



## ***HYPOTHETICALS***

# ***JUDICIAL ETHICS***

### **Version for Presenters**

**\*\*All grants of permission are subject to the overarching principles of the Code. 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. \*\***

There will not be time for review all of these hypotheticals. Presenters should select those that he or she believes will be of most interest/assistance to judges in attendance.

### ***Hypothetical #1: Recommendations and References***

**Key principle: Rule 1.3: 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.**

Judge Milton Mentor has excellent relations with past and present law clerks and interns. A current law intern is applying for jobs at law firms. The intern asks for a letter of recommendation.

A. May he write a letter of recommendation for the intern? On court letterhead?

Yes. Rule 1.3 and Comment [2]. 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. It is critical to distinguish instances when observations are made in the judicial capacity from other instances.

B. The intern asks Judge Mentor if he will also make phone calls to lawyers at the firms. May Judge Mentor call the lawyers to advocate for the intern's application?

No. Rule 1.3 and Comments [1] and [2]. A 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

- C. Judge Mentor's neighbor has a daughter who is applying to college. The applicant has asked Judge Mentor to write a letter of recommendation to accompany her college application. Judge Mentor knows the young woman well, as she has often babysat for his young children. May he write the letter of recommendation? On court letterhead?

He may write a letter, but he may not use court letterhead or email. Rule 1.3 and Comment [2]. 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 send a private letter stating the judge's personal recommendation. The judge may not use official letterhead or court email and 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.

**Key Principle: Rule 3.3, Testifying as a Character Witness. Ordinarily Prohibited, but 2016 Code Explicitly Permits Key Exceptions.**

- D. A former law clerk is applying for admission to the Bar of a state that requires a character reference. The law clerk has asked Judge Mentor to provide such a reference. May Judge Mentor do so?

Yes. Rule 3.3 and Comment [3]. A judge may provide a character reference based on personal knowledge for an applicant to the Bar of any state.

- E. Another former law clerk is applying for a judgeship. The law clerk has asked Judge Mentor to send a letter to the Judicial Nominating Commission on her behalf. May Judge Mentor do so? On court letterhead? If the law clerk is nominated, may Judge Mentor testify before the Governor's Council?

Yes to all. Rule 1.3 and Comment [3], and Rule 3.3 and Comment [2]. Rule 1.3, Comment [3] provides that 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.

Rule 3.3, Comment [2] provides that Rule 3.3 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, so long as the judge's observations are based on the judge's personal knowledge.

## ***Hypothetical #2, Bar Association Activities***

**Key Principle: Code encourages involvement in bar association activities, but a judge must always consider the obligations of judicial office and avoid any activities that are reasonably likely to interfere with those obligations.**

**Hypos below involve Rules 3.1 (overarching principles), 3.7 (types of participation), and 3.13 (gifts).**

Prior to becoming a judge, Judge Julie Joiner was active in the Wessex County Bar Association. She still attends a bi-monthly meeting of the Wessex County Bar Association. She did not see the agenda in advance of the meeting and is surprised to hear that the next topic of discussion concerns using the upcoming 50<sup>th</sup> anniversary year as an opportunity to solicit contributions and recruit new members.

A. Must she leave the meeting?

No. Rule 3.7(A)(3). The 2016 Code permits judges to participate in internal discussions related to fundraising, but she may not otherwise participate in fundraising unless the organization is composed entirely or predominantly of judges and exists to further the educational or professional interests of judges.

B. During the internal fundraising discussion, a member of the Association suggests that Judge Joiner contact her colleagues on the District Court in Wessex County and ask them to join the Association. Judge Joiner does not have supervisory authority over these judges. May she do so?

Yes. 3.7(A)(4) and Comment [2]. A judge shall not solicit contributions or members for the organization except from members of the judge's family or from judges over whom the judge does not exercise supervisory or appellate authority. The Code treats solicitation for members and for contributions the same.

C. Judge Joiner was recently appointed to the Appeals Court. May she solicit her former colleagues in the District Court?

No. 3.7(A)(4) and Comment [2]. She has appellate authority over her former colleagues.

- D. Judge Joiner receives an invitation to attend the annual luncheon of the Wessex County Bar Association. The ticket price is \$100. To encourage her attendance, the Bar Association offers her a complimentary ticket. May she accept? Must she first complete a Disclosure Form certifying that her attendance will serve a legitimate public purpose and obtain approval from her Chief Justice?

She may accept and does not need permission. Rule 3.13(D)(2) and Comment [14]. The Code encourages judicial participation in bar association activities; they are deemed to serve a public purpose.

[Presenter should discuss differences between Rule 3.13(D)(2) and Rule 3.14. Rule 3.14 requires a judge to complete a Disclosure Form and obtain approval from the judge's Chief Justice for tuition-waived or expense-paid events not described in Rule 3.13(D)(2).]

- E. Must Judge Joiner report the gift of the \$100 ticket on her Statement of Extra-Judicial Income?

No. Rule 3.13(D)(2) and Comment [14]. While the Code adopts the State Ethics Commission definition of substantial value (\$50), Rule 3.13 provides certain exemptions from otherwise applicable reporting requirements. Rule 3.13(D)(2) exempts a certain class of invitations (luncheons, dinners, receptions, and similar events) to non-profit-sponsored law-related events held in Massachusetts.

- F. Judge Joiner is invited to a fundraising dinner of the Bar Association where the Bar Association intends to give her an award in recognition of her many contributions to the Bench and Bar. May she attend and accept the award?

Yes. Rule 3.7(A)(6A) and Comment [4]. The 2016 Code reverses a prohibition in the 2003 Code. 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 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. Comment [4] further defines an organization that promotes the general interests of the judicial branch of government or the legal profession.

“Fundraiser” is defined in Comment [3] and in the Terminology section.

- G. Judge Joiner is preparing brief remarks to give when she receives her award. Some of the lawyers who will be present appear regularly in front of her. May she include a paragraph encouraging the lawyers in attendance to provide pro bono legal services?

Yes. Rule 3.7(B) and Comment [6]. A judge may encourage pro bono work, but may not employ coercion or otherwise abuse the prestige of judicial office.

- H. At the dinner, Judge Joiner is presented with a crystal bowl. When she gets home, she investigates online and learns that the bowl likely cost \$200. Must she report it on her Statement of Extra-Judicial Income?

Yes. Rule 3.13(E)(1) and Comment [16]. Disclosure is required because the bowl is of substantial value.

- I. What if the bowl is inscribed with her name and dates of service to the Bar Association?

Disclosure is likely not required. Rule 3.13(D)(1) and Comment [13]. If the bowl is not of substantial value, disclosure is not required. Comment [13] notes that gifts that are inscribed may have little market value.

### ***Hypothetical #3, Speaking about the Administration of Justice***

**Key principle: Code encourages community outreach for this purpose.**

Judge Nancy Noble has been invited to deliver the keynote address at a meeting of a local Chamber of Commerce. This organization has never appeared before Judge Noble. The event is not a fundraiser. Her remarks will focus on topics related to judicial independence and the administration of justice.

- A. May Judge Noble give the keynote address?

Yes. Rule 3.7(A)(6) and Comments [1], [1A] and [1B].

The Code encourages judges to speak to about the administration of justice to not-for-profit groups, including business and community groups.

[Presenter should review relationship between Rule 3.1 and Rule 3.7. Even with respect to activities that are explicitly permitted by Rule 3.7, a judge must always consider whether participation in any extrajudicial

activity would violate Rule 3.1. Comments [1A] and [1B] to Rule 3.7 further elaborate relevant considerations.]

- B. What if the event is held in the large conference space of a law firm where the president of the organization is a partner? What if funding for the event is provided by several of the city's largest businesses? These sponsors will be recognized in the written program. May she still speak?

Yes. Rule 3.7 and Comment [1B]. This Comment explicitly addresses sponsorship and location.

[Presenter should also explain functions of Comment [1A] and [1B]. Comment [1A] pertains to all extrajudicial activities. Comment [1B] pertains to activities where 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.]

- C. Although the event is not intended as a fundraiser, Judge Noble has learned that ticket sales are exceeding expectations, and that revenues from sales and sponsorship may exceed the costs of the event. Does this transform the event into a fundraiser?

No. "Fundraiser" is defined in both the Terminology Section and in Rule 3.7, Comment [3]. 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.

- D. What if the event is a fundraiser? May she still deliver the keynote address?

No. Rule 3.7(A)(6A) and Comment [4]. 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 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. Comment [4] further defines an organization that promotes the general interests of the judicial branch of government

or the legal profession. The Chamber of Commerce is not a law-related organization.

- E. Judge Noble asks a law clerk to update some of the statistics referenced in her remarks. Has Judge Noble violated the Code by asking the law clerk to assist?

No. Rule 3.1(E). The Code permits a judge to make reasonable use of resources incidental to activities that concern the law, the legal system, or the administration of justice.

### ***Hypothetical #4, Self-Represented Litigants***

**Key principle: Code gives guidance. Rule 2.6 and Comment [1A]**

Judge Carl Caring presides over many cases involving self-represented litigants. He wants to facilitate the ability of self-represented litigants to be fairly heard but does not want to violate the Code of Judicial Conduct.

- A. Does the Code provide any guidance on this subject?

Yes. Rule 2.6 and Comment [1A]. Presenter should call judges attention to this clarifying comment.

### ***Hypothetical #5, Disability and Impairment***

**Key principle: Judge must take appropriate action.**

Judge Olivia Observant is sitting on a civil trial. The plaintiff's attorney is an experienced trial attorney. Judge Observant notices that the attorney sometimes seems confused and irritable. At side-bar conferences, Judge Observant detects the unmistakable odor of alcohol.

- A. Must Judge Observant take action?

Yes. Rule 2.14 and its comments. This new provision requires judge to take appropriate action even if the disability or impairment has not manifested itself in a violation of the Rules of Prof Conduct.

- B. What action is required?

Comment [2] explains that 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, and includes a list of examples of action that may be appropriate depending on the circumstances.

C. May Judge Observant wait until the case concludes to act?

It depends. Comment [2] states that 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 if the lawyer is unable to provide competent representation to the lawyer's client.

### ***Hypothetical #6, Family Relations***

**Key principle: Code provides guidance for many commonly-arising situations. Presenter may wish to call judges' attention to the two-page handout titled *The Code and Family Relations*. This hypothetical (Paragraph I) will also raise the issue of attorneys' fees for proceeding before CJC, which may be a topic of interest.**

A. Judge Carl Caring lives with his domestic partner and their young daughter. Judge Caring would like to help his daughter with her efforts to raise money for her Girl Scout troop. May he accompany his daughter as she goes door-to-door in the neighborhood to sell cookies?

Yes. Rule 3.7(C) and Comment [7]. Rule 3.7(C) is intended to allow to allow a judge to participate in a child's normal, daily activities, including certain fund-raising activities. Comment [7] notes that a judge may, for example, accompany the judge's child while the child sells Girl Scout cookies or collects UNICEF donations, or a judge 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.

B. To assist his daughter, Judge Caring would like to bring some boxes of cookies into the courthouse and offer them for sale. May he do so?

No. Rule 3.7 and Comment [7]. Comment [7] also states that the word "assist" in Rule 3.7(C) 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. See also Rule 3.1(D) and Comment [4], which requires that when participating in any extrajudicial activity, a judge must avoid action that would reasonably be perceived as coercive.

- C. Judge Caring's domestic partner works at a mutual fund company and handles all of the family's finances, including their investments. Judge Caring is very appreciative and content to be uninformed. Is Judge Caring under any obligation to be informed as to his own and his partner's financial interests?

Yes. Rule 2.11(B). Disqualification rules require a judge to keep informed about the judge's own personal and fiduciary economic interests, and to 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.

- D. Judge Caring's domestic partner is also active in local political campaigns. One day, Judge Caring returns home to find bumper stickers in support of several candidates on his car. Must Judge Caring remove the bumper stickers?

Yes. Rule 4.1(A) and Comment [2]. The restrictions in Rule 4.1(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.

- E. The wife of Judge Caring's nephew works for a start-up company, and a considerable portion of her compensation is paid in the form of stock options. The company is a defendant in a contract dispute pending before Judge Caring. If the company loses, the value of its intellectual property will decline substantially. Judge Caring has met the nephew's wife twice at large family events. No motion to disqualify has been filed. Is Judge Caring subject to disqualification?

Yes. Rule 2.11(A)(2)(c). The Code requires a judge to disqualify himself or herself in any proceeding in which the judge cannot be impartial or the judge's impartiality might reasonably be questioned, including if 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, has more than a de minimis financial or other interest that could be substantially affected by the proceeding. The wife of Judge Caring's nephew is within the third degree of relationship. 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.

- F. Judge Caring believes that the lawyers and parties in the pending case, if fully informed, would waive his disqualification. Is there a process that would permit a waiver in these circumstances?

Yes. Rule 2.11(C) provides that a judge subject to disqualification, other than for bias or prejudice, 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.

- G. Judge Caring's parents plan to move into a continuing care retirement community. They would like him to review all legal documents related to the move. May he do so?

Yes. Rule 3.10(A). A judge 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.

- H. Judge Caring's elderly uncle was estranged from his brother (Judge Caring's father), and Judge Caring has met his uncle on only a few occasions. The uncle emailed Judge Caring to ask if he would serve as co-executor of his (the uncle's) estate because Judge Caring is "a blood relative." Judge Caring would like to do so, as he has always wished to strengthen his ties to that branch of her family. May he do so?

No. Rule 3.8(A). The uncle is not a "member of the judge's family" as defined by the Code, and there is no close family-like relationship.

- I. A complaint against Judge Caring is made to the Commission on Judicial Conduct. Judge Caring believes the Commission will dismiss the complaint, but wishes to retain a lawyer to provide him with legal advice. Judge Caring's closest friend is a lawyer in town. She offers to represent him at no charge. What factors are relevant to Judge Caring's determining whether he may accept her offer?

Rule 3.13 and Comment [11]. Rule 3.13(B)(2) would allow Judge Caring to accept and not disclose the free legal services if the lawyer is a solo practitioner or works at a firm where all the lawyers are relatives or close personal friends of Judge Caring. Otherwise, Judge Caring may accept but must disclose pursuant

to Paragraph (C) if the following conditions are met: (i) the same benefit is extended to non-judges in comparable circumstances, and (ii) 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.

[Presenter may also want to call attention to Rule 3.13(B)(5), although that provision is not relevant to these facts. Similarly, the presenter may also wish to call attention to Comments [11A] and [11B]. ]

### ***Hypothetical #7, Governmental Commissions***

**Key Principle: Code explores the considerations relevant to the appropriateness of a judge accepting an appointment to a governmental board or commission.**

Judge Robert Risk was appointed to the Superior Court five years ago, after many years in the field of insurance law. The Governor has established a blue-ribbon commission to study insurance reform. Members will include academics, industry and consumer representatives, and attorneys who practice in the field. The mandate of the commission will be to consider all aspects of the statutory and regulatory system that governs all types of insurance. The Governor has invited Judge Risk to serve on the commission.

**A. May he accept?**

No. Rule 3.4 and Comment [1], which references Rule 3.2. Comment [1] to Rule 3.4 explains the factors appropriate for a judge to consider when deciding whether to accept such an appointment. One of the listed factor is the subject matter of the appointment. Comment [1] to Rule 3.2 gives examples of the types of subjects appropriate for a judge to address. The broad policy mandate of this insurance reform commission is not consistent with the types of topics listed in Comment [1] to Rule 3.2, all of which require a closer “nexus” to the work of the courts.

[Presenter should note that Committee did not incorporate nexus test as interpreted by past CJE opinions – its status will be determined as new CJE interprets the new Code. Also note possibility of concerns re need for recurrent disqualification; see Rule 3.1. ]

**B. Judge Risk did not serve on the Commission. The Commission has now made recommendations and a legislative committee is holding a public hearing. May Judge Risk testify before that committee?**

No. Rule 3.2 and Comment [1]. 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.

### ***Hypothetical #8, Non-law-related Extrajudicial Activities***

**Key principle: Code addresses judge's involvement in non-law-related activities.**

Judge Terry Trumbull plays trombone in a non-profit community orchestra. She and the other musicians are not compensated. She has recently been asked to serve on the Board of Directors. Judge Trumbull would like to accept and be an active Board member. The Board has never been involved in any legal disputes.

A. May she accept this position?

Yes. Rule 3.1 and Rule 3.7(A). The Code encourages and clarifies the ability of judges to be involved in non-law-related extrajudicial activities.

B. The Board plans a fundraising campaign. May Judge Trumbull be listed by name and identified as a judge on the orchestra's emails and letters soliciting funds?

Yes, if comparable designations are used for others. Rule 3.7 and Comment [2]. The Code recognizes that in our online world, this information is readily available and that "sanitization" is difficult and likely to be ineffective. But Judge Trumbull may not solicit for contributions and members except from members of her family and judges over whom no supervisory or appellate authority.

C. A wealthy supporter invites all members of the Board to attend a VIP performance at Symphony Hall. The value of the event is \$500. May Judge Trumbull attend? Must she report this gift?

She may attend and she does not have to report this gift. Rule 3.13(B)(4) and Comment [7]. Judge Trumbull may accept this gift so long as the same gift or benefit is made available on the same terms to similarly situated persons who are not judges.

**Hypos #9 and #10 illustrate that many provisions of the New Code, including those that deal with ownership of investment property and serving as an executor, incorporate the analysis used in past CJE advisory opinions. It may be useful to call judges' attention to the clarifying comments added in the new Code. These topics have in the past generated many questions to the CJE.**

### ***Hypothetical #9, Real Estate Interests***

Judge Randy Rich has a 50% interest in a realty trust. Her former law partner owns the other 50% interest. The trust owns a commercial office building that has twelve tenants, including several lawyers. The lawyers are involved in criminal defense work, while Judge Rich sits on the Housing Court. None of these lawyers has ever appeared before Judge Rich.

A. May Judge Rich retain her interest in the trust?

Yes. Rule 3.11 addresses a judge's permitted financial activities. A judge may participate in a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

B. Since Judge Rich applied to become a judge, her former law partner has handled the day-to-day operations of the building, including collecting the rent and paying bills. The former partner would now like Judge Rich to assume these duties? May Judge Rich do so?

No. Rule 3.11 and Comment [2]. Comment [2] incorporates a distinction developed by the CJE in Ops. 2004-6 and 2006-4. A judge must consider the difference between the permitted management of an investment and the prohibited management of a business.

### ***Hypothetical #10, Serving as an Executor***

Judge Lucy Loyall was named the executor of the estate and related trust of her college roommate. Judge Loyall and her roommate were close friends for thirty years, and people often assumed they were sisters. Judge Loyall's children consider the roommate an "aunt," and she was present at most important family events. The roommate does not have any close blood relatives. Judge Loyall expects that there will no objections to the disposition of the assets of the estate or trust.

A. May Judge Loyall serve as executor?

Yes. Rule 3.8(A). The CJE has relied on a list of factors (see, e.g., Op. 2000-2) to

determine whether a relationship is family-like. The Committee Studying the Code anticipates that this or a similar list of factors will be used in the future. Judge Loyall may not practice law in course of her service and must terminate her service if the estate becomes involved in adversary proceedings in the court where Judge Loyall serves.

- B. The college roommate would also like to give Judge Loyall a durable power of attorney. May Judge Loyall accept?

Yes, same as A.