

**STATE OF VERMONT  
VERMONT SUPREME COURT**

**AUGUST TERM, 2019**

**Order Abrogating Administrative Order No. 10 and Promulgating the Vermont Code of  
Judicial Conduct 2019**

Pursuant to Chapter II, Section 30, of the Vermont Constitution, it is hereby ordered:

1. That Administrative Order No. 10, Vermont Code of Judicial Conduct, adopted May 9, 1994, and all subsequent amendments thereto, be abrogated.

2. That the Vermont Code of Judicial Conduct 2019 as set out in the appendix attached to this order is prescribed and promulgated, effective on October 7, 2019. The Reporter's Notes are advisory.

Dated in Chambers at Montpelier, Vermont this 6<sup>th</sup> day of August, 2019.



Signed by the Vermont Supreme Court

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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**Introductory Reporter's Note**

The Vermont Code of Judicial Conduct 2019 (hereinafter Vermont Code 2019) replaces and significantly changes the Vermont Code of Judicial Conduct promulgated by the Vermont Supreme Court in 1994 as Administrative Order No. 10 and subsequently amended (hereinafter Vermont Code 1994). Vermont Code 1994 generally incorporated the American Bar Association's 1990 Model Code of Judicial Conduct (hereinafter ABA Code 1990), with variations necessary or appropriate for Vermont. Vermont Code 1994 did not include the "Commentary" that was incorporated for interpretive guidance following each section of ABA Code 1990. The ABA Commentary, however, was described in the introductory Reporter's Notes to Vermont Code 1994 as one of several "authoritative sources of interpretation for the Vermont Code."

In 2007, the ABA adopted a substantial revision of the Model Code, making major changes in both format and substance that reflected experience since 1990, changes in court structure and process, and increased numbers of self-represented litigants. As of June 2018, 37 states had revised their Codes of Judicial Conduct to incorporate some or all of the 2007 ABA Model Code of Judicial Conduct (hereinafter ABA Code 2007), and nine others, including Vermont, were considering adoption. See

[https://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/map.html](https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html).

The Vermont Judicial Conduct Board in October 2015 recommended that the Supreme Court adopt ABA Code 2007 and presented a draft of a Vermont Code to the Court. The Court referred the draft to its Advisory Committee on Rules of Civil Procedure for review and comment. Vermont Code 2019 is based on the Board's draft with a few changes made by the Advisory Committee and with Reporter's Notes prepared by Professor L. Kinvin Wroth, Reporter to that Committee. The present draft has been reviewed by the Board and is recommended for promulgation by both the Board and the Advisory Committee.

Vermont Code 2019 adopts the format and substantive provisions of ABA Code 2007, with necessary or appropriate Vermont variations. The purpose is to assure that Vermont judges will continue to be governed by principles of conduct that are substantially uniform with those applicable in other jurisdictions. While much of the substance of the former Code remains in effect, the revisions also clarify and expand many provisions in light of problems in application or changing conditions.

Vermont Code 2019, like ABA Code 2007, follows the general format of the Vermont and ABA Rules of Professional Conduct. The five Canons of the former Vermont and ABA Codes of Judicial Conduct, which state broad principles of conduct, have been consolidated in four Canons in a more functional arrangement. Under each Canon are enforceable, numbered, black-letter Rules of Conduct. Each Rule is followed by one or more numbered Comments that are not themselves binding but are intended to both provide interpretive guidance and set aspirational goals for the application of the black-letter Rules. The Reporter's Notes provide further interpretive assistance and highlight Vermont variations from ABA Code 2007.

The Reporter's Notes contain references to the ABA "Reporter's Explanation of Changes," Appendix B, ABA Center for Professional Responsibility, 2007 Edition, Model Code of Judicial Conduct 75-161 (2007), hereinafter cited as ABA Reporter's Explanation. This document is not part of the Code but was before the House of Delegates during its review of the Code. For more detailed comment, see two other publications of the ABA Center for Professional Responsibility: C. Geyh and W. Hodes, Reporter's Notes to the Model Code of Judicial Conduct (2009); A. Garwin et al., Annotated Model Code of Judicial Conduct (3d. ed. 2016). The decisions and advisory opinions of other jurisdictions that have adopted ABA Code 2007 are also sources for interpretation of Vermont Code 2019.

## **PREAMBLE**

[1] An independent, fair, and impartial judiciary is indispensable to our system of justice. The Vermont 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 contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and 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 Vermont Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, 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 assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

### **Reporter's Notes**

The Preamble is taken from ABA Code 2007 with minor verbal changes making clear the application of the Code to Vermont. It now describes the general purpose and rationale of the Code. Paragraphs [2]-[5] of the Preamble to Vermont Code 1994 have been moved to a new "Scope" section paralleling the format of the Vermont Rules of Professional Conduct. Paragraph [2] of the new Preamble emphasizes that judges should avoid both impropriety and its appearance and should aspire to ensure the greatest possible public confidence in their independence, integrity, impartiality, and competence. Paragraph [3] carries forward paragraph [6] of the former Preamble. See ABA Reporter's Explanation 75.

## **SCOPE**

[1] The Vermont Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally 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 or judicial candidate.

[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 or candidate in question, 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 contain 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 contains 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 Vermont Code of Judicial Conduct are rules of reason that should be applied consistent 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. 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 as 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.

### **Reporter’s Notes**

The Scope section is taken from ABA Code 2007, with minor verbal changes making clear the application of the Code to Vermont. The section adapts paragraphs [2]-[5] of the Preamble to Vermont Code 1994 that explained how the various parts of the Rules are intended to operate. The Scope section indicates that judges may be disciplined only for violating the Rules and explains that the Canons are overarching principles that provide important guidance in interpreting the Rules. See ABA Reporter’s Explanation 75-76.

### **TERMINOLOGY**

“**Aggregate,**” in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate’s campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate’s opponent. See Rules 2.11 and 4.4.

“**Continuing part-time judge**” means a judge who serves repeatedly on a part-time basis by

election or under a continuing appointment. The term includes probate and assistant judges. See Application, section B.

**“Contribution”** means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.4.

**“De minimis,”** in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality. See Rule 2.11.

**“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, 3.13, and 3.14.

**“Economic interest”** means ownership of more than a de minimis legal or equitable interest. Except for situations in which 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 the issuer of government securities held by the judge. See Rules 1.3 and 2.11.

**“Election”** includes primary, general, and special elections, whether partisan or nonpartisan. See Rules 4.1, 4.3, and 4.4.

**“Fiduciary”** includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

**“Fourth degree of relationship”** means relatives within the fourth degree of relationship: great-great grandparent, great-grandparent, grandparent, parent, great uncle, great aunt, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, great-great grandchild, nephew, niece, great nephew, or great niece. See Rule 2.11.

**“Impartial,” “impartiality,”** and **“impartially”** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

**“Impending matter”** is a matter that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, 3.13, and 4.1.

**“Impropriety”** includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality. See Canon 1 and Rule 1.2.

**“Independence”** means a judge’s freedom from influence or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, 4.1 and 4.2.

**“Integrity”** means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rule 1.2.

**“Judge”** means anyone, whether or not a lawyer, who is an officer of the judicial system and who performs judicial functions, including an assistant judge, a probate judge, and an officer such as a magistrate, commissioner, traffic hearing officer, master, or referee. See Application, section A.

**“Judicial candidate”** means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2, and 4.4.

**“Knowingly,” “knowledge,” “known,” and “knows”** mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances. See Rules 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.

**“Law”** encompasses court rules as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15, 4.1(1) and 4.2(4).

**“Member of the candidate’s family”** means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship.

**“Member of the judge’s family”** means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

**“Member of a judge’s family residing in the judge’s household”** means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Rules 2.11 and 3.13.

**“Nonpublic information”** means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, juvenile cases, or mental-health reports. 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, 3.13, and 4.1.

**“Periodic part-time judge”** means a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. The term includes retired judges, acting judges, masters, and referees. See Application, section C.

**“Personally solicit”** means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication. See Rules 3.7 and 4.1.

**“Political organization”** means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate’s campaign committee created as authorized by Rule 4.4. See Rules 4.1 and 4.2.

## Reporter’s Notes

The Terminology section is taken from ABA Code 2007 with

changes making clear the application of the Code to Vermont. For clarity, all terms requiring definition are included in this section even if used only once, in contrast to the ABA Code where single-use terms may be defined in the rule where they appear. See, e.g., continuing part-time judge, judge, and periodic part-time judge. The statement at the beginning of the Terminology section in ABA Code 2007, that terms in that section are followed by an asterisk on their first appearance in a rule, and the resulting asterisks in the text, have been deleted as confusing and unnecessary to an understanding of Vermont Code 2019.

Terms in the present section that were not found in the Terminology Section of Vermont Code 1994 include aggregate, contribution, domestic partner, impartial and derivatives, impending matter, impropriety, independence, integrity, judicial candidate, pending matter, periodic part-time judge, and personally solicit. No longer on the list are the following terms found in the 1994 Code: appropriate authority, candidate, court personnel, and pro tempore part-time judge. See Reporter's Notes to Application Section; ABA Reporter's Explanation 76-78. "Appropriate authority" has been eliminated because Rule 2.15 concerning judicial and professional discipline now refers expressly to the Judicial Conduct and Professional Responsibility boards. "Court personnel" has been eliminated because it stated the obvious point that the term did not include lawyers in a proceeding, and the meaning of the term is otherwise obvious. See Rule 2.12(A) (judge's responsibility for "court staff, court officials, and others subject to the judge's direction and control").

Note that the Vermont Code 2019 substitutes "fourth," found in ABA Code 2007, with "third" to describe the degree of relationship involved. See Rule 2.11(a)(2); 12 V.S.A. § 61(a).

## **APPLICATION**

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

(A) **JUDGE.** All judges shall comply with this Code except as provided below.

(B) **CONTINUING PART-TIME JUDGE.** A continuing part-time judge:

(1) is not required to comply

(a) except while serving as a judge, with Rules 2.10(A) and 2.10(B) (Judicial Statements on Pending and Impending Cases);

(b) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), and 3.11(B) (service as officer,

director, or in other capacity in business entity)

(c) except while serving as a judge or seeking appointment, confirmation, retention, election, or re-election as a judge, with Rule 4.1.

(2) shall not act as a lawyer in any case in any unit of the division of the court in which the judge serves or in any unit in any division of the superior court in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

(3) shall not use any office, chambers, and hearing rooms provided to the judge for official duties to practice law.

**(C) PERIODIC PART-TIME JUDGE.** A periodic part-time judge:

(1) is not required to comply

(a) except while serving as a judge, with Rules 1.1, 1.2, 2.10 and 3.2;

(b) at any time with Rules 3.4, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11(B), 3.11(C), 3.12, 3.13, 4.1 and 4.2.

(2) should refrain from judicial service during the period of an extrajudicial appointment not permitted by Rule 3.4 or 3.7.

(3) shall not act as a lawyer in a proceeding in which he or she has served as a periodic part-time judge or in any other proceeding related thereto.

**(D) EFFECTIVE DATE; TIME FOR COMPLIANCE.** This Code takes effect on October 6, 2019. All persons to whom this Code is applicable on that date shall comply immediately with all provisions of this Code. All persons to whom this Code thereafter becomes applicable shall comply immediately with all provisions of this Code except Sections 3.8 and 3.11 and shall comply with those sections as soon as reasonably possible.

**(E) TITLE.** This Code may be known and cited as the Vermont Code of Judicial Conduct 2019.

## **Comment**

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves as a judge as that term is broadly defined the Terminology Section and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] When a person who has been a continuing part-time judge as defined in the Terminology Section is no longer a continuing part-time judge, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the informed consent of all parties, and pursuant to Rule 1.12 of the Vermont Rule of Professional Conduct.

[3] If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in any event must comply as soon as reasonably possible. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period.

### **Reporter's Notes**

For clarity, the Application section, following the format of ABA Code 2007, is placed at the beginning, rather than the end, of the Code. It incorporates the amendment of Application section B(1)(b) of Vermont Code 1994 adopted in 2017, effective February 1, 2019.

The Application section is a simplified version of that in the ABA Code, reflecting Vermont law by recognizing only three categories of judges: “Judge,” “Continuing Part-time Judge,” and “Periodic Part-time Judge.” Those categories are defined in the Terminology section, as in Vermont Code 1994, as amended in 2000 and 2011, rather than in the Application section as in the ABA Code. The category “periodic part-time judge” includes those individuals included as pro tempore part-time judges in ABA Code 2007, Application Section V. Application section D and Comment [3] of Vermont Code 2019 require termination of fiduciary or business activities by a newly appointed judge as soon as reasonably possible after appointment. The provision does not include the limitation of that period to one year imposed in ABA Code 2007, but that one-year limit should provide guidance in defining “reasonable” in the Vermont Code provision.

## **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.**

### **Reporter's Notes**

The text of Canon 1 is taken without change from ABA Code 2007. It combines the language of Canons 1 and 2 of the ABA Code 1990 and Vermont Code 1994, which expressed closely related fundamental values underlying the entire Code. A duty to promote, as well as to uphold these values, has been added, and impartiality has been included with the values of integrity and independence set forth in former Canon 1, consistent with the linking of those three terms

throughout the new Code. The obligation to “avoid . . . the appearance of impropriety” has been retained from former Canon 2, and doubts about its enforceability through discipline have been resolved through its inclusion in Rule 1.2. See ABA Reporter’s Explanation 80-82.

### **RULE 1.1: Compliance with the Law**

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

#### **Reporter’s Notes**

Rule 1.1 adopts the first clause of Vermont Code 1994, Canon 2A, with an added specific reference to the Code of Judicial Conduct taken from the Commentary to ABA Code 1990. The duty to “comply” refers to obedience to provisions of law governing the judge’s professional or personal conduct, rather than to deference to existing law when deciding cases. See Reporter’s Notes to Rule 2.2. The duty to “respect” the law was deleted as vague and unnecessary. The essence of former Vermont Canon 1A has been incorporated in the Preamble. See ABA Reporter’s Explanation 83.

### **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.

#### **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, and 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] Judges should 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] Actual improprieties include violations of law, court rules, or provisions of this Code. 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 should initiate and participate in 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.

### **Reporter's Notes**

Rule 1.2 adopts the second clause of Vermont Code 1994, Canon 2A, following new Canon 1 by adding “independence” as an essential attribute of integrity and impartiality that should always be grouped with them for consistency, and adding the avoidance of impropriety and its appearance from the black letter of former Canon 2 to make clear that failure in that regard is an independent basis for discipline.

Comments [1]-[3] and [5] carry forward, with some modifications, provisions of ABA Code 1990, Commentary to former Canon 2A. New Comment [4] is intended to reflect the importance of encouraging judges to promote professionalism. New Comment [6] is intended to encourage judges to participate in the community to promote public confidence in the courts. See ABA Reporter's Explanation 84.

### **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.

#### **Comment**

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her 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 his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

[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.

### **Reporter's Notes**

Rule 1.3 incorporates the second sentence of Vermont Code 1994, Canon 2B, as a separate enforceable obligation because it addresses the judge's personal conduct, rather than the effect of others' conduct on the judge's judicial responsibilities. Those matters are now covered in Rules 2.4(B), (C), 3.1(E), and 3.3. The present sentence has clarified and tightened the former language: "abuse" has been substituted for "lend"; "economic" as well as "personal" interests are covered; and the judge is prohibited from allowing others to trade on the judge's position. See ABA Reporter's Explanation 85. Comments [1]-[4] are derived from ABA Code 1990, Commentary to former Canon 2B.

### **CANON 2**

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

### **Reporter's Notes**

The text of Canon 2 carries forward the text of Vermont Code 1994, Canon 3, with the addition of "competently" to reflect the importance of competence in the discharge of those duties, including supervisory, administrative, and disciplinary responsibilities, as well as the primary duty of adjudication. Canon 2, addressing the judge's professional duties, is the heart of the Code. See ABA Reporter's Explanation 87.

### **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.

### **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.

### **Reporter's Notes**

Rule 2.1 carries forward Vermont Code 1994, Canon 3A, with textual changes intended to apply not only to the adjudicative function, but to all of the functions of judicial office, as distinct from personal or extrajudicial activities. The word "shall" is used to make clear that

there is an enforceable duty to give precedence to judicial duties. See Reporter's Notes to Rule 1.3; ABA Reporter's Explanation 88.

## **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.

### **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.

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

### **Reporter's Notes**

Rule 2.2 adapts the first half of the first sentence of Vermont Code 1994, Canon 3B(2), substituting "uphold and apply" for "be faithful to" the law in order to emphasize that in deciding cases, "judges should interpret and apply the law as they understand it to be written." ABA Reporter's Explanation 89. This duty is to be distinguished from the duty to "comply" with the law governing professional or personal conduct. See Reporter's Notes to Rule 1.1. The duty to act fairly and impartially, which was not explicit in the former ABA and Vermont codes, is now expressly incorporated in connection with the duty to apply the law. See Reporter's Notes to Rule 2.5. See generally ABA Reporter's Explanation 89.

## **RULE 2.3: Bias, Prejudice, and Harassment**

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

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status, socioeconomic status, or other grounds that are illegal or prohibited under federal or state law and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status, socioeconomic status, or other grounds that are illegal or prohibited under federal or state law against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

## **Comment**

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] 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; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status, socioeconomic status, or other grounds that are illegal or prohibited under federal or state law.

[4] 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.

## **Reporter's Notes**

Rule 2.3 carries forward with stylistic and textual changes the provisions of Vermont Code 1994, Canon 3B(5) and (6). Rule 2.3(B) and (C) and Comment [3] depart from ABA Code 2007 and include discrimination on the basis of grounds identical to those of V.R.Pr.C. 8.4(g) intended to incorporate all grounds prohibited under state and federal law, to track the Vermont Fair Employment Practices Act, 21 V.S.A. § 495(a)(1), and to make clear that the rule extends to statutory grounds such as 21 V.S.A. § 495(a)(5) (HIV). See Reporter's Notes to 2017 amendment of V.R.Pr.C. 8.4(g). See also Rule 3.1 cmt. [3] and Rule 3.6(A).

Rules 2.3(B) and (C) follow ABA Code 2007 in specifically including harassment as prohibited conduct in order to eliminate any doubt that it was a form of bias or prejudice. Comment [4], new in ABA Code 2007, defines "sexual harassment" to make clear its scope

in view of the importance of the problem. See generally ABA Reporter's Explanation 90-93.

#### **RULE 2.4: External Influences on Judicial Conduct**

(A) A judge shall not be swayed by 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.

#### **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.

#### **Reporter's Notes**

Rule 2.4(A) carries forward the second sentence of Vermont Code 1994, Canon 3B(2). Rule 2.4(B) carries forward the first sentence of former Canon 2B, replacing "other" with "financial... interests or" to make clear that they were included in view of their importance. Rule 2.4(C) is the second clause of the second sentence of Vermont Code 1994, Canon 2B, revised to make clear that the prohibition also applied to influence by a third person and eliminating "special" as superfluous. See Reporter's Notes to Rule 1.3; ABA Reporter's Explanation 93-94. Comment [1], new in ABA Code 2007, is intended to show the relationship between the avoidance of outside influence and the duty imposed by Rule 2.2 to act fairly and impartially.

#### **RULE 2.5: Competence, Diligence, and Cooperation**

(A) A judge shall perform judicial and administrative duties, competently and diligently.

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

#### **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 docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt 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 submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, 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.

### **Reporter's Notes**

Rule 2.5(A) combines the duties of competence and diligence found in Vermont Code 1994, Canons 3B(2) and 3C(1), and makes them applicable to both the judicial adjudicative and administrative functions. Rule 2.5(B) is the second half of former Canon 3C(1) revised to make the duty of cooperation mandatory. New Comments [1] and [2] define competence and what is required to attain it. Comments [3] and [4] are derived from ABA Code 1990, Commentary to Canon 3B(8). See Reporter's Notes to Rule 2.2; ABA Reporter's Explanation 94-95.

### **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.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

### **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.

[2] The judge plays an important role in overseeing the settlement of disputes but should be careful that efforts to further settlement 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 in settlement discussions 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 the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (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 settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement 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 settlement discussions could influence a judge's decisionmaking during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

### **Reporter's Notes**

Rule 2.6(A) carries forward the first sentence of Vermont Code 1994, Canon 3(B)(7). Rule 2.6(B) is new, recognizing the importance of settlement in the resolution of cases by allowing judicial encouragement of it but prohibiting judicial coercion of settlement that may impair the right to be heard. Rule 2.6(B) is derived from the final sentence of ABA Code 1990, Commentary [1] to Canon 3B(8) (not included in Vermont Code 1994; see Introductory Reporter's Notes, above). New Comments [1]-[3] elaborate upon and provide guidance to the interpretation of the Rule. See ABA Reporter's Explanation 95-96.

### **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.

### **Comment**

[1] Judges must be available to decide the matters that come before the court. 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 courts. 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.

### **Reporter's Notes**

Rule 2.7 carries forward Vermont Code 1994, Canon 3(B)(1), adding an express reference to Rule 2.11. New Comment [1] is added to emphasize that disqualification must not be used to avoid unpopular or unpleasant cases. See ABA Reporter's Explanation 96-97.

## **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 staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, 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.

### **Comment**

[1] The duty to hear 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 may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent 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.

### **Reporter's Notes**

Rule 2.8(A) carries forward Vermont Code 1994, Canon 3(B)(3), substituting "court" for "judge" as the final word of the sentence. Rule 2.8(B) carries forward Vermont Code 1994, Canon 3(B)(4), revised to make the judge's duty of courtesy mandatory, add court staff and court officials to the list of those to whom the judge's duty is owed, and to add court staff to the list of those of whom the judge is to require courtesy. Rule 2.8(C) carries forward the first clause of Vermont Code 1994, Canon 3(B)(10), with the addition of a specific reference to Rule 2.5. Comment [1] carries forward the Commentary to ABA Code 1990, Canon 3B(4). Comment [2] carries forward the first clause of the Commentary to ABA Code 1990, Canon 3B(11); see Vermont Code 1994, Canon 3(B)(10). Comment [3] is intended to cover the second clause of Vermont Code 1994, Canon 3(B)(10), concerning the expression of appreciation to jurors, which has been omitted from Rule 2.8(C) as more appropriate to a Comment. See ABA Reporter's Explanation 97-98.

## **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 obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

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

(5) A judge may initiate, permit, or consider any ex parte communication when expressly 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 and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

## **Comment**

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

[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 unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against 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] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental-health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

### **Reporter's Notes**

Rule 2.9 carries forward Vermont Code 1994, Canon 3B(7), with changes noted below.

Rule 2.9(A) is the second sentence of former Canon 3(B)(7) with the addition of "or their lawyers" in view of the fact that similar language appeared in the first sentence of the former Canon, which is now Rule 2.6(A), and with the substitution of "matter" for "proceeding" because "pending" and "impending" matters are now defined in the Terminology Section "to set temporal limits on" those phrases and, for pending matters, to "create greater certainty in the application of the Code's restrictions on judicial speech." ABA Reporter's Explanation 77-78.

In Rule 2.9(A)(1), "issues on the merits" in former Canon 3(B)(7)(a) is deleted as duplicative because it is subsumed in "substantive matters," and "permitted" is substituted for "authorized" as a matter of style. In Rule 2.9(A)(1)(a), "substantive" is added to account for the possibility that a nonsubstantive communication could indirectly confer a substantive advantage. Rule 2.9(A)(1)(b) is revised to make clear that a judge may delegate the obligation to notify. ABA Reporter's Explanation 99.

Rule 2.9(A)(2) modifies former Canon 3(B)(7)(b).

### **RULE 2.10. Judicial Statements on Pending and Impending Cases**

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

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

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

### **Comment**

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

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

### **Reporter's Notes**

Rule 2.10(A), (C)-(D) carry forward Vermont Code 1994, Canon 3B(9), with some changes for clarity. Rule 2.10(B), taken from ABA Code 2007, did not appear in Vermont Code 1994, Canon 3B, but makes generally applicable the language of Vermont Code 1994, Canon 5B(4)(a), prohibiting the making of such statements by a candidate for judicial office. Vermont Code 1994, Canon 3B(10), concerning judicial interaction with jurors, was adapted from ABA Code 1990, Canon 3B(11); it is carried forward as Rule 2.8(C). See Reporter's Notes to that rule. Rule 2.10(E) is a new provision in ABA Code 2007 intended to make clear that a judge may respond to challenges to the judge's conduct if the response does not affect the fairness of a proceeding. ABA Reporter's Explanation 103.

Comments [1] and [2] are derived from the Commentary to ABA Code 1990, Canon 3B(9), (10). New Comment [3], suggesting that a third person may defend a judge, is intended to minimize direct discussion by a judge with the media. ABA Reporter's Explanation 103.

### **RULE 2.11. Disqualification**

(A) A judge shall disqualify himself or herself in any proceeding in which 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 fourth 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 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 in a party to the proceeding.

(4) A continuing part-time judge subject to election knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous five years made a contribution to the judge's campaign in any amount.

(5) The judge, while a judge or a judicial candidate, 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.

(6) 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 advise the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding.

(D) A judge shall disclose to the parties on an ongoing basis

- (1) the existence of any investment valued over \$5,000 in an entity that is a party, but a judge is not required to disclose the actual value of the investment;

- (2) any gift made to the judge in the last five years by a party, a party's lawyer, or the law firm of a party's lawyer in a case pending before the judge;

- (3) any other fact or matter relevant to the question of impartiality that, in the judge's view, may require disqualification under Rule 2.11(A). Unless a party promptly moves to disqualify on the basis of a disclosure under (1) or (2), the judge may continue to participate in the proceeding.

## Comment

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[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, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), 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] "Economic interest," as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a 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, officer, 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 the issuer of government securities held by the judge.

## Reporter's Notes

Rule 2.11 carries forward the provisions of Vermont Code 1994, Canon 3E and 3F in clarified and reorganized form, with the following principal differences:

In Rule 2.11(A)(1), the specific ground in Vermont Code 1994, Canon 3E(1)(a), for disqualification of a judge who has engaged in ex parte communication in an unsuccessful effort to mediate or settle the case is omitted. Case-by-case application of the existing disqualification for "personal knowledge of facts that are in dispute"

sufficient for “the judge’s impartiality [to] reasonably be questioned” will allow more flexibility for beneficial settlement efforts.

In Rule 2.11(A)(2), as in Vermont Code 1994, Canon 3E(1)(d), the disqualification extends to activity of a person within the fourth, rather than the third, degree of relationship as provided in 12 V.S.A. § 61. See Terminology section. Also, “domestic partner” has been added to the list of affected relationships in this paragraph as well as in paragraphs (A)(3) and (B), and “general partner or managing member” has been added to the list of disqualifying activities in subparagraph (A)(2)(a).

In Rule 2.11(A)(3), “wherever residing,” found in Vermont Code 1994, Canon 3E(1)(c), has been eliminated as a modifier of “spouse, domestic partner, parent or child” to disqualify judges for their economic interest, leaving “member of the judge’s family residing in the judge’s household” as the modifier for all disqualifying relationships listed in paragraph (A)(3). See Terminology section.

Rule 2.11(A)(4) had no equivalent in Vermont Code 1994, Canon 3E. Canon 5C(3) imposed a \$150 limit on campaign contributions for elected probate and assistant judges, with the implicit requirement of disqualification for knowledge of such a contribution. See also ABA Code 2007, Rule 2.11(A)(4). The present Vermont rule imposes a stricter limit in the interests of avoiding any inference of impropriety.

Rule 2.11(A)(5) had no equivalent in Vermont Code 1994, Canon 3E. However, Canon 5A(2), 5B(4)(a) and (b), (C)(1), and Rule 4.1(A)(12), (13), imposed similar obligations on judges who are candidates for appointment, election, or confirmation in judicial office.

Rule 2.11(A)(6)(a) and (c) carry forward Vermont Code 1994, Canon 3E(1)(b). Rule 2.11(A)(6)(b) is taken from the Commentary to ABA Code 1990, Canon 3E(1)(b). Rule 2.11(A)(6)(d) is a new provision designed to make clear that judges who sit by designation on a court at a different level should not hear cases over which they had previously presided. It is not intended to prevent a judge who heard a case on an appellate court panel from sitting on a rehearing en banc in the same court. ABA Reporter’s Explanation 105. It is also not intended to bar a judge from sitting in closely related cases in different divisions of the Superior Court.

Rule 2.11(B) carries forward Vermont Code 1994, Canon 3E(2).

Rule 2.11(C) carries forward Vermont Code 1994, Canon 3F, retaining two departures from ABA Code 1990, Canon 3(F) and ABA Code 2007, Rule 2.11(C): the judge may “advise,” rather than “ask,”

the parties to consider remittal in order to avoid any appearance of pressure from the judge; and the final sentence, requiring the agreement to be incorporated in the record, is omitted to avoid difficulties in obtaining a writing that might prevent a clearly agreed-upon remittal. Incorporation of a written agreement in the record is the better course, but in any event, the agreement should be stated on the record in open court. See Reporter's Notes to Vermont Code 1994, Canon 3F. Rule 2.11(C) also omits as implicit the sentence in Vermont Code 1994, Canon 3F, and ABA Code 1990, Canon 3(F) expressly requiring that if the parties agree on remittal, the judge must be willing to participate.

Rule 2.11(D) carries forward Vermont Code 1994, Canon 3G and, in edited form, Canon 4I(1), added to Vermont Code 1994 by amendment effective December 18, 2017. The Rule has no counterpart in ABA Code 1990 and ABA Code 2007. It is intended to provide threshold bases for motions to disqualify under V.R.C.P. 40(e), V.R.Cr.P. 50(d), or V.R.A.P. 27.1. Such a motion should be filed within the time provided in those rules. The standard of relevance as defined in V.R.E. 401 is less than the standard of proof for disqualification, so a motion to disqualify will not necessarily lead to disqualification. Of course, a judge may self-disqualify and may disclose indisputably disqualifying information for consideration by parties and counsel under Rule 2.11(C). See Comment [2]. See also Reporter's Notes to Vermont Code 1994, Canon 3G.

Comments [1], [3]-[5] are derived from the Commentary to ABA Code 1990, Canon 3E(1). New Comment [2] is intended to clarify that the obligation to self-disqualify exists whether or not a motion to disqualify is made under Rule 2.11(D). New Comment [6] is intended to restate the definition of "economic interest" set forth in the Terminology section in view of the importance of the term in the disqualification context. See ABA Reporter's Explanation 105-06.

## **RULE 2.12. Supervisory Duties**

(A) A judge shall require court staff, court officials, 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.

### **Comment**

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. 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, judges with supervisory authority must take the steps needed to ensure that judges under their supervision administer their workloads promptly.

### **Reporter's Notes**

Rule 2.12 carries forward Vermont Code 1994, Canon 3C(2) and (3) with some clarifying changes. New Comment [1] emphasizes the importance of staff and the limits that the Code places on their activities in the court room and otherwise in the performance of their official duties when under "the judge's direction and control." New Comment [2] highlights the connection between public confidence and the timely administration of justice. See ABA Reporter's Explanation 106-07.

### **RULE 2.13. Administrative Appointments**

(A) In making administrative appointments, a judge:

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

(B) A continuing part-time judge subject to election shall not appoint a lawyer to a position if the judge either knows that the lawyer, or the lawyer's spouse or domestic partner, has contributed more than \$250.00 within the prior five years to the judge's election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless:

- (1) the position is substantially uncompensated;
- (2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
- (3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.

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

### **Comment**

[1] Appointees of a judge include assigned counsel and officials such as referees, commissioners, special masters, receivers, and guardians. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the fourth degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

[3] The rule against making administrative appointments of lawyers who have contributed in

excess of a specified dollar amount to a judge's election campaign includes an exception for positions that are substantially uncompensated, such as those for which the lawyer's compensation is limited to reimbursement for out-of-pocket expenses.

### **Reporter's Notes**

Rule 2.13(A) and (C) carry forward Vermont Code 1994, Canon 3C(4). Rule 2.13(B) is derived from ABA Code 1990, Canon 3C(5), which is not in Vermont Code 1994. However, Canon 5C(3), and its successor, Rule 4.3(3), imposed the \$150 (now \$250) limit on campaign contributions for elected probate and assistant judges, with the implicit requirement of disqualification for knowledge of such a contribution.

Comment [1], derived from the Commentary to ABA Code 1990, Canon 3C, has been modified to eliminate court staff who are not judicial appointees. New Comment [2] is intended to clarify the meaning of "nepotism" in Rule 2.13(A)(2), with "fourth" substituted for "third" to describe the degree of relationship involved. See Reporter's Notes to Rule 2.11(A)(2) and Terminology Section. New Comment [3] is intended to clarify the meaning of "substantially uncompensated" in Rule 2.13(B)(1). See ABA Reporter's Explanation 107-08.

### **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.

#### **Comment**

[1] "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.

[2] 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, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

## Reporter's Notes

Rule 2.14 and its Comments have no counterpart in Vermont Code 1994 or ABA Code 1990. The Rule is intended to address a problem that, by undermining judicial performance, can undermine public confidence in the courts. Its purpose is to encourage judges to address such problems when they arise. Comment [1] provides a functional definition for “appropriate action.” Comment [2] indicates the range of responses that may constitute “appropriate action” in specific circumstances. See ABA Reporter’s Explanation 108.

### **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, trustworthiness, or fitness as a judge in other respects shall inform the Judicial Conduct Board.

(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, trustworthiness, or fitness as a lawyer in other respects shall inform the Professional Responsibility Board.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

### **Comment**

[1] Taking action to address known misconduct is a judge’s obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, 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.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation or reporting the suspected violation to the appropriate authority or other agency or body.

### **Reporter's Notes**

Rule 2.15 carries forward Vermont Code 1994, Canon 3D(1) and (2). Rule 2.15(A), (B), and (D) were reworded for conformity with the language of the reporting obligations of Rule 8.3 of the Vermont Rules of Professional Conduct. The obligation to report on the basis of information received in Rules 2.15(C) and (D) has been changed from “should” in Canon 3D(1) and (2) to “shall.” Comment [1] emphasizes the connection between reporting misconduct and maintaining public confidence in the judiciary. Comment [2] expands on the Commentary to ABA Code 1990, Canon 3D. See ABA Reporter’s Explanation 109-10.

### **RULE 2.16. Cooperation with Disciplinary Authorities**

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

(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.

### **Comment**

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges’ commitment to the integrity of the judicial system and the protection of the public.

### **Reporter's Notes**

Rule 2.16 has no counterpart in either Vermont Code 1994 or ABA Code 1990. It is intended to address both the need to obtain the cooperation of judges in judicial and lawyer disciplinary matters and the need to make clear that retaliation is “patently unethical.” ABA Reporter’s Explanation 111.

## **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.**

### **Reporter's Notes**

The text of Canon 3 carries forward in revised form the text of Vermont Code 1994, Canon 4, with the addition of “personal” to make

clear that the rules extend to less formal activities such as the acceptance of gifts or participation in private clubs. See ABA Reporter's Explanation 111.

### **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 will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent 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 incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

#### **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, such as by speaking, writing, teaching, or participating in scholarly research projects. 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. See Rule 3.7.

[2] 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.

[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 integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status, socioeconomic status, or other grounds that are illegal or prohibited under federal or state law. See Rules 2.3(B), (C), and Comment [3]; Rule 3.6(A). 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, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

## Reporter's Notes

Rule 3.1 is derived from Vermont Code 1994, Canon 4A, restructured to permit extrajudicial activities, subject to a more extensive list of restrictions focused on judicial independence, impartiality, and integrity and with verbal changes. Rule 3.1(A) carries forward Vermont Code 1994, Canon 4A(3). Rule 3.1(C) adds independence and integrity to impartiality, which is covered in former Canon 4A(1). The language “appear to a reasonable person” replaces “reasonable doubt” to provide a more common standard not associated with criminal law. New Rule 3.1(B) is a specific instance of the conduct interfering with judicial performance prohibited by Rule 3.1(A). New Rule 3.1(D) arises from concerns based on coercion that may occur in smaller communities. New Rule 3.1(E) strikes a balance between activities intended to gain favor for personal reasons, as prohibited by former Canon 2B, from those that may serve the purposes of increasing public understanding of the courts. See ABA Reporter's Explanation 111-13.

Comments [1]-[3] are derived from the Commentary to ABA Code 1990. New Comment [4] is intended to elaborate on new Rule 3.1(D). See ABA Reporter's Explanation 112, 113-14.

### **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;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or

(C) when the judge is self-represented in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

#### **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.

[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, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting

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 using the prestige of judicial office.

### **Reporter's Notes**

Rule 3.2 is derived from Vermont Code 1994, Canon 4C(1). The word "voluntarily" was added to the introductory sentence to make clear that the rule does not allow a judge to ignore a formal summons to appear before a governmental body. Rule 3.2(A) carries forward the first exception of Canon 4C(1). Rule 3.2(B) is added in recognition of the fact that, in performing their judicial role, judges may acquire relevant expertise that they may share with executive or legislative bodies. Rule 3.2(C) adopted the second exception of Canon 4C(1), adding "legal or economic" to modify "interests" and adding fiduciary roles to the exception. See ABA Reporter's Explanation 114-115.

The Comments are new in ABA Code 2007. Comment [1] explains the rationale of Rules 3.2(A) and (B). Comment [2] identifies other Rules that may limit the scope of a voluntary judicial appearance. Comment [3] emphasizes the limits on self-representation by judges before governmental bodies. See ABA Reporter's Explanation 115-116.

### **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.

#### **Comment**

[1] A judge who, without being subpoenaed, testifies as a character witness abuses 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.

### **Reporter's Notes**

Rule 3.3 is derived from the last sentence of Vermont Code 1994, Canon 2B. The changes are intended to make clear that the rule

extends to any adjudicatory proceeding and to nontestimonial exercise of influence in a proceeding. The Comment, taken from the Commentary to ABA Code 1990, Canon 2B, is intended to emphasize that a judge, if possible, should avoid being summoned to give character evidence. See ABA Reporter's Explanation 116-17.

#### **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.

##### **Comment**

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

##### **Reporter's Notes**

Rule 3.4 is a simplified version of the first sentence of Vermont Code 1994, Canon 4C(2). Comment [1] is a modified version of the Commentary to ABA Code 1990, Canon 4C(2). Comment [2] was taken from the text of that section, which was not adopted in Vermont. See ABA Reporter's Explanation 117.

#### **RULE 3.5. Use of Nonpublic Information**

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

##### **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 his or her judicial duties.

[2] This rule is not intended, however, 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 a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

## Reporter's Notes

Rule 3.5 is based on Vermont Code 1994, Canon 3B(11) (Canon 3B(12) in ABA code 1990), among judicial duties. It is now placed in Canon 3 covering extrajudicial duties to reflect that it addresses misuse of office for personal advantage. "Intentionally" has been added to make clear that merely careless conduct does not violate the Rule. New Comments [1] and [2] are intended to link the Rule to the prohibition of abuse of office in Rule 1.3 and to make clear that the Rule does not prevent a judge from using nonpublic information to prevent physical harm to the judge or others. See ABA Reporter's Explanation 118.

### **RULE 3.6. Affiliation with Discriminatory Organizations**

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status, socioeconomic status, or other grounds that are illegal or prohibited under federal or state law.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join 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.

### **Comment**

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of the grounds set forth in Rule 3.6(A) those who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, 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, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[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.

### **Reporter's Notes**

Rule 3.6 and its Comment are taken from ABA Code 2007, Rule 3.6, with modifications in Rule 3.6(A) and Comment [2] to describe the grounds of prohibited discrimination in terms identical to those of V.R.Pr.C. 8.4(g) intended to incorporate all grounds prohibited under state and federal law and to track the Vermont Fair Employment Practices Act, 21 V.S.A. § 495(a)(1), and discrimination on the basis of other grounds barred by federal or state law such as 21 V.S.A. § 495(a)(5) (HIV). See Reporter's Notes to 2017 amendment of V.R.Pr.C. 8.4(g). See also Rules 2.3(B), (C), and Comment [3]; Rule 3.1, Comment [3].

The new rule otherwise carries forward Vermont Code 1994, Canon 2C, eliminating the one-year grace period before a judge who learns of the discriminatory nature of the organization must resign. Comment [2] provides a functional test for the determination whether an organization engages in invidious discrimination. Comment [3] makes clear that a judge must immediately resign from an organization upon learning that it engages in invidious discrimination. See ABA Reporter's Explanation 118-21.

### **RULE 3.7. Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities**

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fundraising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

(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.

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

## **Comment**

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fundraising purpose, does not constitute a violation of paragraph (A)(4). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fundraising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fundraising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico 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.

## **Reporter's Notes**

Rule 3.7 is based on Vermont Code 1994, Canon 4C(3), reorganized and expanded. Rule 3.7(A) expands coverage of the rule to all activity of a judge with a covered organization. Rule 3.7(A)(2) adds family members to those from whom a judge may solicit funds, but Rule 3.7(A)(3) and (4) limit membership solicitation and participation in fundraising events to law-related organizations. Rule 3.7(B), allowing judges to encourage lawyers to participate in pro bono activities, is

new. The Comments are derived from the Commentary to ABA Code 1990, Canon 4C(3), adapted to address the reorganization and expansion embodied in Rule 3.7. New Comment [3] makes clear that minor activities in connection with fundraising events do not constitute a violation of Rule 3.7(A)(4). New Comment [5] expands on new Rule 3.7(B). See ABA Reporter's Explanation 121-26.

### **RULE 3.8. Appointments to Fiduciary Positions**

(A) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, 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 practicable, but in no event later than one year after becoming a judge or as soon as the judge can do so without causing serious financial detriment.

#### **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. 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.

#### **Reporter's Notes**

Rule 3.8 (A)-(C) carry forward Vermont Code 1994, Canon 4E(1)-(3). Rule 3.8(D) and Comment [1] are based upon the Commentary to ABA Code 1990, Canon 4E. See ABA Reporter's Explanation 126-27.

### **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.

## **Comment**

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned 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.

## **Reporter's Notes**

Rule 3.9 is based on Vermont Code 1994, Canon 4F. The language “apart from the judge’s official duties” replaces “in a private capacity” to make clear that a judge could serve as a neutral in pursuit of his official duties. See Comment [1]; ABA Reporter’s Explanation 127-28.

## **RULE 3.10. Practice of Law**

A judge shall not practice law. A judge may be self-represented 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.

## **Comment**

[1] A judge may act be self-represented in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge’s personal or family interests. See Rule 1.3.

## **Reporter's Notes**

Rule 3.10 carries forward Vermont Code 1994, Canon 4G, with the final clause added from the second paragraph of the Commentary to ABA Code 1990, Canon 4G. Comment [1] is based on the first paragraph of the Commentary to ABA Code 1990, Canon 4G. See ABA Reporter’s Explanation 129.

## **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:

- (1) a business closely held by the judge or members of the judge’s family; or
- (2) 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.

### **Comment**

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for judges to use their official title or appear in judicial robes in business advertising, or to conduct their business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

[2] As soon as practicable without serious financial detriment, judges must divest themselves of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

### **Reporter's Notes**

Rule 3.11 is derived from Vermont Code 1994, Canon 4D(1)-(4), with some revision and changes. Rule 3.11(C) is new, gathering in one section restrictions on financial activities found in the text of Vermont Code 1994, Canon 4D(1)-(4), and the Commentary to ABA Code 1990, Canon 4D(1)-(4). New Comment [1] provides examples supporting the rationale of Rule 3.11(C). New Comment [2] is the second sentence of Vermont Code 1994, Canon 4D(4). See ABA Reporter's Explanation 129-31.

### **RULE 3.12. Compensation for Extrajudicial Activities**

A judge may accept reasonable compensation or income 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.

### **Comment**

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

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

### **Reporter's Notes**

Rule 3.12 is derived from the provisions of Vermont Code 1994, Canon 4H(1), covering compensation. "Income" has been added to Rule 3.12 in light of the requirement for reporting income (including rental income) added to former Canon 4H(2) by amendment effective December 18, 2017. The provisions of Canon 4H(1) covering reimbursement are now grouped in Rule 3.14. The phrase "reasonable compensation or income" in the text of the rule replaces the provision of Canon 4H(1), referring to what a nonjudge would receive for similar activity, since a judge might be applying professional skills in an extra-judicial role, and the phrase "undermine the judge's independence, integrity, and impartiality" is included consistent with its use in Rule 1.2 and other places in Vermont Code 2019. Compensation received under Rule 3.12 is subject to public reporting under Rule 3.15(A)(1).

New Comment [2] reflects the facts that reporting of compensation, formerly covered in Canon 4H(2), is now covered in Rule 3.15. See ABA Reporter's Explanation 131-33.

### **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, 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 law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge under Rule 2.11;

(3) ordinary social hospitality;

(4) 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;

(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;

(6) 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;

(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or

(8) gifts, awards, 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 law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:

(1) gifts incident to a public testimonial;

(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:

(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

(b) an event associated with any of the judge's educational, religious, charitable, fraternal, or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and

(3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

## **Comment**

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items need not be publicly reported. As the value of the benefit or the likelihood that the source of the benefit will appear before the judge increases, the judge is either prohibited under paragraph (A) from accepting the gift or required under paragraph (C) to publicly report it.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. 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.

[3] 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. 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 below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other 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 Rule 3.13 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. A judge should, however, 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.

[5] Rule 3.13 does not apply to contributions to a probate or assistant judge's campaign for judicial office. Such contributions are governed by other Rules of this Code, including Rules 4.3 and 4.4.

### **Reporter's Notes**

Rule 3.13 is a thoroughly reorganized adaptation of Vermont Code 1994, Canon 4D(5), and the Commentary to ABA Code 1990, Canon 4D(5). Rule 3.13(A), defining items that may not be accepted, extends coverage to "other things of value," and incorporates the phrase "independence, integrity, or impartiality" consistent with its use in Rule 1.2, 3.1, and other places in Vermont Code 2019. Rule 3.13(B), drawn partly from Canon 4D(5), lists items that may be accepted without limitation or reporting. Rule 3.13(C) lists items, including gifts or other things of value received from a former or potential litigant, of sufficiently greater potential effect on judicial performance that they must be reported under Rule 3.15(A)(2). Both (B) and (C) are subject to the qualification that acceptance does not invoke the prohibition of Rule 3.13(A) or other legal prohibitions. See ABA Reporter's Explanation 133-35.

Comments [1]-[4] explain the "three-tiered" approach of Rule 3.13 and develop issues raised by the inclusion of family members in Rule 3.13(B)(8) and (C)(2). Comment [5] makes clear that Rule 3.13 does not apply to campaign contributions to elected judges, which are covered by rules under Canon 4. See ABA Reporter's Explanation 136.

### **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 and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.

## **Comment**

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.

[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 on 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. The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

## Reporter's Notes

Rule 3.14 covers provisions for reimbursement of expenses for extrajudicial activities, formerly grouped with compensation for extrajudicial activities in Vermont Code 1994, Canon 4H(1). Compensation is now covered separately in Rule 3.12. Rule 3.14(A) includes waivers of fees and charges as a form of reimbursement. It makes clear that reimbursement must meet the overriding tests of Rules 3.1 and 3.13(A) that reimbursement not undermine judicial “independence, integrity, or impartiality.” Rule 3.14(B) adds “domestic partner” to the list of those other than the judge whose expenses may be reimbursed. Rule 3.14(C) makes clear that Rule 3.15(A)(3) applies to reporting of reimbursements. See ABA Reporter's Explanation 137-39.

New Comment [1] explains the rationale for allowing reimbursement for attendance at educational and other extrajudicial activities. New Comments [2] and [3] provide guidance to judges in determining whether or not to accept reimbursement or waiver of fees for particular events. See ABA Reporter's Explanation 139.

### **RULE 3.15. Reporting Requirements**

(A) A judge shall publicly report the amount or value of:

(1) compensation or income, including rental income from real property, received for extrajudicial activities as permitted by Rule 3.12;

(2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items, alone or in the aggregate with other items received from the same source in the same calendar year, does not exceed \$250.00; and

(3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A), unless the amount of reimbursement or waiver, alone or in the aggregate with other reimbursements or waivers received from the same source in the same calendar year, does not exceed \$250.00.

(B) When public reporting is required by paragraph (A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation or income; the description of any gift, loan, bequest, benefit, or other thing of value accepted; and the source of reimbursement of expenses or waiver or partial waiver of fees or charges.

(C) The public report required by paragraph (A) shall be made in such a form as directed by appropriate order of the Supreme Court and shall be filed annually as a public document in the Office of the Court Administrator by January 31 for the previous year.

## Reporter's Notes

Rule 3.15 is based on Vermont Code 1994, Canon 4H(2), as amended effective December 8, 2017. Rule 3.15(A)(1) thus applies to

compensation and income received under Rule 3.12, including rental income. Rule 3.15(A)(2) applies to gifts accepted pursuant to Rule 3.13, and Rule 3.15(A)(3) applies to reimbursements received pursuant to Rule 3.14, in either case in excess of \$250.00 from the same source in the same year. The reference to community property in Canon 4H(2) has been deleted as unnecessary because Rules 3.1-3.15 apply to compensation, gifts, or reimbursement. Vermont Code 1994, Canon 4I(2), concerning judge's income and assets (renumbered by amendment in 2017), has been deleted as unnecessary in the Code. See ABA Reporter's Explanation 140-42. Canon 4I(1), added to Vermont Code 1994 by amendment effective December 18, 2017, has been incorporated as Rule 2.11(D)(1). Rule 3.15(C) carries forward the last sentence of Vermont Code 1994, Canon 4H(2), and combines the effect of ABA Code 2007, Rules 3.15(C) and (D).

There are no Comments to Rule 3.15 in ABA Code 2007.

## **CANON 4**

### **A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.**

#### **Reporter's Notes**

Canon 4 carries forward Vermont Code 1994, Canon 5, with changes noted under each Rule below. See Reporter's Notes to Vermont Code 1994, Canon 5, and first and second 2012 amendments.

#### **RULE 4.1. Political Conduct of Incumbent Judges**

(A) A judge shall not:

- (1) act as a leader or hold an office in a political organization or take part in any political campaign;
- (2) publicly endorse or publicly oppose a candidate for public office;
- (3) make speeches on behalf of a political organization;
- (4) participate in political caucuses or meetings;
- (5) pay an assessment or make a contribution to a political party, organization, or candidate, or purchase tickets for political party dinners or other functions;
- (6) solicit funds for a political party, organization, or candidate; or
- (7) engage in any other political activity except as authorized under any other provision of this Code, or on behalf of measures to improve the law, the legal system, or the administration of justice.

(B) A judge who is a candidate for retention or confirmation in a state judicial office currently held, or for appointment to any other public office, shall also comply with the provisions of Rule 4.2.

(C) A judge shall resign from judicial office upon becoming a candidate for any elective office, except that:

(1) a probate or assistant judge may be a candidate for reelection or may serve as town meeting moderator, and

(2) an assistant judge or a candidate for the office of assistant judge may also seek election to the office of probate judge, and a probate judge or a candidate for the office of probate judge may also seek election to the office of assistant judge, and in either case, if otherwise qualified and elected to both offices, may serve both as an assistant judge and as a probate judge, provided that the judge or candidate complies with the provisions of Rule 4.3.

### **Reporter's Notes**

Rule 4.1 carries forward Vermont Code 1994, Canon 5A, with changes to conform to the numbering and style of ABA Code 2007. See Reporter's Notes to Vermont Code 1994, Canon 5, and first and second 2012 amendments.

### **RULE 4.2. Political Conduct of Candidates for Appointment to or Confirmation or Retention in Public Office**

(A) A candidate for appointment to, or confirmation or retention in, state judicial office, or for appointment to any other public office,

(1) if an incumbent judge, shall at all times comply with all provisions of these Canons except as expressly permitted in this Rule 4.2;

(2) if a candidate for initial appointment to state judicial office, shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(3) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under Rules 4.1-4.4;

(4) shall not:

(a) if a candidate for state judicial office, make pledges or promises of judicial conduct other than the faithful and impartial performance of the duties of the office;

(b) if a candidate for state judicial office, make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court;

(c) knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or any other candidate;

(d) solicit or accept funds, personally or through a committee or otherwise, to support the candidacy;

(e) engage in any political activity to secure the appointment, except that such persons may:

(i) communicate personally or through a paid lobbyist or other representative with the Judicial Nominating Board, the office of the Governor, the Joint Committee on Judicial

Retention, and members of the General Assembly, or any other nominating, appointing, or confirming authority;

(ii) seek support or endorsement for the appointment from individuals and organizations;

(iii) provide to those specified in Rules 4.2(A)(4)(e)(i) and (ii) information as to the candidate's qualifications for office; and

(iv) if not an incumbent judge, retain an office in a political party or organization, participate in political caucuses or meetings, and continue to pay ordinary assessments and make ordinary contributions to a political party, organization, or candidate, and purchase tickets for political party dinners or other functions.

(f) authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under Rules 4.1-4.4;

(5) may respond to personal attacks or attacks on the candidate's record so long as the response does not violate Rule 4.2(A)(4).

### **Reporter's Notes**

Rule 4.2 carries forward Vermont Code 1994, Canon 5B, with changes to conform to the numbering and style of ABA Code 2007. See Reporter's Notes to Vermont Code 1994, Canon 5, and first and second 2012 amendments.

### **RULE 4.3. Political Conduct of Candidates for Election as Judge of Probate or Assistant Judge**

(A) Except as provided in this Rule 4.3, a candidate for election or reelection as a probate or assistant judge shall comply with all applicable provisions of Rules 4.1(A)(1) and 4.2.

(B) A candidate for election or reelection as judge of probate or assistant judge may, while a candidate,

(1) speak to gatherings on the candidate's own behalf;

(2) appear in newspaper, television and other media advertisements supporting the candidacy;

(3) distribute pamphlets and other promotional campaign literature supporting the candidacy; and

(4) publicly endorse or publicly oppose any candidate for the same office.

(C) A candidate for election or reelection as a probate or assistant judge shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums, and other means not prohibited by law. Such committees may solicit and accept campaign contributions not to exceed \$ 250.00 from any single source, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for the candidacy. Subject to Rule 2.11(A)(4), such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than 90 days before a primary election and no later than 90 days after the last election in which the candidate

participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others and is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.

#### **Reporter's Notes**

Rule 4.3 carries forward Vermont Code 1994, Canon 5C, with changes to conform to the numbering and style of ABA Code 2007. See Reporter's Notes to Vermont Code 1994, Canon 5, and first and second 2012 amendments. The second clause of the final sentence of Rule 4.3(C) is adapted from ABA Code 2007, Rule 4(A). It is intended to make explicit the assumptions underlying Section 5C(3) of Vermont Code 1994. See ABA Reporter's Explanation 159. Rule 2.11(A)(4) requires disqualification if any contribution has been received within five years from a lawyer appearing before the judge.

#### **RULE 4.4. Applicability**

A successful candidate, whether or not an incumbent, or an unsuccessful candidate who is an incumbent, is subject to judicial discipline for conduct in the course of seeking appointment or election that violates the provisions of Rules 4.1-4.3; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for campaign conduct that violates the Vermont Code of Professional Responsibility. A lawyer who is a candidate for judicial office is subject to Rule 8.2(b) of the Vermont Rules of Professional Conduct.

#### **Reporter's Notes**

Rule 4.4 carries forward Vermont Code 1994, Canon 5D, with changes to conform to the numbering and style of ABA Code 2007 and the Vermont Rules of Professional Conduct. See Reporter's Notes to Vermont Code 1994, Canon 5, and first and second 2012 amendments.