has been so resolved.
- (3) If it finds that there has been conduct that is or might be cause for discipline but for which an informal adjustment is appropriate, it may, with the agreement of the judge, so inform or admonish the judge, direct professional counseling or assistance for the judge, or impose conditions on the judge's future conduct. The complainant shall be notified that the matter has been so resolved. When either conditions or treatment is prescribed, the Commission shall provide for supervision, enforcement thereof, or both.
- (4) If it finds by a preponderance of the credible evidence that there is sufficient cause to believe that there has been misconduct of a nature requiring a formal disciplinary proceeding, the Commission shall issue formal charges against the judge. A copy of the formal charges shall be served promptly upon the judge, and the judge shall have ten (10) days to respond.
- (5) If it finds that there has been conduct that is or might be cause for discipline and for which direct submission to the Supreme Judicial Court is appropriate, it may, with the agreement of the judge, make a direct submission in accordance with Rule 13.

Amended May 8, 2007, effective July 1, 2007.

## **Professional Conduct Rules**

### **Commission on Judicial Conduct Rule 11: Post-Hearing Procedure**

#### **RULE 11. POST-HEARING PROCEDURE**

A. Within thirty (30) days after the conclusion of the hearing, the Hearing Officer shall submit to the Commission and to the judge a report which shall contain proposed findings and recommendations, the transcripts of testimony, and all exhibits.

B. Upon receipt of the report of the Hearing Officer, the Commission shall send a copy of the report to the complainant forthwith.

C. Within twenty (20) days after receipt of such report, counsel for the judge and for the Commission shall each be allowed to submit to the Commission written objections to the proposed findings and recommendations. Any such objections shall become part of the record.

D. Within the same twenty (20) day period the judge and the complainant, if any, may file a written request to be heard before the Commission regarding its recommendation for discipline.

E. If either participant does so request, notice shall be given to both as to the scheduled time and place for such hearing, at least seven (7) days in advance. Such hearing shall be public, but Commission deliberations regarding such recommendation shall be conducted in executive session.

F. Unless there is good cause for delay, the Commission shall reach a decision on the basis of the full record within ninety (90) days after the hearing concerning recommendation for discipline, if there is such a hearing, or otherwise within ninety (90) days after receipt of the Hearing Officer's report. Its conclusions may differ from those proposed by the Hearing Officer. Its decision shall state specific reasons for all conclusions and recommendations.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.

NO. OE-136

IN RE: THOMAS ESTES

ORDER

The Commission on Judicial Conduct (Commission) and the Hon. Thomas Estes (Judge) have submitted a final submission upon agreed facts, pursuant to G.L. c. 211C and Rule 13A of the Rules of the Commission on Judicial Conduct (final submission) in Commission complaint no. 2017-39. Upon consideration of the final submission and after hearing from the parties, the court makes the following determinations and enters the following order.

1. The court accepts the stipulation of facts in the final submission. The parties agree and have stipulated that the Judge had an undisclosed sexual relationship with Tammy Cagle, a clinician member of the "team" in the drug court session of the Pittsfield Division of the District Court Department (drug court). We note at the outset what is not included or addressed in the final submission. There is no finding, determination, or stipulation with respect to the presence or absence of sexual harassment or discrimination, and we make no such determination or finding. The final submission also does not address whether the Judge had any hiring or firing authority over Cagle. In arriving at our disposition in this matter, the court has considered only the facts and misconduct that have been agreed to by the parties as set forth in the final submission.

The stipulated facts are as follows. While Cagle was a member of the drug court team over which the Judge presided, the Judge and Cagle engaged in an undisclosed sexual relationship. Their sexual encounters began in November, 2016, and continued until July, 2017. From November, 2016, until March, 2017, while Cagle was an active member of the drug court team, Cagle and the Judge had sexual encounters both in Cagle's home and on several occasions in the Judge's lobby. Before or after some of their sexual encounters, they would have general discussions regarding the operation of the drug court. They also communicated about a particular defendant, although the Judge appears not to have taken any action in response to Cagle's request regarding that defendant. During some of the time period covered by their affair, the Judge attempted to mediate problems between Cagle and other members of the drug court team. The final sexual encounter between the Judge and Cagle was in July, 2017, by which time Cagle was no longer on the drug court team. The Judge used his official electronic mail (e-mail) account to communicate with Cagle and facilitate one of the sexual encounters.

2. The court also accepts the parties' stipulation that the Judge's conduct constituted wilful judicial misconduct that brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer. The court further accepts the stipulation that the Judge has violated the Code of Judicial Conduct by failing to act, at all times, in a manner that promotes public confidence in the independence, integrity, or impartiality of the judiciary, and by failing to avoid impropriety or the appearance of impropriety, in violation of Rule 1.2; by failing to give precedence to judicial duties, in violation of Rule 2.1; by creating an appearance that he was not performing all duties of judicial office fairly and impartially, in violation of Rule 2.2; by creating an appearance that he was not performing judicial duties without bias or prejudice, in violation of Rule 2.3; by creating an appearance that his judicial



decision-making was subject to inappropriate outside influences, in violation of Rule 2.4; by failing to be dignified, and courteous to litigants, witnesses, lawyers, court personnel, and others with whom he deals in an official capacity, in violation of Rule 2.8(B); by failing to disqualify himself from a proceeding in which his impartiality might reasonably be questioned, in violation of Rule 2.11(A); by participating in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, in violation of Rule 3.1(C); and by making improper use of court premises, staff, stationery, equipment or other resources, in violation of Rule 3.1(E).

3. We have carefully considered the recommendations of the parties for disposition in light of the agreed upon violations of the Code of Judicial Conduct. Although this court's dispositions in prior proceedings and dispositions in other jurisdictions generally may offer some guidance, the appropriate resolution in these matters depends on the particular circumstances. Because none of our earlier cases is on point, our prior judicial disciplinary decisions provide little guidance in reaching a conclusion on the facts presented in this proceeding. We have weighed mitigating and aggravating circumstances, including the Judge's expressions of remorse and his very positive judicial performance evaluations.

Because deference to the judgments of our courts requires that courts maintain the public's trust and confidence, our disposition must assure the public that judges are held to high standards and that the judiciary is worthy of the trust and confidence necessary in a society governed by law. Here, the Judge has admitted to violations of the Code of Judicial Conduct that are serious and numerous and that implicate fundamental principles of integrity, impartiality, and respect for the judicial office. As we said in *Deputy Chief Counsel for the Pub. Defender Div. of the Comm. for Pub. Counsel Servs. v. Acting First Justice of the Lowell Div. of the Dist. Court*

*Dep't*, 477 Mass. 178, 180 (2017), "A judge is the leader of the drug court team." In this role, the judge presides over drug court sessions, makes final decisions on participant eligibility after considering input from team members, and makes all decisions in drug court cases. See Executive Office of the Trial Court, *Adult Drug Court Manual, A Guide to Starting and Operating Adult Drug Courts in Massachusetts*, at 9 (2015). The Judge admitted that Cagle participated in discussions regarding admission into drug court, referral for treatment, and termination from drug court during his undisclosed extramarital relationship with her. He also admitted that he and Cagle engaged in general discussions regarding the drug court before or after their sexual encounters. We have no doubt that the Judge's undisclosed sexual relationship with a member of his drug court team raises, at the least, the appearance of inappropriate influence and partiality in his decisions regarding drug court participants and thus puts the integrity of the drug court during his leadership into question. Further damaging respect for his office, the Judge used his lobby in the court house for at least several of their sexual encounters, reflecting complete disrespect for the dignity and decorum of the court. He also used his court e-mail account to communicate with Cagle, including communicating on a strategy to ensure that their text messages would not be seen by his family. It is beyond dispute that these egregious, deliberate, and repeated acts of misconduct severely diminished respect in the eyes of the public not only for this judge but also for the judiciary.

As noted above, the Judge's performance evaluations suggest that he has been a conscientious judge who consistently received very positive ratings from attorneys, court employees, and jurors. The Judge's misconduct, however, is serious, and his prior positive evaluations cannot repair the damage to the judicial system caused by his grave, wilful, and repeated wrongdoing. The Judge's unwillingness to abide by the standards imposed on his office

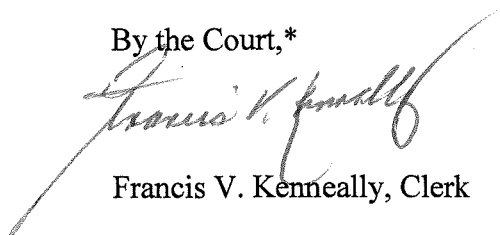
brought the office of the Judge, and by extension, the judiciary, into disrepute. "That the standards imposed on judges are high goes without saying. Because of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and there should be strict adherence to them. Failure on the part of even a few judges to comply with these standards serves to degrade and demean the entire judiciary and to erode public confidence in the judicial process. Anyone who is unwilling to accept and abide by such stringent rules of conduct should not aspire to or accept the great honor and the grave responsibility of serving on the bench." *Matter of Morrissey*, 366 Mass. 11, 16-17 (1974).

Clearly, the Judge's misconduct has damaged the esteem of the judicial office in the public's eye. The sanction we impose is severe not because we seek to punish the Judge severely, but because, like the Commission, we seriously question whether he can command the respect and authority essential to the performance of his judicial function. In furtherance of our duty to assure the public that Massachusetts judges are held to high standards of conduct and that the Commonwealth's judiciary is worthy of their trust and confidence, we conclude that Judge Estes shall be and hereby is publicly censured, and that effective June 15, 2018, he shall be suspended without pay indefinitely or until further order of this court, and it is so ORDERED. A copy of this order shall be delivered to the Governor and the Legislature.

4. The Commission shall be permitted to share with the legislative and executive branches any nonimpounded material that has been provided to this court.

5. In response to the Commission's request regarding a press release, the Commission may issue a press release consistent with this order.

By the Court,\*

A handwritten signature in dark ink, appearing to read "Francis V. Kenneally", written over a horizontal line.

Francis V. Kenneally, Clerk

Entered: May 24, 2018

\* Chief Justice Gants Recused

## **5.000 POLICY PROHIBITING DISCRIMINATION, HARASSMENT, RETALIATION, AND COMPLAINT RESOLUTION PROCEDURE**

### **PREAMBLE**

The Trial Court is committed to providing equal access to justice in a safe and dignified environment. To do this we must deliver justice with fairness, effectiveness, efficiency, and consistency, and in a manner that strengthens and supports diversity, equity, and inclusion. We must also provide support to a professional, well-trained, engaged, collaborative, culturally competent, and diverse workforce.

It is our goal to provide prompt and courteous service to the public by committed and dedicated professionals in a manner that inspires public trust and confidence. We strive to be sensitive and adaptive to cultural, racial, ethnic, gender, disability, and language differences, and to create a work environment that permits us to serve the public better.

In furtherance of these goals, the Trial Court has adopted this Policy prohibiting discrimination, harassment, and retaliation, and providing methods of resolving complaints.

### **POLICY PROHIBITING DISCRIMINATION, HARASSMENT, AND RETALIATION**

#### **5.100 Policy Statement Prohibiting Discrimination, Harassment, and Retaliation**

The Trial Court recognizes the right of all employees, supervisors, managers, and elected and appointed officials including Judges, Clerks, Registers, and the Recorder, (collectively, "Employees") to work in an environment in which individual dignity is respected. The Trial Court also recognizes the right of all litigants, witnesses, attorneys, jurors, members of the public, (collectively "Court Users") and service providers, including but not limited to contractors, interns, and volunteers, (collectively "Service Providers") to be treated with dignity and respect by all Trial Court Employees.

Towards these ends, the Trial Court is committed to creating and maintaining a workplace free from discrimination, harassment, and retaliation on the basis of actual or perceived membership in a protected class, which includes race, color, sex (including sexual harassment, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth, and breastfeeding), age (40 or over), disability, including a request for reasonable accommodation, sexual orientation, gender identity (including transgender status), military service or veteran status, religion or religious creed, including a request for reasonable accommodation, national origin, genetic information, ancestry, participation in discrimination complaint-related activities, or any other classification protected by law.

It is the goal of the Trial Court to promote a workplace that is free of sexual and gender harassment. Sexual and gender harassment of employees occurring in the workplace or impacting users of the Trial Court or in other settings associated with one's employment or one's use of the Trial Court will not be tolerated. Allegations of sexual and gender harassment will be taken seriously; the Trial Court will respond promptly to complaints of sexual harassment and where it is determined that such inappropriate conduct has occurred, the Trial Court will act promptly to eliminate the conduct and impose corrective action where appropriate.

Retaliation against anyone based on a complaint about or opposition to discrimination or harassment based on protected class, including a request for reasonable accommodation, or participation in or cooperation with an investigation of such a complaint, is prohibited. No Employee may retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for filing a complaint under this Policy or for otherwise exercising rights and responsibilities under this Policy.

Conduct prohibited by this Policy includes conduct not only in the workplace, but also in any work-related settings, such as work-related trips, meetings or conferences, or designated court social gatherings during work hours or after work hours. The use of Trial Court resources, including technology resources, such as computers, internet access, email, cell phones, or other electronic devices to discriminate, harass, or retaliate against anyone on the basis of membership in a protected class is prohibited. Employees who harass, discriminate against, or retaliate against Employees, Court Users, or Service Providers in non-work related settings or using personal resources, including social media, to do so may also be disciplined for violations of this Policy or the Standards of Conduct in [Section 16.100](#) of this Personnel Policies and Procedures Manual.

Because the Trial Court takes allegations of discrimination, harassment, and retaliation seriously, Employees, Service Providers, and Court Users, are encouraged to make a complaint if they believe they have been treated unfairly or have knowledge of another individual having been treated unfairly in violation of this Policy (“Reporting Party”). The Trial Court will inform the person against whom the complaint has been brought (“Responding Party”) of the allegations made. See Section 5.600 below. The Trial Court will respond promptly and appropriately to complaints, and where it is determined that inappropriate conduct has occurred, will act promptly to eliminate the conduct and take remedial or corrective action as is necessary, including disciplinary action where appropriate.

This Policy also prohibits certain conduct that may not rise to the level of a violation of law. While this Policy sets forth the goals of promoting a workplace free from discrimination, harassment, and retaliation, the Policy does not limit the Trial Court’s authority to discipline or take remedial action for conduct that violates other sections of this Personnel Manual or that is otherwise unacceptable, regardless of whether that conduct constitutes discrimination, harassment, or retaliation, under the law or this Policy.

The Trial Court has assigned the Office of Workplace Rights & Compliance (“OWRC”) the primary responsibility to conduct investigations, remedy the effects of prohibited conduct, and prevent its recurrence.

## **A. Prohibited Conduct**

The Trial Court holds its Employees to a high professional standard. Conduct which does not meet the legal definition of discrimination or harassment, but is inappropriate and may lead to discrimination or harassment may still be found to be a violation of this Policy.

### **1. Prohibition Against Discrimination**

Trial Court Employees are prohibited from discriminating, harassing, or retaliating against any Trial Court Employee, applicant for employment, Service Provider, or Court User, on the basis of actual or perceived membership in a protected class. This Policy applies to all areas of employment, including but not limited to, recruitment, testing, screening, hiring, selection for training and professional development, reclassification, transfer, promotion, assignments, demotion, layoff, discipline, termination, compensation, benefits, and all other terms and conditions of employment, as well as interactions with and treatment of Court Users and Service Providers.

## **2. Prohibition Against Discriminatory Harassment**

No Employee may engage in verbal, nonverbal, or physical conduct that denigrates or shows hostility toward an individual, including Employees, Service Providers, and Court Users, and has the adverse effect of creating an intimidating, hostile, or offensive working environment because of actual or perceived membership in any protected class, such as harassment based on race, gender, sexual orientation or gender identity, religion, disability, or any other category in Section 5.100, above.

Harassing conduct may include, but is not limited to, the following:

- Physical Conduct: Threatening, intimidating, or hostile acts.
- Non-Verbal Conduct: The display or transfer—through any form of distribution, including mail, hand delivery, or communication systems such as Internet, email, or fax—of photographs, literature, cartoons, pictures, calendars, graffiti, or other material, which show hostility towards, stereotype, denigrate, or are degrading, to persons in a protected class.
- Verbal Conduct: Statements, jokes or comments, epithets and/or slurs, based on assumptions or stereotypes that convey a denigrating message (either intentionally or unintentionally) to individuals based on their protected status.

## **3. Prohibition Against Sexual Harassment**

Sexual harassment is a form of sex discrimination. Sexual harassment means unwelcome conduct of a sexual nature, such as sexual advances, requests for sexual favors, and verbal, non-verbal, or physical conduct of a sexual nature where:

- Submission to or rejection of such speech or conduct is made, either explicitly or implicitly, a term or condition of an individual's employment, or is made, either implicitly or explicitly, a basis for an employment decision; or
- The speech or conduct creates an intimidating, hostile, humiliating, or sexually offensive environment that is sufficiently severe or pervasive as to interfere with a reasonable person's work



performance or to alter the conditions of employment in a way that creates a hostile work environment.

The Trial Court holds its Employees to a high professional standard. Conduct which does not meet the legal definition of sexual harassment, but is inappropriate and may lead to sexual harassment may still be found to be a violation under this Policy.

#### **a. Key Factors in Identifying Sexual Harassment**

Sexual harassment occurs in a wide variety of situations that share a common element – the inappropriate introduction into the workplace of sexual activities or comments. When trying to determine whether certain behavior violates this Policy, and in particular when thinking about whether a person's speech or behavior has created a hostile work environment, consider whether the behavior is:

- **Sexual**, as opposed, for instance, to an occasional compliment of a socially acceptable nature;
- **Repeated or pervasive.** A minor, isolated incident may or may not violate the Policy, depending on the circumstances;
- **Severe.** A single serious incident, such as a supervisor's demand for sexual favors or a sexual assault, will violate the Policy;
- **Unwelcome**, to even just one person – whether the target of the behavior or a bystander;
- **Intimidating, hostile, or offensive**, whether it was the actor's intention to offend or not; or
- **Interfering with** the Employee's, Court User's, or Service Provider's ability to do his/her/their job or court-related activity.

The following general principles apply when determining what constitutes sexual harassment:

- The person who is the subject of a complaint of harassment may be any Employee, including an appointed or elected official, manager, supervisor, or co-worker, or a Service Provider, or Court User.

- A person complaining about sexual harassment may be any Employee, including an appointed or elected official, manager, supervisor, or a Service Provider, or Court User.
- The effect on the individual alleging harassment – rather than the intention of the person who is the subject of the complaint of harassment – is generally the focus.
- The person complaining about sexual harassment may be any gender and the person who is the subject of a complaint of sexual harassment may be the same or a different gender.
- The person complaining about sexual harassment does not have to be a different gender or sexual orientation from the person accused of harassment.
- The person complaining about sexual harassment does not have to be the subject of the offensive behavior. For example, a witness who is not the subject of the behavior may make a complaint if offended by the conduct.
- The person complaining about sexual harassment need not suffer any economic loss or loss of job opportunity as a result of the conduct.

#### **b. Examples of Conduct Prohibited by this Policy**

Sexual harassment can take many forms. This conduct may involve physical, verbal, or non-verbal conduct. In some instances the conduct may be repeated or pervasive, and in others a single serious incident is enough to constitute sexual harassment. Sexual harassment is unacceptable in any form. The following are some examples of conduct prohibited by this Policy:

##### **Physical Conduct:**

- Coerced or forced kissing, groping, sexual assault;
- Stalking, in person or through electronic or other forms of communication; or
- Uninvited, unwelcome physical contact such as kissing, touching, pinching, grabbing, hugging, patting, or brushing up against a person.

**Verbal Conduct:**

- Demands for sexual favors accompanied by an implied or overt threat concerning an individual's employment status, security, or treatment;
- Derogatory comments and/or slurs about an individual's gender or sexual orientation;
- Unwanted sexual flirtations or propositions;
- Speaking in the workplace of one's sexual activity or inquiring about or commenting on another's sexual activity;
- Comments about an individual's body;
- Innuendos of a sexual nature;
- Verbal innuendos that relate to or reflect negatively on a particular gender or sexual orientation; or
- Jokes, language, epithets, or remarks that have the purpose or effect of stereotyping, demeaning, or making fun of an individual based upon his/her/their sex, gender, or perceived sexual orientation.

**Non-Verbal Conduct:**

- Indecent exposure;
- Arranging to be alone with a person for the purpose of making sexual advances;
- Unwanted sexual flirtations, advances;
- Obscene gestures or suggestive or insulting sounds (e.g., catcalls, whistling);
- Staring or leering;
- Purposefully, and unnecessarily, violating a person's personal space; or

- Display or transfer – through any form of distribution including communication systems such as Internet, email, or fax – of photographs, literature, cartoons, pictures, calendars, graffiti or other material, which are sexually suggestive or degrading to a particular gender or sexual orientation.

#### **4. Prohibition Against Retaliation**

Retaliation constitutes an abuse of authority, and is prohibited. Retaliation against anyone based on a complaint about or opposition to discrimination or harassment based on actual or perceived protected class, including a request for reasonable accommodation, or participation in or cooperation with an investigation of such a complaint, is prohibited.

Complaints of retaliation will be viewed as separate and distinct from the original complaint and may form the basis for a new complaint. Retaliation may result in disciplinary action even though the original harassment or discrimination complaint was not substantiated.

#### **B. Limitations on Certain Relationships**

Dating, physical, or intimate sexual relationships between certain Employees, Service Providers, and Court Users pose serious issues not only under this Policy, but under the Trial Court Standards of Conduct, State ethics and conflict of interest laws, and the ethical rules applicable to employees, and elected and appointed officials.

Judges, Clerks, Registers, the Recorder, and Managers. Elected or appointed officials, including Judges and Clerks, Registers, and the Recorder, as well as managers and supervisors may not initiate or maintain a dating, physical, or other sexually intimate relationship with any Employee where the elected or appointed official, manager, or supervisor exercises management oversight or influence, or has an actual or apparent supervisory role over or reporting relationship with the Employee.

No Employee who has supervisory or custodial authority over any person appearing before the court may initiate or maintain a dating, physical, or sexually intimate relationship with a person over whom the employee has supervisory or custodial authority.

No Employee may initiate or maintain a dating, physical, or other sexually intimate relationship with a Service Provider or Court User where the Employee has actual or apparent authority to exert influence over the

Service Provider or Court User, including but not limited to, the authority to Influence judicial proceedings, the scheduling, status or disposition of cases, the retention of Service Providers, or custody or conditions of confinement.

Violation of this Policy may constitute a violation not only of this Policy, but of the employee's ethical obligations, and may result in disciplinary action, up to and including termination or, in the case of a Judge or Clerk, referral to the Commission on Judicial Conduct or the Departmental Chief Justice, who may refer the matter to the Committee on Professional Responsibility for Clerks of Court, respectively.

In rare circumstances, it may be possible to address a violation of this Policy based on immediate disclosure and prompt remedial measures, including reassignment and/or transfer. In the event that any relationship referenced in this Policy exists, the person in a position of authority involved in the relationship must notify the relevant manager so that appropriate steps may be taken to ensure full compliance with this Policy, the Standards of Conduct in [Section 16.000](#) of this Manual, and applicable ethical requirements. In addition, the subordinate involved in the relationship is encouraged to notify the OWRC if the other person involved in the relationship fails to notify his/her/their manager.

Co-workers. Where a dating or physical relationship arises between coworkers that is not otherwise prohibited by this Policy, the parties must conduct themselves in a professional manner while involved in work related activities. If a dating or physical relationship between co-workers creates a conflict of interest or favoritism, creates an unacceptable perception of a conflict of interest or favoritism, causes dissension, interrupts the work flow of the court, or otherwise creates a negative work environment, the Trial Court may take action, which could include, but is not limited to, reassignment of one or both parties, or, depending on the conduct involved, discipline.

The Trial Court expects co-workers involved in a dating or physical relationship to maintain the highest ethical and professional standards:

- The relationship must be entirely voluntary;
- The relationship must not have a negative impact on work performance or Trial Court operations;

- One person in the relationship must not give preferential treatment to the other person in the relationship, or that person's friends or family members; and,
- If such a relationship ends, each person must continue to treat the other in a professional manner; neither may harass nor retaliate against the other.

## **5.200 Requests for Reasonable Accommodation**

The Trial Court will provide reasonable accommodations in accordance with state and federal laws for those requesting accommodations for their sincerely held religious beliefs, customs, practices, and/or observances to ensure that an individual may apply for a job, perform the job, and/or enjoy the benefits, terms, conditions or privileges of employment, unless doing so creates an undue hardship.

The Trial Court will provide reasonable accommodations in accordance with state and federal laws for qualified individuals with disabilities, to include applicants, Employees, Service Providers, and Court Users, unless doing so creates an undue hardship or poses a direct threat to the individual or others in the workplace. In addition, the Trial Court recognizes its obligation to provide reasonable accommodations to its Employees for a pregnancy or pregnancy-related condition.

A reasonable accommodation is a modification or adjustment to the work environment that allows an individual with a disability, pregnancy-related condition, or sincerely held religious belief to enjoy equal access to all employment opportunities and workplace benefits as others.

Any Court User or Service Provider who requires a reasonable accommodation should contact the [ADA Coordinator of the Courthouse they are visiting](#). Please also see, [the Massachusetts Trial Court Request for Reasonable Accommodation Form](#).

Any Employee who requires a reasonable accommodation should contact the Human Resources Department ("HR") to request that accommodation. Alternatively, an Employee may make a request for reasonable accommodation to his/her/their local manager, but is not required to do so. HR will determine what constitutes an appropriate accommodation and whether the accommodation requested is reasonable and feasible. This decision is made on a case by case basis through an interactive process with the individual requesting an accommodation, which generally includes

review of appropriate documentation from the individual's medical provider for disability or pregnancy related accommodations. It is the responsibility of the individual requesting accommodation to provide sufficient information, upon request, to support the need for the accommodation requested. Personal medical records supporting the request should be provided only to HR. The Trial Court may require updated medical documentation from an appropriate healthcare provider upon receipt of a request to extend, modify, or renew an accommodation.

### **5.300 Responsibilities of Employees, Supervisors, and Managers**

All Trial Court Employees are expected to know about and follow this Policy. Each individual has a responsibility to conform his, her, or their behavior to insure a working environment free of discrimination, harassment, and retaliation. Any Employee who violates this Policy may be subject to disciplinary action, up to and including termination of employment. If a Service Provider or a Court User engages in discriminatory or harassing conduct, the OWRC shall inform the employer or licensing or other supervising entity, if any, of the person alleged to be in violation of the Policy in writing of the complaint and take any other appropriate action.

Trial Court Employees who are also supervisors or managers have additional responsibilities. Supervisors and managers are in leadership positions and should serve as a model to other Trial Court employees of what is respectful and professional conduct.

Judges, Clerks, Registers, the Recorder, and other management employees have an obligation to report when they are informed of or observe conduct that is discriminatory or harassing toward a Trial Court Employee or toward a Service Provider or Court User. Failure to report such conduct may result in disciplinary action by the appropriate authority. The report should be made in accordance with Section 5.608.

Elected or appointed officials and managers are also responsible for responding to allegations of discrimination or harassment by Service Providers or Court Users. In the case of Service Providers or Court Users, the OWRC shall inform the employer or licensing or other supervising entity, if any, of the person alleged to be in violation of the Policy in writing of the complaint and take any other appropriate action.

#### **5.400 Responsibilities of Judges, Clerks, Registers, and the Recorder**

As leaders in the Trial Court, Judges, Clerks, Registers, and the Recorder bear heightened responsibilities to refrain from violations of this Policy, and to report conduct inconsistent with this Policy. Conduct in violation of this Policy by a Judge, Clerk, Register or the Recorder may constitute a violation of the Code of Judicial Conduct or the Code of Professional Responsibility for Clerks of the Courts, respectively.

#### **5.500 Remedial Action and Discipline for Policy Violations**

If an investigation reveals that an Employee has engaged in conduct in violation of this Policy or other Trial Court policies, the appropriate manager may determine and impose remedial action and/or discipline, up to and including termination. The response will depend upon the nature and seriousness of the violation, as well as prior violations. The appropriate manager may take disciplinary action in accordance with the discipline provisions set forth in this Trial Court Personnel Policies and Procedures Manual or pursuant to other appropriate disciplinary provisions.

The OWRC will notify, in writing, the party who made the complaint and the party against whom the complaint was made of the findings and recommendations for corrective actions with a copy to the appropriate manager(s) and HR. Where the complaint involves employees within a court department, the Departmental Chief Justice and Deputy Court Administrator will also be notified. Where the complaint involves employees within a department of the Office of Court Management (“OCM”), the Probation Department, or Office of the Jury Commissioner, the Director of the Department or the appropriate Commissioner, shall be notified. The parties involved in the complaint will be asked to report any possible retaliation or further incidents immediately.

### **COMPLAINT AND INVESTIGATION PROCEDURES**

#### **5.600 Complaint and Investigation Procedures Overview**

This section of the Policy outlines the process for bringing and investigating a complaint of discrimination or harassment on the basis of membership in a protected category, or retaliation based on protected conduct. It includes:

- How to make a complaint and to whom it may be made;
- How and when a complaint may be resolved by informal means;



- How and when a complaint will be investigated;
- What to expect if you are a witness or have information concerning a complaint;
- What an elected or appointed official or manager may have to do if he/she/they become aware of a complaint; and
- How the person making the complaint and the persons who have been named in the complaint will receive the results of the investigation.

Although it is hard to provide a firm timeline for handling each and every complaint, the process of evaluating and investigating a complaint should not take longer than 20-30 business days, although that time period may be extended depending on the circumstances.

Complaints may be filed at any time, but the Trial Court's ability to take action may be limited by such factors as employment status of the Parties or witnesses. A prompt report will enable the Trial Court to most effectively respond to a complaint and redress the effect of the prohibited conduct.

## **5.601 Making a Complaint**

### **A. Who Can Make a Complaint?**

Any Employee, Court User, or Service Provider may make a complaint under this Policy, either orally or in writing. ("Reporting Party").

### **B. To Whom Can a Complaint be Made?**

If you are a Trial Court Employee and you believe that you have been discriminated against, harassed, or retaliated against in violation of this Policy, or have been improperly denied a reasonable accommodation, or have witnessed or been subject to conduct that is otherwise inconsistent with this Policy, you may make a complaint to your immediate manager, to another manager, to your departmental administrative office, or to the **OWRC Hotline 617-878-0411** or using the [OWRC Complaint Form](#) or to any of the [Offices](#) listed at the end of this Policy.

**If your complaint involves your manager**, you do not have to bring your complaint to that manager, you may bring your complaint to any other

manager or the **OWRC Hotline 617-878-0411** or to any of the [Offices](#) or persons listed at the end of this Policy.

**If your complaint involves the Chief Justice of the Trial Court or the Court Administrator**, you may bring your complaint to any manager, to the OWRC Hotline 617-878-0411, to any of the [Offices](#) listed at the end of this Policy or by mail to the Supreme Judicial Court, Attn: Chief Justice Ralph Gants, One Pemberton Square, Boston, Massachusetts 02108, by email to [Ralph.Gants@jud.state.ma.us](mailto:Ralph.Gants@jud.state.ma.us), or by telephone to 617-557-1135.

**Any Employee, Service Provider, or Court User**, who though not involved, learns about behavior that may violate this Policy may also make an oral or written complaint, using the OWRC Hotline or bringing the complaint to the attention of any of the [Offices](#) listed at the end of this Policy.

**Anonymous complaints**, including complaints made on the OWRC Hotline, will be considered to the extent that the information provided includes sufficient facts. Because anonymous complaints may be more difficult to investigate, you are encouraged to identify yourself when bringing a complaint.

**If you are a Service Provider or Court User**, and want to make a complaint that a Trial Court Employee or other Service Provider has violated this Policy, you may contact the OWRC Hotline or any of the [Offices](#) listed at the end of this Policy.

### **C. What Should a Trial Court Manager Do About a Complaint?**

Any elected or appointed official, including Judges, Clerks, Registers and the Recorder, as well as managers who receive an oral or written complaint or otherwise have knowledge of conduct that may violate this Policy must promptly forward such complaint or information to the OWRC or, as specified in Section 5.609, if the person alleged to have committed the violation is a Judge, Clerk, Register, or the Recorder, to the Departmental Chief Justice, for action.

In the event of a situation in which safety is a concern or inappropriate conduct is occurring in the moment, the manager should take appropriate action immediately and report the complaint immediately thereafter. The manager should consult with the OWRC and HR before placing an employee on paid administrative leave, (see Section 16.600C of this Manual), or imposing any immediate discipline. No employee may be placed on paid administrative leave without the approval of HR.

#### **D. What Should a Complaint Contain?**

A complaint may be made orally or in writing. If you make an oral complaint, the person receiving your complaint, or the OWRC will fill out the [OWRC Complaint Form](#) with the information you provide and you may be asked to review it for accuracy and completeness and to sign and date it.

The [OWRC Complaint Form](#) for filing a written complaint may be found at the end of this Policy, and is available on the Trial Court internal and external websites [Trial Court Personnel Policies & Procedures Manual](#). It may be filled out on-line and sent to the OWRC or you may print it out and send it to any of the [Offices](#) listed at the end of this Policy.

A complaint should include the name and preferred contact information for the person bringing the complaint, the name and contact information for the person or persons alleged to have violated this Policy if known, the basis of the complaint (that is, what happened because of your or another person's actual or perceived membership in a protected class or the claim of retaliation) and a brief summary of what happened, when, and where.

If the complaint proceeds to a full investigation, a copy of the complaint may be given to the person or persons against whom the complaint is filed, subject to redaction of any contact information or highly personal information, unless providing a copy of the complaint would create a substantial risk that evidence material to the investigation might be altered, lost or destroyed, or there is a substantial danger of retaliation against the person bringing the complaint or any other person mentioned in the complaint.

#### **E. Which Office will Handle the Complaint?**

Except as otherwise provided in Section 5.609, all complaints regarding a violation of this Policy, no matter with whom they are originally filed, will be referred to the OWRC unless the complaint is against the OWRC, in which case it will be referred to the Court Administrator. The OWRC take all reasonable steps to notify the person bringing a complaint within two business days when a complaint has been received by the OWRC. In the discretion of the Director of the OWRC, relevant managers will be notified to explore whether it is possible to resolve the matter informally or whether interim action is required.

Under [G. L. c. 211B, § 10](#), each Chief Justice of a Trial Court Department has authority over Judges, Clerks, Registers, or the Recorder, within his/her/their department. For this reason, complaints against a Judge,

Clerk, Register, or the Recorder, will be referred to the Departmental Chief Justice, who will determine how to proceed as set forth in Section 5.609.

Any complaint against a Departmental Chief Justice will be referred to the Chief Justice of the Trial Court, and a complaint against the Chief Justice of the Trial Court or the Court Administrator will be referred to the Supreme Judicial Court.

## **5.602 Intake, Initial Screening, Interim Measures and Informal Resolution**

### **A. Intake**

Except as otherwise provided in Section 5.609, the OWRC will log all complaints and maintain records of those complaints and their disposition.

### **B. Initial Screening**

If, after initial screening and review of complaints being handled by the OWRC it is clear that a complaint does not constitute a violation of this Policy, it may be closed or referred to some other department. The OWRC will contact the person bringing the complaint to discuss referral to another office.

### **C. Interim Measures**

In appropriate circumstances, including where there are safety concerns, the OWRC, after consultation with HR and the Departmental Chief Justice, may arrange with the appropriate manager for an Employee or Service Provider against whom a complaint is made to be temporarily transferred, placed on paid administrative leave, directed to have no contact with the person who made the complaint, or otherwise be directed to take or refrain from taking certain action. Where appropriate, and upon request by the person bringing the complaint, he or she or they may be temporarily transferred or placed on paid administrative leave. Any transfer must comply with the requirements of the [G.L. c. 211B, §10 \(vi\)](#). The placement of any individual on paid administrative leave requires the approval of HR. Such interim measures are not forms of discipline and do not indicate any conclusion regarding the complaint.

If a member of the public or other Court User is engaging in conduct in violation of this Policy, a manager may have the individual removed from the court premises or take other appropriate action, consistent with the requirements of access to justice and due process for persons appearing

before the court. The manager shall document all actions taken under this provision.

#### **D. Informal Resolution**

If, after initial screening and review, the OWRC is able to resolve a complaint by an initial telephone call or other contact, the OWRC will promptly notify the person making the complaint, the appropriate manager reporting a possible violation of this Policy, and when appropriate, the person against whom the complaint was made, about the results of this action.

### **5.603 Preliminary Inquiry**

For complaints requiring further action, the OWRC may conduct a preliminary inquiry, except as otherwise provided in Section 5.609 for complaints against a Judge, Clerk, Register, or the Recorder. The timing of the inquiry will depend on the severity of the conduct alleged in the complaint, the complexity of the issues raised, or other case specific factors, but the OWRC will make its best efforts to complete its preliminary inquiry promptly, preferably within five business days of receipt of the complaint. Some complaints may be of such a nature that they proceed immediately to an investigation. For other complaints, a preliminary inquiry may be appropriate.

#### **A. Notification to Person Bringing the Complaint**

The person bringing the complaint will be notified of the name and contact information of the person conducting the inquiry and will be informed that the Policy prohibits retaliation for bringing a complaint. Any retaliation should be reported to the OWRC immediately.

#### **B. Content of Preliminary Inquiry**

A preliminary inquiry may include contact with the person bringing the complaint for additional information, contact with the appropriate manager or department head, and review of relevant documents or other records necessary to evaluate the complaint to determine if the facts alleged in the complaint, together with any other information learned by the person conducting the inquiry, if true, do or do not constitute a violation of this Policy.

### **C. Outcome of Preliminary Inquiry**

If, after a preliminary inquiry, the OWRC determines that the facts alleged in the complaint or learned by the person conducting the inquiry do not constitute a violation of the Policy, the OWRC will notify the person bringing the complaint and the appropriate manager, as well as inform them of whether or not the complaint was referred to another Trial Court department such as HR.

Where the preliminary inquiry does not dispose of the complaint, or where the complaint is initially determined to require a full investigation, the OWRC will so notify, in writing, the involved parties, the appropriate manager(s), the Departmental Chief Justice and Deputy Court Administrator or their designees when the complaint involves employees within a court department; the Commissioner of Probation when the complaint involves the Probation Department; the Jury Commissioner when the complaint involves the Office of Jury Commissioner, or the relevant Director of the involved Department when the complaint involves employees in the OCM. If a complaint is made against a Director in the OCM, or a Departmental Chief, or the Commissioner of Probation, the OWRC will notify the Chief Justice of the Trial Court and the Court Administrator. If a complaint is made against the Jury Commissioner, the OWRC will also notify the Chief Justice of the Supreme Judicial Court.

## **5.604 Investigation**

### **A. Notification to the Appropriate Manager of Person Bringing the Complaint**

If the OWRC determines that a complaint, (other than a complaint against a Judge, Clerk, Register, or the Recorder) warrants an investigation, the Director of the OWRC, or designee, will notify the appropriate manager of the person bringing the complaint as well as the appropriate manager of the person against whom the complaint has been made. The notification will include the name and contact information of the investigator assigned, and the general nature of the allegations to be investigated. The Director will discuss with the appropriate manager the background of the complaint, the scope of the investigation, and determine the order, place, and timing of interviews of other persons and may review relevant documents or other materials, including electronic records.

## **B. Notification to Person Bringing the Complaint (“Reporting Party”)**

If the OWRC determines that a complaint, (other than a complaint against a Judge, Clerk, Register, or the Recorder) warrants an investigation, it will notify in writing the person bringing the complaint that an investigation will be conducted. The notification will include the name and contact information of the investigator assigned, the general nature of the allegations to be investigated, an explanation of expected confidentiality, and the prohibition against retaliation or undue influence toward the person bringing the complaint, any potential witnesses, or other persons participating in or cooperating with the investigation.

The OWRC will give written notice of the investigation to the involved parties, the appropriate manager(s), the Departmental Chief Justice and Deputy Court Administrator or their designees when the complaint involves employees within a court department; the Commissioner of Probation when the complaint involves the Probation Department; the Jury Commissioner when the complaint involves the Office of Jury Commissioner, or the relevant Director of the involved Department when the complaint involves employees in the OCM.

If a complaint is made against a Director in the OCM, or the Commissioner of Probation, the OWRC will notify the Chief Justice of the Trial Court and the Court Administrator. If a complaint is made against the Jury Commissioner, the OWRC will also notify the Chief Justice of the Supreme Judicial Court.

Complaints against Judges, Clerks, Registers, or the Recorder, will be handled under the provisions of Section 5.609.

## **C. Notice to Persons Against Whom Complaint is Brought (“Responding Party”)**

At least 24 hours before conducting an interview with the person or persons against whom a complaint is brought, the investigator will notify in writing that person(s) of the complaint, the prohibition against retaliation, and of the expectation of confidentiality and cooperation in the investigation. The investigator will also provide him/her/them with a copy of the complaint (which may have redacted sections if the complaint contains personal contact information or other highly personal information such as medical information), unless providing a copy of the complaint would create a substantial risk that evidence material to the investigation might be altered, lost or destroyed, or there is a substantial danger of retaliation or undue

influence against the person bringing the complaint or any other person mentioned in the complaint.

The OWRC will give written notice of the investigation to the appropriate manager(s), the Departmental Chief Justice and Deputy Court Administrator or their designees when the complaint involves employees within a court department; the Commissioner of Probation when the complaint involves the Probation Department; the Jury Commissioner when the complaint involves the Office of Jury Commissioner, or the relevant Director of the involved Department when the complaint involves employees in the OCM. If a complaint is made against a Director in the OCM, or the Commissioner of Probation, the OWRC will notify the Chief Justice of the Trial Court and the Court Administrator. If a complaint is made against the Jury Commissioner, the OWRC will also notify the Chief Justice of the Supreme Judicial Court.

#### **D. Interviews and Review of Documents and Other Materials**

The investigator will normally conduct interviews with the person bringing the complaint, the persons against whom the complaint is brought, and any relevant witnesses, including those identified by the person bringing the complaint and the person against whom the complaint is brought. Upon request, the investigator will provide a reasonable opportunity to permit individuals who will be interviewed to obtain a representative. The investigator may conduct follow-up interviews as necessary. It is the responsibility of the person bringing the complaint to inform the investigator of a need for reasonable accommodations due to a disability.

#### **E. Availability of a Personal Representative During Interviews**

The person bringing the complaint, the persons against whom the complaint is brought, and any witnesses, may bring a personal representative, such as a union steward or business agent for union employees, attorney, or other representative from outside of the Trial Court to any interviews with the investigator. During interviews, the personal representative's role is advisory, and the representative may not respond to the interviewer's questions in place of the person being interviewed. The unavailability of a representative will not unreasonably delay the interview, subject to the discretion of the investigator.

#### **F. Responsibilities of Persons Interviewed**

All elected or appointed officials, managers, supervisors, and employees are required to cooperate during the investigation of a complaint and provide



truthful information to the investigator. See Section 16.100 of this Personnel Manual. All persons being interviewed are strongly encouraged to inform the investigator if they are in need of any reasonable accommodations due to a disability.

### **G. Documenting Investigations**

The investigator will document all interviews and will retain the notes of the investigation, including all documents reviewed, in a file that will be kept confidential except as may be required by law, and which will be retained in the OWRC, separate from any personnel files, along with a copy of the original complaint and the confidential investigative report.

### **H. Confidentiality**

The Trial Court respects the privacy concerns of the person who brings a complaint, the person or persons against whom a complaint is brought, any witnesses, and any persons participating in an investigation. Investigations will be conducted by the OWRC in as confidential a manner as practicable without interfering with the thoroughness or objectivity of the investigation, or the need to inform appropriate Trial Court officials of the existence of the complaint. To investigate a complaint thoroughly and responsibly, however, in most cases the identity of the person bringing the complaint, witnesses, and the nature of the complaint will have to be made known to some people outside of the OWRC, including supervisory or departmental administrative personnel.

Persons participating in the investigation of a complaint, including witnesses, are strongly encouraged to avoid discussing any aspect of the investigation with those with no need to know. Unnecessary discussion, rumors, and speculation may interfere with the goal of conducting a fair and thorough investigation. This does not prevent discussion with a union or other representative, including counsel, and is not meant to prohibit or interfere with the ability of the person bringing the complaint or the person or persons against whom the complaint is brought to secure witnesses or other information necessary to a fair consideration of the complaint.

## **5.605 Confidential Investigative Report**

At the conclusion of the investigation, the investigator will draft a confidential report including a full evaluation and analysis of the evidence, and will provide recommended findings of fact and a recommended conclusion as to whether it is more likely than not that the alleged conduct

occurred, and if so, whether the conduct violated this Policy. The investigator will present this report to the Director of the OWRC.

## **5.606 Review of Investigator's Recommended Conclusions**

The Director of the OWRC will provide a copy of the full confidential investigative report to the appropriate manager and discuss the findings prior to the Director's determination whether or not to adopt the investigator's recommended findings and conclusions. The appropriate manager may request further investigation.

### **A. Agreement on the Findings and Conclusions**

If the appropriate manager accepts the recommended findings and conclusions:

1. The manager will maintain control of the confidential report, will not make a copy of it in any manner, and will return it or otherwise dispose of it at the direction of the Director of the OWRC.
2. The Director will notify, in writing, the party bringing the complaint of a summary of the facts and findings, and of the conclusion of whether it is more likely than not that the Policy was violated, and where appropriate, that remedial action was taken to stop the behavior. This notification will be copied to the appropriate manager(s), the Departmental Chief Justice and Deputy Court Administrator or their designees when the complaint involves employees within a court department; the Commissioner of Probation when the complaint involves the Probation Department; the Jury Commissioner when the complaint involves the Office of Jury Commissioner; or the relevant Director of the involved Department when the complaint involves employees in the OCM. If a complaint is made against a Director in the OCM or the Commissioner of Probation, the OWRC will notify the Chief Justice of the Trial Court and the Court Administrator. If a complaint is made against the Jury Commissioner, the Director will also notify the Chief Justice of the Supreme Judicial Court.
3. Simultaneously, the Director will notify the party(s) against whom the complaint was brought that the investigation has concluded and will provide that party(s) with a summary of the facts and findings, as well as inform the party(s) of the conclusion of whether it is more likely than not that a violation of the Policy has occurred, and that any corrective action will be determined by the appropriate manager. Copies of this written

notification will be sent to the appropriate manager(s), the Departmental Chief Justice and Deputy Court Administrator or their designees when the complaint involves employees within a court department; the Commissioner of Probation when the complaint involves the Probation Department; the Jury Commissioner when the complaint involves the Office of Jury Commissioner, or the relevant Director of the involved Department when the complaint involves employees in the OCM. If a complaint is made against a Director in OCM or the Commissioner of Probation, the OWRC will notify the Chief Justice of the Trial Court and the Court Administrator. If a complaint is made against the Jury Commissioner, the OWRC will also notify the Chief Justice of the Supreme Judicial Court. HR.

4. The parties to the complaint will be asked to report any possible retaliation or further incidents immediately.

**B. If there is No Agreement on the Findings and Conclusions**

If, upon review of the investigative report, the appropriate manager does not accept the recommended findings and/ or conclusion:

1. The Director will forward the investigative report to the Departmental Chief Justice if the complaint involves a court department, or to the Court Administrator if the complaint involves an OCM Department, or to the Chief Justice of the Trial Court and the Court Administrator if the complaint involves the Probation Department, or to the Chief Justice of the Supreme Judicial Court if the complaint involves the Office of Jury Commissioner.
2. The appropriate manager will also submit in writing to the Department Chief Justice, or in case of an OCM department, the Court Administrator, or in case of Probation, the Chief Justice of the Trial Court and the Court Administrator, or in the case of the Jury Commissioner, to the Chief Justice of the Supreme Judicial Court, the specific grounds upon which the manager objects to the recommended findings and/or conclusions, including a full evaluation and analysis of the evidence, as well as what finding, conclusion or other action the manager proposes.
3. The Departmental Chief Justice, Court Administrator, Chief Justice of the Trial Court and Court Administrator, or Chief Justice of the Supreme Judicial Court, as appropriate, will review both the investigative report and the written objection and will make the final determination regarding the findings and conclusions. The Departmental Chief Justice, Court Administrator, Chief Justice of the Trial Court and Court Administrator,

or Chief Justice of the Supreme Judicial Court, as appropriate, may, in the alternative, state what further actions are to be taken by the Director of the OWRC to resolve this disagreement.

4. Once the Departmental Chief Justice, Court Administrator, Chief Justice of the Trial Court and Court Administrator, or Chief Justice of the Supreme Judicial Court, as appropriate, has determined the final findings and conclusions, the Director of the OWRC will notify, in writing, the party bringing the complaint of a summary of the facts and findings, and of the conclusion of whether it is more likely than not that the Policy was violated, and where appropriate, that remedial action was taken to stop the behavior. This notification will be copied to the appropriate manager(s), the Departmental Chief Justice and Deputy Court Administrator or their designees when the complaint involves employees within a court department; the Commissioner of Probation when the complaint involves the Probation Department; the Jury Commissioner when the complaint involves the Office of Jury Commissioner, or the relevant Director of the involved Department when the complaint involves employees in the OCM.

If a complaint is made against a Director in the OCM, or the Commissioner of Probation, the OWRC will notify the Chief Justice of the Trial Court and the Court Administrator. If a complaint is made against the Jury Commissioner, the OWRC will also notify the Chief Justice of the Supreme Judicial Court.

5. Simultaneously, the Director will notify the party(s) against whom the complaint was brought that the investigation has concluded and will provide that party(s) a summary of the facts and findings, as well as inform that party(s) of the conclusion of whether it is more likely than not that a violation of the Policy has occurred, and that any corrective action will be determined by the appropriate manager. Copies of this written notification will be sent to the appropriate manager(s), the Departmental Chief Justice and Deputy Court Administrator or their designees when the complaint involves employees within a court department; the Commissioner of Probation when the complaint involves the Probation Department; the Jury Commissioner when the complaint involves the Jury Commissioner, or the relevant Director of the involved Department when the complaint involves employees in the OCM.

If a complaint is made against a Director in the OCM or the Commissioner of Probation, the OWRC will notify the Chief Justice of the Trial Court and the Court Administrator. If a complaint is made

against the Jury Commissioner, the OWRC will also notify the Chief Justice of the Supreme Judicial Court.

6. The parties to the complaint will be asked to report any possible retaliation or further incidents immediately.

## **5.607 Grievances and Appeals for Employees and Managers**

Employees who are members of a bargaining unit may grieve the disciplinary action of the appropriate manager pursuant to the terms of their collective bargaining agreement. Managerial employees may appeal disciplinary action pursuant to [Section 16.500](#) of this Policy Manual.

## **5.608 Required Action by Supervisors and Managers**

A manager who becomes aware of conduct that constitutes a violation of the Policy – whether or not a complaint has been made – must take appropriate action to stop the conduct. A supervisor should notify the OWRC and his/her/their manager, or regional manager, if appropriate, of such an incident to determine the most appropriate response.

Where an employee has not come forward with a specific complaint, but the manager is aware of an incident that is in violation of this Policy, the manager should contact the OWRC to seek advice about an appropriate response by the manager. Contacting the OWRC allows the Trial Court to track such behavior and plan systemic efforts to eliminate it. It also helps to ensure that individuals who move from one location to another are held accountable for their behavior in all settings. As set forth in Section 5.601(C), above, in the event of a situation in which safety is a concern or inappropriate conduct is occurring in the moment, the manager should take appropriate action immediately and report the incident immediately thereafter. HR must be consulted before imposing discipline to ensure that the imposition of discipline is appropriate to remedy the problem, and is fair, equitable, and proportionate. HR must also be consulted before placing an employee on paid administrative leave.

In some instances a manager may become aware of conduct that is unprofessional, or conduct that constitutes a single, isolated, and minor instance of a violation of the Policy, which the manager has fully addressed. The manager has discretion whether to contact the OWRC in this situation. However, should the behavior continue, repeat or escalate, the manager should notify the OWRC.

## **5.609 Provisions for Investigation of Complaints Against Judges, Clerks, Registers, and the Recorder.**

The law creates procedures for oversight and review of the conduct of Judges. The Rules of the Supreme Judicial Court create procedures for the oversight and review of the conduct of Clerks including Registers and the Recorder. This Policy reflects those procedures.

### **A. Complaints against Judges**

The law states that each Departmental Chief Justice is responsible for the oversight and discipline of any justice assigned or appointed to that department. The statute says that “the chief justice shall have the power to discipline any justice assigned or appointed to his department who refuses or fails to comply with any order concerning the performance of his duties as justice or any other lawful order of the chief justice or deputy court administrator of his department.” It also says that “all proceedings, documents, and other matters relating to such discipline shall at all times be confidential and not open to the public unless the justice appealing the disciplinary action agrees that the same shall not be confidential, or unless the Supreme Judicial Court determines that it is in the public interest for any such proceeding, document, or other matter relating to such discipline to be made public.” [G. L. c. 211B, § 10 \(xvi\)](#). For this reason, complaints against Judges are directed in the first instance to the Departmental Chief Justice who is required to maintain confidentiality in the manner specified by the statute.

In addition to any complaint made or investigation conducted in accordance with this Policy, complaints may be filed with the Commission on Judicial Conduct. The Legislature has established the Commission on Judicial Conduct with the “authority to receive information, investigate, conduct hearings, and make recommendations to the supreme judicial court concerning allegations of judicial misconduct.” With specified exceptions, “all proceedings of the commission shall be confidential until there has been a determination of sufficient cause and formal charges have been filed with the supreme judicial court.” [G. L. c. 211C, § 6](#).

Complaints received by or forwarded to the OWRC alleging that a Judge has violated this Policy will be referred to the appropriate Departmental Chief Justice without further screening or inquiry. The OWRC will notify the person filing the complaint of the referral within two business days of receipt of the complaint. Complaints received by a Departmental Chief Justice will

be logged and the person filing the complaint will be notified of the receipt of the complaint promptly, preferably within two business days, circumstances permitting. The Departmental Chief Justice, or designee, will take the steps necessary and appropriate to review, investigate, and resolve the complaint in a manner substantially consistent with the general procedures in Sections 5.602 through 5.604 of this Policy, and consistent with applicable law.

#### **B. Complaints Against Clerks, Registers, and the Recorder**

Rule 3:13(2) of the Rules of the Supreme Judicial Court states that complaints against Trial Court Clerks (defined to include Registers and the Recorder) shall be referred to the Departmental Chief Justice who shall investigate and impose discipline as appropriate, unless referred by the Chief Justice to the Trial Court Committee on Professional Responsibility for Clerks of the Courts pursuant to (4) (B) and (C).

Complaints received by or forwarded to the OWRC alleging that a Clerk, Register, or the Recorder, has violated this Policy will be logged by the OWRC and referred to the appropriate Departmental Chief Justice without further screening or inquiry. The OWRC will notify the person filing the complaint of the referral promptly, preferably within two business days of receipt of the complaint. Complaints received directly by a Departmental Chief Justice will be logged and the person filing the complaint will be notified of the receipt of the complaint preferably within two business days, circumstances permitting. The Departmental Chief Justice, or designee, will take the steps necessary and appropriate to review, investigate and resolve the complaint substantially consistent with the general procedures in Sections 5.602 through 5.604 of this Policy, and consistent with applicable law, and may also refer the matter to the Trial Court Committee on Professional Responsibility for Clerks of the Courts pursuant to Rule 3:13(4) (B) and (C).

#### **C. Consultation and Investigation**

In any inquiry or investigation of a complaint against a Judge, Clerk, Register, or the Recorder, alleging a violation of this Policy, the Departmental Chief Justice, in determining the nature and scope of investigation, may consult with the OWRC or may designate that any portion of the inquiry or investigation be conducted by the OWRC, or in conjunction with any investigator designated by the Departmental Chief Justice.

**D. Record Retention and Reporting Requirement**

Departmental Chief Justices and the OWRC shall file quarterly reports with the Chief Justice of the Trial Court detailing (1) number and nature of complaints filed against Judges, Clerks, Registers, and the Recorder; (2) number of open investigations more than 30 days old; and (3) statement of findings, recommendations, and description of resolution concerning closed complaints.

**THE OFFICES, PERSONS, OR HOTLINE NUMBER TO WHICH YOU  
MAY MAKE A COMPLAINT INCLUDE THE FOLLOWING:**

**Office of Workplace Rights & Compliance (OWRC)**

**Hotline: 617-878-0411**

**Email: [WorkplaceRights@jud.state.ma.us](mailto:WorkplaceRights@jud.state.ma.us)**

Margaret Peterson Pinkham, Director  
Two Center Plaza, Suite 540, Boston, MA 02108  
Direct: 617-878-0416  
Email: [margaret.pinkham@jud.state.ma.us](mailto:margaret.pinkham@jud.state.ma.us)

**Office of Diversity, Equity, Inclusion and Experience (ODEIE)**

John Laing, Chief Experience and Diversity Officer  
John Adams Courthouse, Suite 1M-100  
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**Executive Office of the Trial Court**

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Jonathan S. Williams, Court Administrator

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### **Departmental Administrative Offices**

#### **Boston Municipal Court Department**

Edward W. Brooke Courthouse

24 New Chardon Street, 6<sup>th</sup> Floor, Boston, MA 02114

Direct: 617-788-8700

Chief Justice Roberto Ronquillo, Jr.

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Cheryl Sibley, Deputy Court Administrator

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#### **District Court Department**

Edward W. Brooke Courthouse

24 New Chardon Street, 1<sup>st</sup> Floor, Boston, MA 02114

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Chief Justice Paul C. Dawley

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Philip McCue, Deputy Court Administrator

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#### **Housing Court Department**

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Benjamin Adeyinka, Deputy Court Administrator

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#### **Juvenile Court Department**

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Direct: 617-788-6550

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Thomas Capasso, Deputy Court Administrator  
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**Land Court Department**

Suffolk County Courthouse  
Three Pemberton Square,  
11<sup>th</sup> Floor, Boston, MA 02108  
Direct: 617-788-7470

Chief Justice Gordon Piper  
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Jill Ziter, Deputy Court Administrator  
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**Probate and Family Court Department**

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Direct: 617-788-6600

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Linda Medonis, Deputy Court Administrator  
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**Superior Court Department**

Suffolk County Courthouse  
Three Pemberton Square, 13<sup>th</sup> Floor, Boston, MA 02108  
Direct: 617-788-8130

Chief Justice Judith Fabricant  
Email: [judith.fabricant@jud.state.ma.us](mailto:judith.fabricant@jud.state.ma.us)  
Elaina Quinn, Deputy Court Administrator  
Email: [elaina.quinn@jud.state.ma.us](mailto:elaina.quinn@jud.state.ma.us)

## 5.610 Additional Resources

### **Commission on Judicial Conduct**

*(if the person complained about is a judge)*

Attn: Executive Director

11 Beacon Street, Suite 525, Boston, MA 02108

Direct: 617-725-8050

Fax: 617-248-9938

*The Commission on Judicial Conduct does not accept complaints by telephone. If you have a disability that prevents you from submitting a written complaint, please contact the CJC's office to discuss how it can best accommodate your needs: 617-725-8050.*

Aggrieved Employees who are members of a bargaining unit may also file a grievance under the applicable collective bargaining agreement.

An Employee, Service Provider, or Court User who believes that he/she/they have been discriminated against, harassed, or retaliated against in violation of the law may file a complaint within 300 days with the following agencies:

### **United States Equal Employment Opportunity Commission (EEOC)**

JFK Building, 475 Government Center, Boston, MA 02203 800-669-6820

### **Massachusetts Commission Against Discrimination (MCAD)**

One Ashburton Place, Boston, MA 02108

617-994-6000

436 Dwight Street, Room 220, Springfield, MA 01103

413-739-2145

484 Main Street, Room 320, Worcester, MA 01608

508-453-9630

800 Purchase Street, Room 501, New Bedford, MA 02740 508-990-2390

**Massachusetts Trial Court  
Office of Workplace Rights & Compliance (OWRC)**

TO REPORT A CONCERN OR FILE A COMPLAINT OF DISCRIMINATION, HARASSMENT, AND/OR RETALIATION, PLEASE  
COMPLETE THIS FORM OR CONTACT THE **OWRC HOTLINE AT 617-878-0411**.  
THE OWRC COMPLAINT FORM IS AVAILABLE ON MASS.GOV (FOR EXTERNAL USERS) AND ON COURTYARD (FOR INTERNAL  
USERS). PLEASE COMPLETE ALL REQUIRED (\*) FIELDS. PLEASE PRINT CLEARLY.

**Information about Reporting Party (Person Filing the Complaint)**

PLEASE NOTE: IF YOU WISH TO REMAIN ANONYMOUS, PLEASE DO NOT COMPLETE THIS SECTION

Name

First Name

Last Name

Employee ID# (If Applicable)

(e.g. 932812)

Work Location or Location of Incident

Job Title (If You are a Trial Court Employee)

Preferred Phone Number

Preferred Email Address

**Complaint Information**

I believe that I (or another person) have been treated in a discriminatory manner or have been harassed based on: (please check all that apply)\*

- ☐ Race
- ☐ Color
- ☐ Sex (including, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth, and breastfeeding) ☐ Age (40 or older)
- ☐ Disability (including failure to provide a reasonable accommodation) ☐ Sexual Orientation
- ☐ Gender Identity (including transgender status)
- ☐ Military Service or Veteran Status
- ☐ Religion or Religious Creed
- ☐ National Origin
- ☐ Genetic Information
- ☐ Ancestry
- ☐ Sexual Harassment

I believe that I (or another person) have been retaliated against based on my/their participation in discrimination complaint related activities.\* ☐ Yes ☐ No

☐ I do not know

11/04/19

### Information about Responding Party (Person or Persons Complained Against)

Name\*

First Name

Last Name

Work Location or Location of Incident\*

Job Title

Relationship

to

Complainant\*

*(e.g. supervisor, co-worker, service provider, court user, vendor, other.*

*If other, please specify)*

Responding Party Phone Number

Responding Party Email Address

### Information about the incident or incidents

Briefly describe what happened to make you believe that you (or another person) have been discriminated against or harassed or retaliated against.\*

Where did this happen?\*

When did this happen?\*

What resolution are you looking for?\*

**COMPLAINTS MAY BE FILED BY MAIL OR HAND DELIVERED TO:**

MASSACHUSETTS TRIAL COURT, OFFICE OF WORKPLACE RIGHTS & COMPLIANCE, TWO CENTER PLAZA, 5<sup>TH</sup> FLOOR, SUITE 540,  
BOSTON, MASSACHUSETTS 02108

**OR ELECTRONICALLY (VIA E-MAIL) TO:** [WORKPLACERIGHTS@JUD.STATE.MA.US](mailto:WORKPLACERIGHTS@JUD.STATE.MA.US)

**APPENDIX E**

**MASSACHUSETTS TRIAL COURT POLICY AND PROCEDURE FOR THE  
ELIMINATION OF SEXUAL AND GENDER HARASSMENT IN THE  
WORKPLACE**

## APPENDIX E

### MASSACHUSETTS TRIAL COURT POLICY AND PROCEDURE FOR THE ELIMINATION OF SEXUAL AND GENDER HARASSMENT IN THE WORKPLACE

#### I. PURPOSE AND SCOPE OF POLICY

The Massachusetts Trial Court is committed to the prevention and elimination of sexual and gender harassment in the courts. This document establishes the policy of the Massachusetts Trial Court regarding sexual and gender harassment in the workplace. It applies to judges, elected and appointed officials, managers, supervisors, employees, non-court employees who work in or have business with the court, members of the public who use court facilities, vendors and contractors. The policy applies in every Trial Court facility and office, and at every function, conference, or event related to one's course of employment or business with the Trial Court both during and outside of regular business hours.

This policy provides examples of conduct that may constitute sexual or gender harassment. The list of examples is not comprehensive. It is intended to help the reader determine if certain conduct might be considered a violation of the policy. Finally, this document sets forth the Trial Court complaint procedure that should be followed by anyone who believes that he/she may be a victim of unlawful sexual harassment as well as the procedure that should be followed by supervisors and managers who become aware of conduct that might be in violation of the policy.

#### II. KEY TERMS DEFINED

The following definitions shall apply when interpreting this Policy:

**Sexual Harassment.** Sexual harassment is a form of sex discrimination that is illegal under federal and state law. These laws provide that unwelcome sexual advances, requests for sexual favors, and other physical conduct or verbal and/or no-verbal communication of a sexual nature constitute sexual harassment when:

- submission to or rejection of such speech or conduct is made either explicitly or implicitly a term or condition of an individual's employment or a basis for an employment decision or the implication is made that it will be used for such purpose; or
- such speech or conduct creates an intimidating, hostile, humiliating or sexually offensive environment that is sufficiently severe and pervasive as to interfere with a reasonable person's work performance or to alter the condition of employment and create a hostile work environment.

**Gender Harassment.** Gender harassment is a form of sex discrimination that is illegal under federal and state law. It is severe, pervasive or sufficiently patterned conduct that



is directed against a person because of his/her actual or perceived sex, gender or sexual orientation. It is harassment that does not necessarily involve sexual activity or language.

**Employee.** Unless otherwise indicated in the policy, this term refers to all Massachusetts Trial Court employees including judges, elected and appointed court officials, managers, supervisors, administrators, department heads, union members, union exempt employees, professional employees and other persons paid through the Human Resources Compensation Management System (HRCMS) to provide a service to the Trial Court. Employees with supervisory or managerial responsibilities are referred to herein collectively as supervisors or managers.

**Retaliation.** Retaliation is adverse treatment that is directed at an individual because that individual made a complaint alleging a violation of this policy or assisted in the investigation of a complaint.

**Human Resources Coordinator for Gender Issues (CGI).** Among other duties of the Human Resources Coordinator for Gender Issues (CGI), the CGI is the specialist within the Human Resources Department of the Office of Court Management who serves as the sexual and gender harassment officer for the Trial Court and provides an array of technical assistance to managers handling complaints of sexual and gender harassment. This includes verification of previously substantiated complaints of harassment or retaliation, guidance on the investigative process and documentation, and guidance in determining appropriate remedial or disciplinary action. The CGI accepts complaints filed directly with his/her office and conducts or designates others to conduct investigations of complaints.

The CGI may be contacted at Two Center Plaza, Boston, MA 02108 or by phone at 617-742-8575 or toll free at 1-800-572-5027 or by fax at 617-742-0968 or by email at [cgi@jud.state.ma.us](mailto:cgi@jud.state.ma.us). Other staff of the Human Resources Department may also be contacted at the telephone and fax numbers listed.

### III. KEY FACTORS IN IDENTIFYING SEXUAL OR GENDER HARASSMENT

Sexual and gender harassment occurs in a wide variety of situations that share a common element – the inappropriate introduction into the workplace of sexual or gender-based activities or comments. When trying to determine whether certain behavior violates this policy, consider whether the behavior is:

- **Sexual or gender-based**, as opposed, for instance, to an occasional compliment of a socially acceptable nature;
- **Repeated or pervasive** since a minor, isolated incident will not necessarily violate the policy;
- **Severe** – a single serious incident such as sexual assault will violate the policy;
- **Unwelcome** by even just one person – whether the target of the behavior or a bystander;

- **Intimidating, hostile, or offensive** whether it was the actor's intention or not; or
- **Interfering with** the worker's ability to do his/her job.

#### **IV. SEXUAL AND GENDER HARASSMENT – APPLICABLE PRINCIPLES**

The following general principles apply when determining what might be sexual or gender harassment:

- The effect on the individual alleging harassment – rather than the intention of the accused – is the focus in a sexual and gender harassment situation.
- The victim of sexual or gender harassment may be a man or a woman and the harasser may be a man or a woman.
- The victim does not have to be a different gender or sexual orientation from the harasser.
- The harasser can be a manager, supervisor, co-worker, member of the bar, member of the public or other individual involved in some manner with the court, such as a vendor.
- The victim does not have to be the subject of the offensive behavior. For example, a witness who is not the subject of the behavior may be considered a victim if offended by the conduct.
- The victim need not suffer any economic loss, such as losing a promotion, as a result of the harasser's conduct.
- A victim can be a member of the public or non-court employee.

#### **V. EXAMPLES OF CONDUCT PROHIBITED BY THIS POLICY**

Sexual and gender harassment can take many forms. It might involve physical, verbal or non-verbal conduct. In some instances the conduct must be repeated and pervasive, and in others a single serious incident is enough to constitute sexual or gender harassment. It is unacceptable in any form and in any work-related setting, including conferences, meetings, or work-related social events whether during or outside of regular business hours. The following are some examples of conduct prohibited by this policy:

##### **Physical conduct:**

- Coerced or forced kissing, groping, sexual assault
- Stalking, in person or through electronic or other forms of communication

- Uninvited intimate physical contact such as touching, hugging, patting, brushing up against, pinching and grabbing

**Verbal conduct:**

- Demand for sexual favors accompanied by an implied or overt threat concerning an individual's employment status, security or treatment
- Derogatory comments and/or slurs about an individual's gender or sexual orientation
- Unwanted sexual flirtations or propositions
- Speaking in the workplace of one's sexual activity or inquiring about or commenting on another's sexual activity
- Comments about an individual's body
- Innuendos of a sexual nature
- Verbal innuendos that relate to or reflect negatively on a particular gender or sexual orientation
- Jokes, language, epithets or remarks that have the purpose or effect of stereotyping, demeaning, or making fun of an individual based upon his/her sex, gender or perceived sexual orientation
- Slang terms or labels that can be considered derogatory or too familiar in a professional setting, such as "honey," "sweetie," "dear," "darling" ...

**Non-verbal conduct:**

- Indecent exposure
- Arranging to be alone with a person for the purpose of making sexual advances
- Unwanted sexual flirtations, advances
- Obscene gestures or suggestive or insulting sounds (e.g., catcalls, whistling)
- Prolonged staring or leering at a person
- Purposefully, and unnecessarily, violating a person's personal space

- Display or transfer – through any form of distribution including communication systems such as Internet, email, or fax – of photographs, literature, cartoons, pictures, calendars, graffiti or other material, which are sexually suggestive or degrading to a particular gender or sexual orientation.

## **VI. EMPLOYEE ROLES AND RESPONSIBILITIES**

Employees play a key role in keeping harassment out of the workplace. Employees who are also supervisors or managers have additional responsibilities. Whether an employee believes he/she is experiencing sexual or gender harassment, has witnessed the harassment of another or is a manager obliged to immediately address and resolve any complaint of a violation of this policy, every employee plays a role in maintaining a safe and harassment-free workplace.

### **A. Responsibility to Comply with Policy**

Every employee of the Trial Court is personally responsible for conducting him or herself in a manner that is in full compliance with this policy. Any behavior of a sexual nature in the workplace should be avoided, as it may be offensive to those who witness it or are the object of it. Under state law, employees may be held personally liable for engaging in sexual harassment.

### **B. Reporting Inappropriate Behavior**

Employees are encouraged to promptly report to a manager or the CGI conduct that may be in violation of the policy. Managers rely on employees to inform them when employees observe inappropriate conduct of the nature described in the policy, especially if it is offensive to them or to any other employee or user of the court. Only with such knowledge can the manager take steps to stop the behavior. Reporting information promptly prevents escalation of a bad or potentially dangerous situation.

### **C. Options for Dealing with Sexual and Gender Harassment**

All court employees and persons who have business with the court are entitled to work in an environment free from sexual and gender harassment. Employees and others covered by this policy have several options to address conduct that they perceive to be in violation of the policy. Individuals may choose to use one or more of the options described below, in any order they see fit. It is not necessary to use the self-help option before making a complaint.

**Self-help.** If an employee believes that he/she is being harassed, the most immediate goal should be to stop the conduct, while remaining safe. In some situations, an employee can do this by telling the other person that the behavior is offensive and not welcome and requesting that the behavior stop. An employee may wish to take this step if he/she believes that the other party may not be aware that the behavior is offensive and had no intention of offending.

If an employee chooses this option, the employee should consider describing to the other person the specific language or behavior that was offensive and the circumstances in which the incident took place; or the employee might firmly state that while it may not be intended, the behavior is offensive, intimidating or embarrassing. The employee might say something like, "I don't like jokes like that; I don't think they're funny. Please don't tell them."

**Seeking information.** In some instances, confronting the other person about the behavior may be too intimidating or uncomfortable. This may be especially true if the other person is the employee's supervisor or manager. The employee may decide to discuss the situation with his/her manager, or, alternatively, with another local manager, a regional manager, or the CGI. These individuals can provide more information about sexual and gender harassment, discuss possible approaches to addressing the employee's concerns, and explain the complaint process. If during the discussion a manager learns that a potentially serious violation of this policy may have occurred, or learns that the person whose conduct is in question was previously found to have violated the policy, the manager may be required to conduct a full investigation. Although the person seeking information under these circumstances may not wish the matter to go any further than a discussion with the manager, the manager may be under an obligation to act.

**Making a complaint.** An employee may choose to make a verbal or written complaint to the Trial Court alleging a violation of the policy. If this option is selected, the employee should make the complaint to the employee's manager, a regional manager or the CGI. The employee should be prepared to provide a written document explaining the employee's allegation(s) with some specificity. Specific information such as a description of the incident, times, dates, witnesses, statements, and other details supporting the allegation will allow the manager or CGI to conduct a thorough investigation of the matter. Complaints made with the CGI must be in writing. Employees are encouraged to contact the CGI with any questions about the allegation(s) or about the process before making a complaint. The CGI will send or make available to the employee a complaint form that will assist the employee in providing the necessary information.

**Other options.** In addition to filing a complaint within the Trial Court, an employee may choose to pursue the matter outside of the Trial Court. Using the Trial Court complaint process does not prohibit an employee from also doing the following:

- Filing a formal complaint within 300 days of the most recent incident with the: Massachusetts Commission Against Discrimination (MCAD), One Ashburton Place, Boston, MA 02108, 617-727-3990; Massachusetts Commission Against Discrimination (MCAD), 436 Dwight Street, Room 220, Springfield, MA 01103, 413-739-2145; or United States Equal Employment Opportunity Commission (U.S. EEOC) John F. Kennedy Fed Bldg., 2400 Government Center, Boston, MA 02114, 1-800-669-4000; or

- Filing a grievance under the collective bargaining agreement where the employee is a member of a union; or
- Engaging an attorney to represent the employee's interests.

**Employee Assistance Program.** If an employee wishes to speak to someone outside of the court for counseling or to discuss workplace issues, the employee may contact the Employee Assistance Program (EAP), an employee benefit that provides assistance and short-term counseling to employees on a wide range of issues, including work-related stress. The Trial Court is not informed of those who use this benefit. Telephone and in-person counseling services are provided at no cost to the employee and are confidential. Information about the EAP can be found on the Trial Court website at <http://trialcourtweb.jud.state.ma.us/admin/hr/eap.html> or be telephone at 1-800-451-1834.

**Keeping notes.** It is recommended that whatever option an employee chooses when dealing with a perceived policy violation that the employee keep notes about the behavior at issue, including the dates, times, locations, and persons involved in the situation and the steps taken by the employee to attempt to resolve the situation, if applicable.

#### **D. Cooperating in Investigations, Maintaining Confidentiality, Retaliation**

Employees are required to cooperate in any inquiry or investigation of an alleged violation of this policy and to maintain confidentiality of all proceedings connected with the inquiry or investigation. All discussions between managers and persons who believe that a violation of the policy may have occurred, or who have questions about the policy, will remain confidential to the fullest extent possible consistent with the Trial Court's commitment to ensure the safety and well-being of all people working in or using the courts. All actions taken to investigate and resolve complaints shall also be conducted with as much confidentiality as possible without compromising the thoroughness of the investigation or the safety of all persons involved.

Employees are prohibited from retaliating or discriminating in any way against another employee who has alleged a violation of this policy or cooperated in the investigation of a complaint. Such retaliation is unlawful and will not be tolerated. Claims alleging retaliation will be investigated; and, if substantiated, will be treated as a policy violation that could result in disciplinary action.

#### **E. Additional Responsibilities of Supervisors, Managers, Judges**

Supervisors and managers are in leadership positions in the courts and their own behavior serves as a model to other employees of what is expected. In addition, under the law, supervisors and managers may be held personally liable for their behavior.

It is the duty and responsibility of supervisors and managers to strictly enforce the terms of this policy. They must be vigilant to ensure that the workplace remains free of sexual and gender harassment and take appropriate action if they are aware of behavior that could be or could lead to a violation of this policy.

Managers are well-advised to be on guard against any conduct of a sexual nature, even if there is no indication that it is perceived to be offensive or unwelcome at the time the conduct occurs. Others may subsequently witness the behavior and find it offensive, or the conduct may escalate. All efforts to avoid these risks are prudent.

Judges hold visible positions of authority within the court and as such are in a unique position to influence the court environment. A judge should take reasonable steps to notify an appropriate manager or the CGI if the judge witnesses or receives a credible report of behavior that the judge believes is in violation of this policy.

#### **F. Required Action by Supervisors and Managers**

**Managers and supervisors must act.** A manager who becomes aware of conduct that may constitute a violation of the policy or could potentially lead to a violation of the policy – whether or not a complaint has been made – must take appropriate action to stop the conduct. A supervisor should immediately notify his/her manager, or regional manager, if appropriate, of such an incident and that manager will then determine the most appropriate response.

In the situation where an employee has not come forward with a specific complaint, but the manager is aware of an incident that might be in violation of this policy, the manager has a range of options:

- The manager may decide to conduct an investigation on his/her own initiative and take remedial action, possibly including disciplinary action, to promptly eliminate the conduct;
- If the manager has personally observed the offending conduct, he/she may choose to speak directly to the offending party and explain that such behavior is not acceptable and must stop immediately and may provide the party with a copy of this policy or other materials that help explain the provisions of the policy;
- The manager might choose to hold a staff meeting to discuss the provisions of this policy, distribute a copy of the policy and remind staff that sexual and gender harassment will not be tolerated in the court. The manager may remind staff that they work in a system dedicated to justice and fairness, and that this type of conduct undermines the integrity of the entire court system.

Managers are encouraged to contact the CGI about any situations that involve this policy – even those that do not involve a complaint – and to seek advice about an appropriate response by the manager. Contacting the CGI allows the Trial Court to

track such behavior and plan systemic efforts to eliminate it. It also helps to ensure that individuals who move from one location to another are held accountable for their behavior in all settings.

**Investigation of complaint.** If a person makes a verbal or written complaint under this policy with a manager or supervisor, or a written complaint with the CGI, the manager or CGI must conduct a thorough investigation of the allegation so that if it is substantiated, prompt remedial action can be taken to stop the offending behavior. Investigations will be conducted in a fair and timely manner and will include private, individual meetings with the person making the complaint, the person about whom the complaint is made, and with any witnesses. The person conducting the investigation may also choose to review records or go to the location at issue to view the conditions at that location. To the extent practicable, the person making the complaint and the person about whom it is made will be kept informed of the progress of the investigation.

**Notification and coordination requirements.** If a person makes a complaint and the manager finds that any of the conditions listed below exist, the manager *must* contact the CGI for guidance and coordination so that a thorough investigation can be completed and a timely decision issued. The CGI should be contacted as soon as possible after the manager becomes aware of the complaint. However, the manager must always take immediate steps to ensure the safety of any person the manager believes is at risk of harm. Sometimes this will require that action be taken before the CGI is contacted. The following conditions trigger the manager's obligation to call the CGI:

- The alleged conduct could place the complainant or another person at risk of harm;
- The complaint alleges conduct that is repeated, frequent or pervasive;
- The complaint alleges a serious form of harassment;
- The manager is aware or learns that another harassment complaint is pending against the person about whom the current complaint is being made or that that individual was previously found to have violated this policy;
- In addition to the underlying complaint of harassment, there is an allegation that the person about who the complaint is made has retaliated against the complainant.

Under these circumstances, after the investigation is completed and before a final decision is made in the matter, including a determination on disciplinary action, if applicable, the manager must contact the CGI again to discuss the manager's proposed findings and decision on the complaint. The person investigating the complaint will then issue a written report including findings, the final decision, and any discipline or other remedial action that is recommended.

The written report together with any completed forms that the CGI has requested must then be submitted to the CGI. The complainant and the person about whom the complaint was made will be notified of the findings and decision as soon as possible.



**Keeping records and maintaining confidentiality.** In all matters implicating this policy that come to the attention of a manager, the manager must maintain in an investigative file copies of all documents as well as a narrative about how the manager became aware of the matter and all actions taken in response. This account may include dates, times, places and names of people to whom the manager spoke, witness statements, notes and any other applicable documentation. All actions taken to investigate and resolve complaints shall be conducted with as much confidentiality as possible without compromising the thoroughness of the investigation or the safety and well-being of all persons involved.

**Interference is prohibited.** Any supervisor or manager who prevents or attempts to prevent an individual from making a complaint under this policy, or who fails to cooperate with or interferes in any way with the investigation of such a complaint, will be subject to disciplinary action.

## **VII. DISCIPLINE**

If an investigation of a complaint of sexual or gender harassment reveals that an employee has engaged in actions that violate this policy, discipline will be imposed, up to and including discharge. The discipline will depend upon the seriousness of the violation. The appropriate manager will take disciplinary action in accordance with the progressive discipline provisions set forth in the Trial Court Personnel Policy and Procedures Manual or pursuant to other appropriate disciplinary provisions.

Complainants will be informed that remedial action was taken to stop the harassing behavior. To monitor the success of the remedial action in stopping the behavior, complainants will be asked to report any further incidents.

## **VIII. NON-COURT EMPLOYEES**

Managers are also responsible for responding to allegations of harassment by non-court employees. In the case of non-court employees who work regularly in the court, the appropriate manager shall inform in writing the employer of the person alleged to be in violation of the policy about the situation and seek assurance from the employer that the offensive conduct will stop immediately. If the offensive behavior does not stop, the court may take appropriate action.

If a member of the public or other non-court employee is found to be in violation of this policy, a manager may have the individual removed from the court premises or take other appropriate action. The manager shall keep written notes of all actions taken under this provision. As with all potential violations of this policy, managers are strongly encouraged to contact the CGI for advice and assistance.