

## **Summary of Key New and Revised Provisions**

Format and Organization. The 2016 Massachusetts Code of Judicial Conduct adopts the structure of the 2007 American Bar Association Model Code. The Canons state overarching principles. A set of enforceable black-letter Rules follows each Canon. The Comments that accompany the Rules do not state enforceable obligations, but rather provide interpretive guidance and, occasionally, identify aspirational goals.

Substantive Changes from the 2003 Massachusetts Code of Judicial Conduct. The most significant substantive differences between the 2016 Massachusetts Code and the 2003 Massachusetts Code are as follows. In several instances, the 2016 Code reverses the 2003 Code. Far more often, the 2016 Code addresses topics that were formerly not addressed or provides additional clarification:

### **Canon 1**

- Relationship Between the Code and the State Conflict of Interest Law. Rule 1.1, Comment [1], clarifies the relationship between the Code and the state conflict of interest law, G.L. c. 268A and c. 268B. Comment [1] explains that a judge's obligation to comply with the law ordinarily includes the obligation to comply with the state conflict of interest law, but that the unique role of judges requires them on occasion to be bound by rules that may be more or less restrictive than those followed by other public employees. In many instances, the 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. However, in a few instances (e.g. acceptance of some gifts related to a judge's official position such as certain bar association invitations), the 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.
- Judicial Outreach. Rule 1.2, Comments [4] and [6], explicitly encourage judicial outreach for purposes of improving professionalism within the bench and bar, promoting access to justice, and promoting public confidence in the administration of justice. These Comments expand upon the revisions to Canons 4A and 4B made to the 2003 Code in 2012.
- Judicial Recommendations. Rule 1.3, Comment [2], states that a judge may provide a recommendation on official letterhead and/or sign it using the judicial title only if the recommendation is based on observations made in the judge's judicial capacity. There is no comparable provision in the 2003 Code, but the principle is not new.

## **Canon 2**

- **Bias and Harassment.** Rule 2.3 adds "or engage in harassment" to the prohibition against a judge's manifestations of bias or prejudice. The rule also prohibits bias, prejudice, or harassment based upon a person's status or condition. Examples of status or condition listed in Comment [2] include 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. The Comments also elaborate on the meaning of harassment, including sexual harassment.
- **Self-Represented Litigants.** Rule 2.6(A) expressly permits a judge to make reasonable efforts to facilitate the ability of self-represented litigants to be fairly heard, and a Comment provides examples of permissible accommodations. This is a new topic.
- **Participation in Settlement Discussions and Plea Discussions.** Rule 2.6(B) continues to permit judges to encourage parties to settle their civil cases, but now explicitly directs that the judge shall not act in a manner that is coercive. Rule 2.6(B) also authorizes judges to participate in plea discussions in criminal cases in accordance with applicable law. The reference to criminal cases is new.
- **Ex Parte Communication in Specialty Courts.** Rule 2.9(A)(2) provides for an exception to the prohibition against ex parte communications in specialty courts as authorized by law. The term "specialty court" is defined in the Terminology section to mean 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, and the definition further explains that specialty court sessions integrate treatment and services with judicial case oversight and intensive court supervision. "Law" is defined in the Terminology section to include court rules as well as 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. Ex parte communications in specialty courts is a new topic.
- **Inadvertently Received Ex Parte Communication.** Rule 2.9(B) provides that if a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall promptly notify the parties of the substance of the communication. This is a new topic.
- **Prohibition Against Independent Investigation.** Rule 2.9(C) prohibits a judge from independently investigating adjudicative facts. There is no comparable provision in the 2003 Code, although the principle is not new.

- Disqualification. Rule 2.11(A) provides that a judge must disqualify himself or herself 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. Comment [2] explains that a judge's obligation to disqualify applies whether or not a motion to disqualify has been filed. These provisions make explicit what is implicit in the 2003 Code.
- Addressing Disability or Impairment of a Lawyer or Another Judge. Rule 2.14 requires a judge to take appropriate action when the judge has a reasonable belief that the performance of a judge or a lawyer is impaired by mental or physical illness or by alcohol or substance abuse. The 2003 Code requires a judge to take appropriate action only where the impairment has manifested itself in lack of diligence or competence or is evidenced by the violation of an ethical rule that raises a significant question about the judge's or lawyer's honesty, integrity, trustworthiness, or professional fitness. This is a new topic.
- Cooperation with Disciplinary Authorities. Rule 2.16 requires judges to cooperate with disciplinary authorities and prohibits judges from retaliating against those assisting or cooperating with an investigation. There is no comparable provision in the 2003 Code, although the principle is not new.

### **Canon 3**

- Coercive Activities. Rules 3.1(B) and (D) explicitly prohibit a judge from engaging in extrajudicial conduct that would appear to a reasonable person to be coercive or that is reasonably likely to lead to recurrent disqualification. There is no comparable provision in the 2003 Code, although the principle is not new.
- Reasonable Use of Court Resources in Connection with Extrajudicial Activities. Rule 3.1(E) permits a judge to make reasonable, lawful use of court premises, staff, and resources in connection with activities that concern the law, the legal system, or the administration of justice. There is no comparable provision in the 2003 Code.
- Proposing Legislation. Rule 3.2 gives examples of topics a judge may appropriately address with an executive or legislative body or official, and makes it clear that a judge may propose new legislation or amendments to existing legislation as well as comment on new legislation or amendments to existing legislation proposed by others. The permission to propose or comment on new legislation is new.
- Testifying as a Character Witness. Rule 3.3, Comments [2] - [4], explain that the prohibition on testifying as a character witness does not preclude a judge from vouching for the qualifications of judicial applicants or nominees; providing

character references for bar applicants; or responding to inquiries from governmental entities, or contractors for such entities, conducting background checks on applicants for public employment. Commentary to the 2003 Code permits judges to vouch for the qualifications of judicial applicants or nominees, but the other exceptions are new.

- Appointment to Governmental Commission. Rule 3.4, Comment [1], clarifies the factors relevant to a judge's acceptance of an appointment to a governmental board or commission. These factors include the subject matter of the appointment, the availability of judicial resources, respect for the separation of powers, and the importance of minimizing judicial disqualification and of upholding the independence, integrity, and impartiality of the judiciary.
- Use of Nonpublic Information. Rule 3.5, Comment [2] states that the restrictions on a judge's use of nonpublic information are not intended to limit the judge's ability to act on information acquired in a judicial capacity where necessary to protect the health or safety of the judge or other persons. This is a new topic.
- Membership in Discriminatory Organizations. Rule 3.6, which prohibits a judge from holding membership in organizations practicing invidious discrimination, now requires a judge to resign immediately from any organization practicing invidious discrimination.
- Participation in Legal, Educational, Religious, Charitable, Fraternal, or Civic Organizations. Rule 3.7(A) and associated Comments address the permissible scope of a judge's participation in extrajudicial activities. Notably, a number of activities prohibited under the 2003 Code or under Advisory Opinions interpreting that Code are now permitted, but a judge's participation is always subject to the controlling requirements of Rule 3.1.
  - Fundraising Events. Paragraph (A)(6A) permits a judge to serve as a keynote speaker or receive an award or comparable recognition at a fundraising event of an organization, so long as the organization is concerned with the law, the legal system, or the administration of justice *and* promotes the general interests of the judicial branch or the legal profession, including enhancing the diversity and professionalism of the Bar. This provision reverses a prohibition in the 2003 Code. A fundraising event is defined as an event for which the organizers' chief objectives include raising money to support the organization's activities beyond the event itself.
  - Planning Fundraising. Paragraph (A)(3) permits a judge to participate in internal discussions related to fundraising. This provision reverses a prohibition in the 2003 Code. If the organization is composed entirely or predominantly of judges, a judge also may plan fundraising and manage and invest the organization's funds.

- Sponsorship of Events. Comments [1A] and [1B] clarify that while permitted activities must be of or sponsored by an organization not conducted for profit, a judge may participate in events of an organization that receives sponsorship or financial support from for-profit entities.
- Solicitation. Paragraph (A)(4) permits a judge to solicit contributions or members for an organization only if the persons solicited are members of the judge's family or judges over whom the judge does not exercise supervisory authority. The Code now treats solicitation for contributions and for members in the same way.
- Judge's Name on Solicitations. Comment [2] clarifies that Paragraph (A)(4) permits a judge associated with an organization to be identified by name and title on letterhead or other materials used by the organization to solicit donations and members if comparable designations are used for other persons associated with the organization. This provision reverses a prohibition in the 2003 Code.
- Encouraging Pro Bono Services. Rule 3.7(B) permits a judge to encourage lawyers to provide pro bono publico legal services. This is a new topic.
- Assisting Minor Children with Fundraising Activities. Rule 3.7(C) permits a judge to assist the judge's minor children in fundraising activities, so long as the activities are not for the primary or exclusive benefit of the judge's own child. This is a new topic.
- Practicing Law. Rule 3.10 provides that a judge may give legal advice and review documents for a member of the judge's family, but may not serve as a family member's lawyer in any forum. Rule 3.10 also permits a judge to serve as a judge advocate general in the military. These are new topics.
- Reasonable Compensation for Teaching Activity. Rule 3.12 permits a judge to be reasonably compensated for any teaching activity, but prohibits a judge from otherwise accepting an honorarium or fee for a speaking engagement. A teaching activity is broadly defined to 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.
- Accepting Gifts or Other Benefits. Rule 3.13 considers when a judge may accept a gift or other benefit. A judge may never accept a gift or benefit if it would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. If that threshold standard is met, the determination of whether a judge may accept a gift or benefit depends in part on whether the gift or benefit is

given for or because of the judge's official position or action. Rule 3.13 also addresses a judge's obligation to disclose gifts that the judge may accept.

Of particular note is the treatment of the following types of gifts that are given for or because of a judge's official position or action:

- Gifts Incident to Public Recognition. This type of gift may be accepted but must be disclosed if it is of "substantial value." (As of this writing, "substantial value" is defined as \$50 or more. See 930 Code of Massachusetts Regulations 5.05.) The 2003 Code required disclosure only if the value of the gift exceeded \$350.
- Invitations to Attend Without Charge Luncheons, Dinners, Receptions, Award Ceremonies, and Similar Events of Bar Associations and Other Law-Related Non-profit Organizations that are Held in Massachusetts. Acceptance is permitted and disclosure is not required. A judge is no longer required to obtain a determination by the Chief Justice of the court on which the judge sits that the invitation serves a legitimate public purpose because such invitations are presumed to do so.
- Discounted or Free Membership to Bar Associations or Other Law-Related Non-Profit Organizations. Acceptance is permitted and disclosure is not required. This is a new topic.
- Free or Discounted Attorneys' Fees. Acceptance without disclosure is permitted in two instances: first, when the lawyer providing the legal services and all the firm's lawyers are relatives or close personal friends of the judge, or second, when a lawyer or law firm has offered special pricing as part of a commercial opportunity or marketing strategy to a group of similarly situated persons who are not judges. There are additional instances when a judge may accept but must disclose free or discounted legal services. Acceptance with disclosure is permitted if the same benefit is extended to non-judges in comparable circumstances (e.g., a firm offers a professional courtesy discount to former partners, and the judge is a former partner), and the lawyer, the lawyer's firm, and their interests are not before the judge, have not been before the judge in the reasonably recent past, and are unlikely to come before the judge in the reasonably near future. The Code also addresses when a judge may accept free or discounted legal services for representation in disciplinary matters. This is a new topic.
- Reimbursements of Expenses and Waivers of Fees and Charges. Rule 3.14(C) provides that, when offered the opportunity to attend certain types of events (other than those addressed in Rule 3.13(D)(2)) and receive reimbursement of expenses or waiver of fees or charges, a judge must notify the Chief Justice of the court on which the judge sits and obtain a determination that acceptance serves a legitimate

public purpose. There is no comparable provision in the 2003 Code, but Rule 3.14 is consistent with practice pursuant to the Massachusetts conflict of interest law.

- Reporting Requirements. Rule 3.15 requires a judge annually to complete the Public Report of Extra-Judicial Income and the Statement of Financial Interests.

#### **Canon 4**

- Political Activities. There are no significant substantive changes.