# STATE OF ALASKA

# COMMISSION ON JUDICIAL CONDUCT

# 2012 ANNUAL REPORT

**510 L Street, Suite 585 (As of 9/01/2012)**
**Anchorage, Alaska 99501**
**(907) 272-1033**
**(800) 478-1033**
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# Alaska Commission On Judicial Conduct

## 2012 Roster

### Judge Members

**Judge Keith Levy**
Alaska District Court
P.O. Box 114100
Juneau, Alaska 99811-4100
*(Term expires February 1, 2015)*

**Judge Philip R. Volland**
Alaska Superior Court
825 W. 4th Avenue
Anchorage, Alaska 99501-2004
*(Term expires February 1, 2015)*

**Judge Ben Esch**
Alaska Superior Court
Box 1110
Palmer, Alaska 99645
*(Term expires February 1, 2016)*
*(Chairperson)*

### Attorney Members

**Robert Groseclose**
714 4th Ave., Suite 200
Fairbanks, Alaska 99701
*(Term expires March 1, 2016)*

**Amy Gurton Mead**
155 S. Seward Street
Juneau, Alaska 9980
*(Term expires March 1, 2016)*

**Jan S. Ostrovsky**
605 W. 4th Avenue, 138
Anchorage, Alaska 99501
*(Term expires March 1, 2013)*

### Public Members

**Amy L. Demboski**
PO Box 672114
Chugiak, Alaska 99567
*(Term expires March 1, 2015)*

**Robert Sheldon**
1029 W. 3rd Avenue, Suite 550
Anchorage, Alaska 99501
*(Term expires March 1, 2016)*

**Chris Brown**
1029 W. 3rd Avenue, Suite 550
Anchorage, Alaska 99501
*(Term expires March 1, 2013)*

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# INTRODUCTION

Alaska's Commission on Judicial Conduct was created by amendment to the state constitution in 1968. The Commission is composed of three state court judges, three attorneys who have practiced law in the state for at least ten years, and three members of the public. This group of nine individuals from differing backgrounds and geographical areas addresses problems of judicial conduct and disability. Complaints alleging judicial misconduct may be filed by any person.

# COMMISSIONER BIOGRAPHIES

## Judicial Members (2012)

**HONORABLE KEITH B. LEVY** was appointed to the District Court in 2005. He chairs the Newer Judge Development Committee and presides over the Juneau Therapeutic Court, a program for the rehabilitation of individuals convicted of felony driving under the influence of alcohol. He graduated from the State University of New York at Binghamton and received his law degree from the University of Santa Clara Law School. Before being appointed to the bench he worked in private practice and held a variety of public service positions including staff attorney to the Alaska Court of Appeals, legal counsel to the Alaska Legislative Affairs Agency, and assistant attorney general with the Alaska Department of Law. He served on the Board of Governors of the Alaska Bar Association, including a term as president.

**HONORABLE BEN ESCH** is a graduate of Arizona State University School of Law. He has lived in Alaska since 1973 and served as a judge of the Superior Court in Nome, Alaska since 1996. The Chief Justice of the Alaska Supreme Court appointed him the presiding judge for the Second Judicial District in January 2008.

**HONORABLE PHILLIP R. VOLLAND** is the Deputy Presiding Judge for Criminal Matters for the Third Judicial District in Anchorage, Alaska. Judge Volland was appointed to the bench in 2002 following nearly 30 years in private practice. He is presently Chair of the Criminal Rules Committee and is a former president of the Alaska Bar Association. Judge Volland formerly served on the Civil Rules Committee, the Special Committee to Review the Code of Judicial Conduct, the Law Related Education Committee, the Sentencing Commission and the Alaska Public Offices Commission. Judge Volland received his legal training at New York University School of Law where he was a Root-Tilden Scholar. He was admitted to state and federal practice in Alaska in 1977.

# Attorney Members (2012)

**JAN OSTROVSKY** is the Clerk of the Bankruptcy Court for the District of Alaska. He has been an attorney since 1975 practicing in small and large firms and as an appointed official of the U.S. Department of Justice. Mr. Ostrovsky has previously served as a board member of the Consumer Education and Training Services (CENTS Project) in Seattle, as the United States Trustee for the northwest states, and as a professional fee examiner in the Enron bankruptcies. He is a contributing author to the Collier Bankruptcy Treatise and co-author of the "Collier Compensation, Employment and Appointment of Trustees and Professionals" volume.

**AMY GURTON MEAD** currently practices law in Juneau as an Assistant City and Borough Attorney. She holds a J.D. Degree from Tulane Law School, in addition to a B.A. in Psychology from Boston University. Ms. Gurton Mead has served as a Judicial Clerk for the Hon. Thomas A. Jahnke, an Assistant District Attorney in Ketchikan (1996-1998), as an Assistant Attorney General in Juneau (2000-2001) and as the City and Borough Attorney for Wrangell (2008-2010). Prior to joining the CBJ Law Department, she was in a private practice in Juneau. She's been a member of the Alaska Bar Association since 1997.

**ROBERT "BOB" GROSECLOSE** has practiced law in Fairbanks since 1976. He received a Bachelor of Arts in Economics from the University of Oregon in 1971, including his completion of a course of study at the Netherlands International School of Business (currently known as Nyenrode University). He received his law degree from the Columbus School of Law, Catholic University of America, in December 1975. Other than a 1974 summer clerkship with the Alaska Superior Court in Fairbanks, Bob has been in private practice since 1976. He is a shareholder with COOK SCHUHMANN & GROSECLOSE, Inc. in Fairbanks. Bob served on the Alaska Judicial Council (2000-2006) and has served in various Alaska Bar Association committee capacities since receiving his bar license in 1976.

# Public Members (2012)

**JAMES C. (CHRIS) BROWN** has lived in Alaska since 2004, and has a 30+ year career in the telecommunications industry. Mr. Brown was born in Canada and grew up in the Southeastern US, where he received an electrical engineering degree from the University of South Florida and an MBA from Emory University in Atlanta, Georgia. Mr. Brown's professional career spans both domestic and international telecommunications, including senior management positions with Sprint, British Telecom and currently AT&T Alaska. Chris and Margaret, his wife of 33 years have one son, Matthew, who is a student at the University of Alaska - Anchorage. Chris's interests include amateur radio, photography, and music. He was appointed to the Commission in 2009.

**AMY DEMBOSKI** was raised in a military family and moved to Eagle River in 1989. She graduated from Chugiak High School in 1994. Amy has Bachelor degrees in Justice and History from UAA, and an MBA in finance from Columbia Southern University. Amy has worked for 15 years in the healthcare industry. During the latter part of that career her focus was on business development and management, building and managing two businesses. Now, she is working at a law firm focusing on estate, tax, and business planning. Amy and her husband, Ben, have two children. Their daughter, Kennedy, is a junior at Chugiak High School and son Riley is a 7$^{th}$ grader at Mirror Lake Middle School. Amy spends much of her time volunteering in the Chugiak and Eagle River area as a member of the local community council, the parks and recreation board, and as a member of the Lions club.

**ROBERT D. SHELDON** is a lifelong Alaskan who was raised in Talkeetna. He has a Bachelor of Science Degree in Finance, and a minor in Economics, from Colorado State University. Robert has served as a director or partner for privately held organizations in aviation, banking and finance. He also is a volunteer in the business community facilitating, financing and encouraging relationships and is a member of Omicron Delta Epsilon, an international economics society. His broad interest in finance and economics extends into understanding interconnections with the judiciary. Robert has been married to Marne Sheldon for 17 years and has three sons. Robert was appointed to the Conduct Commission in 2008. His interests include family, remote rafting, exploration, and coaching.

# I. THE COMMISSION'S ROLE AND FUNCTION

## A. Judicial Officers Who Come Under the Commission's Authority

Alaska's Commission on Judicial Conduct oversees the conduct of justices of the Alaska Supreme Court, judges of the state court of appeals, state superior court judges, and state district court judges. The commission may not handle complaints against magistrates, masters, attorneys, or federal judicial officers.

**Complaints against state magistrates and masters are handled by the presiding superior court judge for their respective judicial districts:**

**First Judicial District**

Honorable Trevor Stephens
Alaska Superior Court
415 Main Street, Room 400
Ketchikan, Alaska 99901

**Second Judicial District**

Honorable Michael Jeffery
Alaska Superior Court
Box 270
Barrow, Alaska 99723

**Third Judicial District**

Honorable Sen Tan
Alaska Superior Court
825 W. Fourth Avenue
Anchorage, Alaska 99501

**Fourth Judicial District**

Honorable Michael MacDonald
Alaska Superior Court
101 Lacey Street
Fairbanks, AK 99701

**Complaints against attorneys can be directed to:**

Stephen J. Van Goor, Bar Counsel
Alaska Bar Association
Box 100279
Anchorage, Alaska 99510

**Complaints against federal judges in Alaska are handled by:**

Assistant Circuit Executive
United States Court of Appeals
P.O. Box 193939
San Francisco, California 94119
Telephone (415) 556-6100

## B. Types of Complaints the Commission May Address

### 1. Misconduct

The broadest category of conduct complaints against judges falls under the term "misconduct." Judicial misconduct has a very specific meaning under the Code of Judicial Conduct. The Code of Judicial Conduct generally governs the activities of judges both on and off the bench. It is a comprehensive statement of appropriate judicial behavior and has been adopted by the Alaska Supreme Court as part of the Rules of Court. Judicial misconduct can be divided into several categories.

## (a) Improper Courtroom Behavior

At times complaints against judges allege improper behavior in the courtroom during a trial. Allegations of improper courtroom behavior may include: improper consideration and treatment of attorneys, parties, witnesses, and others in the hearing; improper physical conduct; or persistent failure to dispose of business promptly and responsibly.

Examples of improper courtroom behavior include: racist or sexist comments by a judge and sleeping or drunkenness on the bench. Judges can also be disciplined for administrative failures such as taking an excessive amount of time to make a decision.

## (b) Improper or Illegal Influence

Judges must be independent from all outside influences that may affect their abilities to be fair and impartial. Consequently, judges are restricted as to the types of activities in which they can participate. At a minimum, judges cannot allow family, social, or political relationships to influence any judicial decision. Judges also should not hear a matter in which the judge has a personal interest in the outcome. Extreme examples of improper influence would include the giving or receiving of gifts, bribes, loans, or favors. To help assure judicial independence, judges are required to file financial disclosure statements with the court and other financial statements with the Alaska Public Offices Commission.

### (c) Impropriety Off the Bench

Judges are required to live an exemplary life off the bench, as well. Consequently, the commission has the authority and responsibility to look at judges' activities outside of the courtroom. Complaints dealing with off-the-bench conduct might allege: misuse of public employees or misappropriation of property or money for personal purposes; improper speech or associations; interference with a pending or impending lawsuit; lewd or corrupt personal life; or use of the judicial position to extort or embezzle funds. Clearly, off-the-bench conduct includes a wide range of behavior from merely inappropriate actions to criminal violations.

### (d) Other Improper Activities

Judges are also subject to restrictions in other aspects of their positions. These include prohibitions against: conducting proceedings or discussions involving one party to a legal dispute; interfering with the attorney-client relationship; bias; improper campaign activities; abusing the prestige of the judicial office; obstructing justice; and criminal behavior.

## 2. Physical or Mental Disability

Apart from allegations of misconduct in office, the Commission also has the authority and responsibility to address allegations of judges' physical and mental disabilities. Disabilities may include: alcohol or drug abuse; senility; serious physical illness; or mental illness.

The Commission can require medical examinations as part of its investigation and also can recommend counseling when appropriate.

### 3. Complaints the Commission May Not Address

The most common complaints that the commission has no authority to address involve questions of law. Frequently, complaints allege dissatisfaction with decisions that judges make in their judicial capacity. For example, individuals often complain of wrong child custody awards or sentences that judges impose in criminal cases. The Commission may not enter into cases or reverse judicial decisions. That role belongs to the appellate courts.

# II. HOW THE COMMISSION OPERATES

## A. Filing a Complaint

While the Commission may initiate its own investigation, any person may also file a complaint against a state judge with the Commission. A blank complaint form is in **Appendix F** of this report. A form is not necessary, but the complaint should be in writing and should include enough information to enable the Commission staff to begin an investigation. Necessary information includes: the judge's name, the conduct complained of, a case number if it involves a court case, and the names of others present or aware of the facts. Complaints should be sent to:

**Alaska Commission on Judicial Conduct**
**510 L Street, Suite 585**
**Anchorage, Alaska 99501**

Commission staff will be happy to assist anyone in writing a complaint.

## B. Complaint Investigation

Soon after a complaint is filed, the Commission will review the accusation. Commission staff will often interview the person who filed the complaint to determine the facts giving rise to the complaint. After the initial inquiry, the Commission may conduct a full investigation. All complaints within the Commission's legal authority are investigated further. If the charge is found to be without merit, an accusation against a judge may be dismissed by the Commission during the investigation. If a preliminary investigation supports the complaint, a formal investigation begins. It is at this stage that the judge involved is informed of the complaint. A formal investigation includes an interview with the judge.

Complaints filed with the Commission and all Commission inquiries and investigations are confidential. If the Commission finds that probable cause exists that a judge has committed misconduct that warrants action more serious than a private admonishment or counseling, a formal statement of charges is issued. The statement of charges is public information. Some time after the formal charges issue, the Commission will hold an open public formal hearing on the matter. At that hearing, Special Counsel (hired by the Commission) presents the case against the judge. The judge is often represented by an attorney who presents that judge's defenses. The full Commission usually sits as decision-makers in the matter and renders a decision that may include recommendations to the Alaska Supreme Court for sanctions against the judge. The results of a Commission proceeding are public when Commission recommendations are made to the supreme court.

The Commission's decision may be to exonerate the judge of the charge or charges, recommend counseling or recommend that the supreme court take formal action. The Alaska Supreme Court may impose one of the following sanctions against the judge: suspension, removal, retirement, public or private censure, reprimand,* or admonishment.

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*The Commission on Judicial Conduct originally had statutory authority to issue reprimands without action by the Alaska Supreme Court. That power was held to be unconstitutional by Inquiry Concerning a Judge, 762 P.2d 1292 (1988).

## COMMISSION COMPLAINT PROCESS

The complaint process begins when a written complaint is received by Commission staff. If the complaint falls *outside the Commission's authority,* such as a complaint about an attorney or about a judge's legal decision, the complaint is *dismissed*.* If the complaint appears to be *within the Commission's authority,* a case number is assigned to the complaint and an initial *investigation* is begun.

During the initial *investigation* stage, a complaint is examined to determine if there is enough evidence to warrant a further investigation. Generally, this process includes close examination of the written complaint (including any evidence or explanation attached), and an inspection of any relevant court documents.

If the Commission determines that there is no reliable evidence supporting the complaint, it is *dismissed*.*

If the Commission determines that the complaint has enough substance to warrant action, the *judge in question is notified* and *given an opportunity to respond*. During this stage, the judge may receive a private *informal adjustment, private discipline,* or, after a determination of probable cause, *formal charges* may issue. If the investigation reveals that the complaint was unfounded, the complaint will be *dismissed*.* The *issuing* of formal charges by the Commission starts a period of *formal discovery,* where both the Special Counsel hired by the Commission and the accused judge gather evidence and information to support their respective positions.

After the formal discovery period, a *public hearing* is held. The hearing is usually conducted by the Commission (but it is possible that a Special Master could be appointed). Special Counsel presents the case against the judge and the judge will often hire an attorney for his or her defense. There are two possible outcomes from the public hearing; either the charges are dismissed, or the Commission finds the judge guilty of misconduct and *recommends sanctions to the Alaska Supreme Court*.

The Alaska Supreme Court may carry out the Commission's recommended sanctions, modify them, or overturn the Commission's decision.

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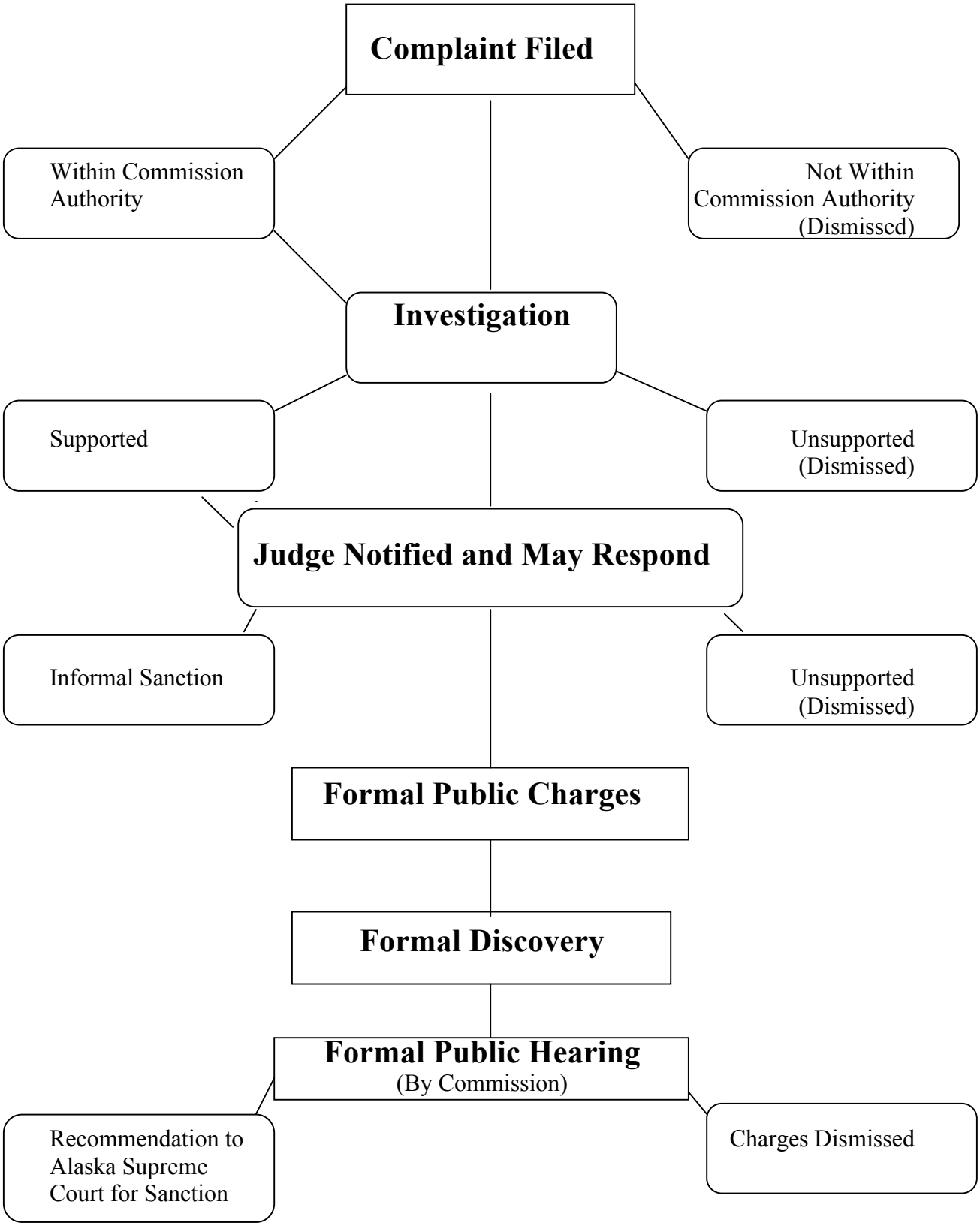
* Prior to dismissal by the Commission, staff notifies the complainant in writing of the staff recommendation to dismiss.

# Commission Complaint Process



# III. CALENDAR YEAR 2012 ACTIVITIES

## A. Summary of Complaints

The tables that follow summarize the current Commission caseload. Complaint filing numbers reflect only written complaints received by the Commission and do not reflect the numerous telephone inquiries staff receives. In 2012, staff responded in writing to 56 inquiries and approximately 150 verbal and e-mail inquiries.

In 2012, staff continued to make a concerted effort to screen many complaints before they actually were filed with the Commission. Twelve new jurisdictional complaints were filed this year. Of those jurisdictional complaints, four were eventually dismissed, leaving eight 2012 jurisdictional complaints that will require investigation. In addition to the 2012 jurisdictional complaints, one jurisdictional complaint from previous years was acted on.

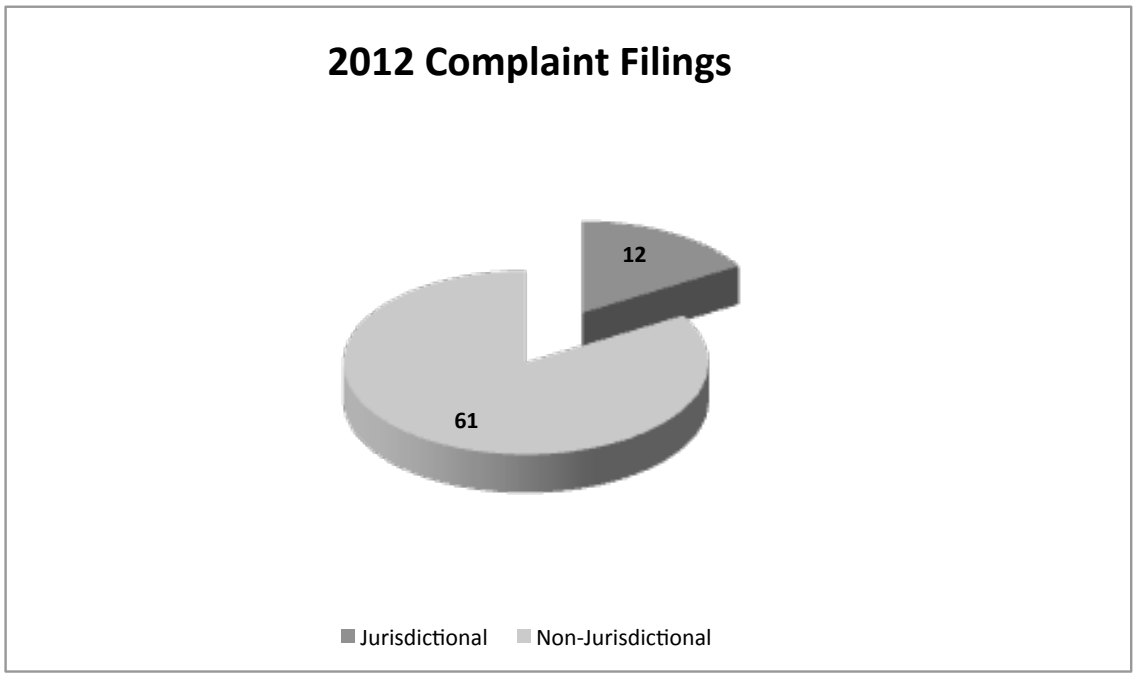
The Commission opens approximately two complaints a month that require staff investigation. In August of 1991, the Commission adopted a policy of processing all new incoming complaints within 90 days. In addition, the Commission established a minimum goal of fully investigating three complaints per month.

# Table 1
## 2012 Complaint Filings

**Complaint Filings**

| | | |
|---|---|---|
| Within the Commission's Authority | *Jurisdictional* | 12 |
| Not Within the Commission's Authority | *Non-Jurisdictional* | 61 |
| | **Total New Complaints** | **73** |

# Figure 1



# Table 2

## Comparison With Previous Years'

### Total Accusations Filed by Calendar Year

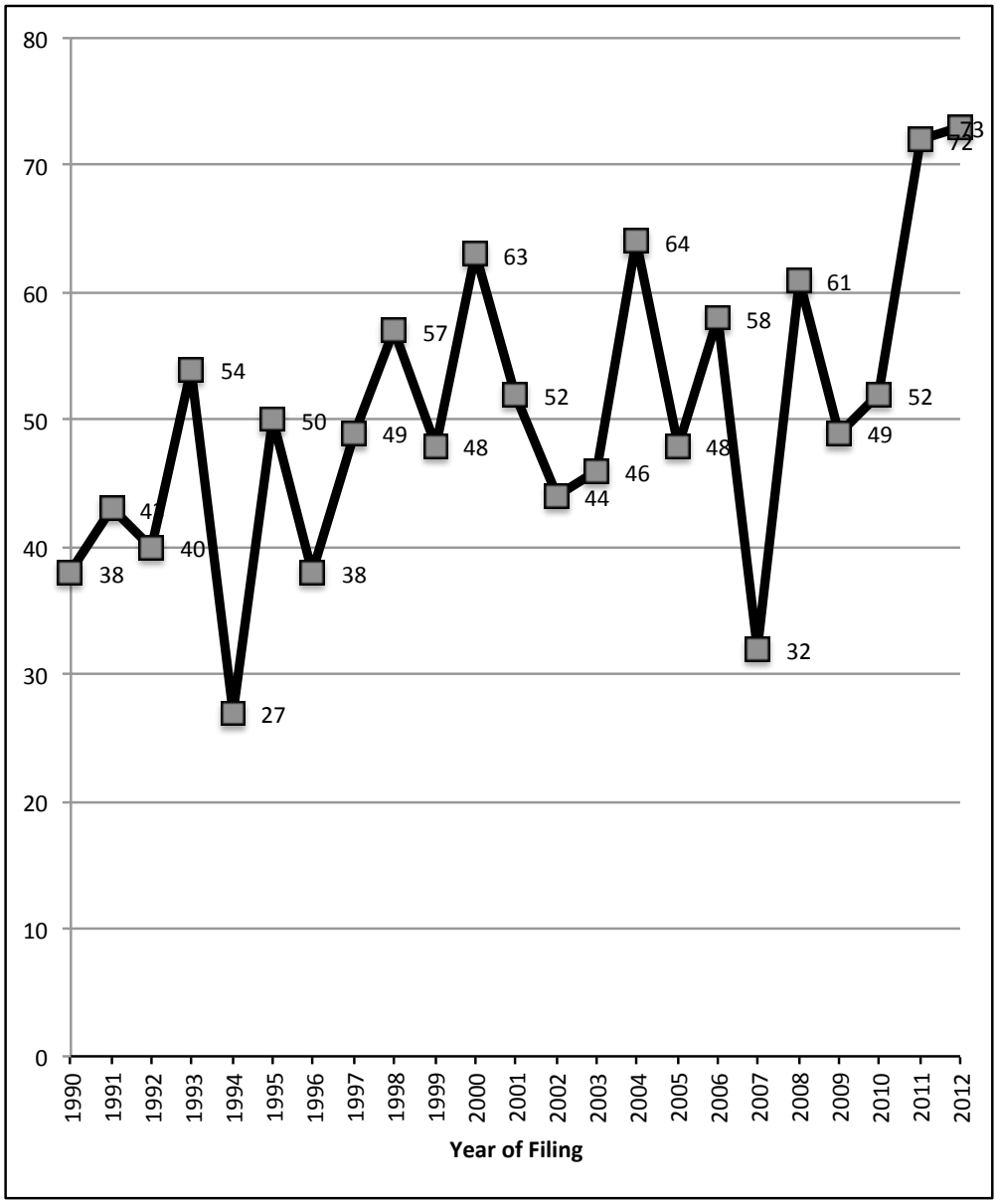
(includes complaints both within the Commission's Authority and those not within the Commissions authority that were not screened out prior to receipt)

| | |
|---|---|
| 2012 | 73 |
| 2011 | 72 |
| 2010 | 52 |
| 2009 | 49 |
| 2008 | 61 |
| 2007 | 32 |
| 2006 | 58 |
| 2005 | 48 |
| 2004 | 64 |
| 2003 | 46 |
| 2002 | 44 |
| 2001 | 52 |
| 2000 | 63 |
| 1999 | 48 |
| 1998 | 57 |
| 1997 | 49 |
| 1996 | 38 |
| 1995 | 50 |
| 1994 | 27 |
| 1993 | 54 |
| 1992 | 40 |
| 1991 | 43 |
| 1990 | 38 |

* Beginning in 1990, Commission staff have made a concerted effort to actively screen accusations that are outside the Commission's authority prior to filing. This active screening process accounts for the apparent drop in accusation filings since 1989.

# Figure 2

## Comparison with Prior Years' Filings



# Table 3

## Complaint Sources 2008-2012

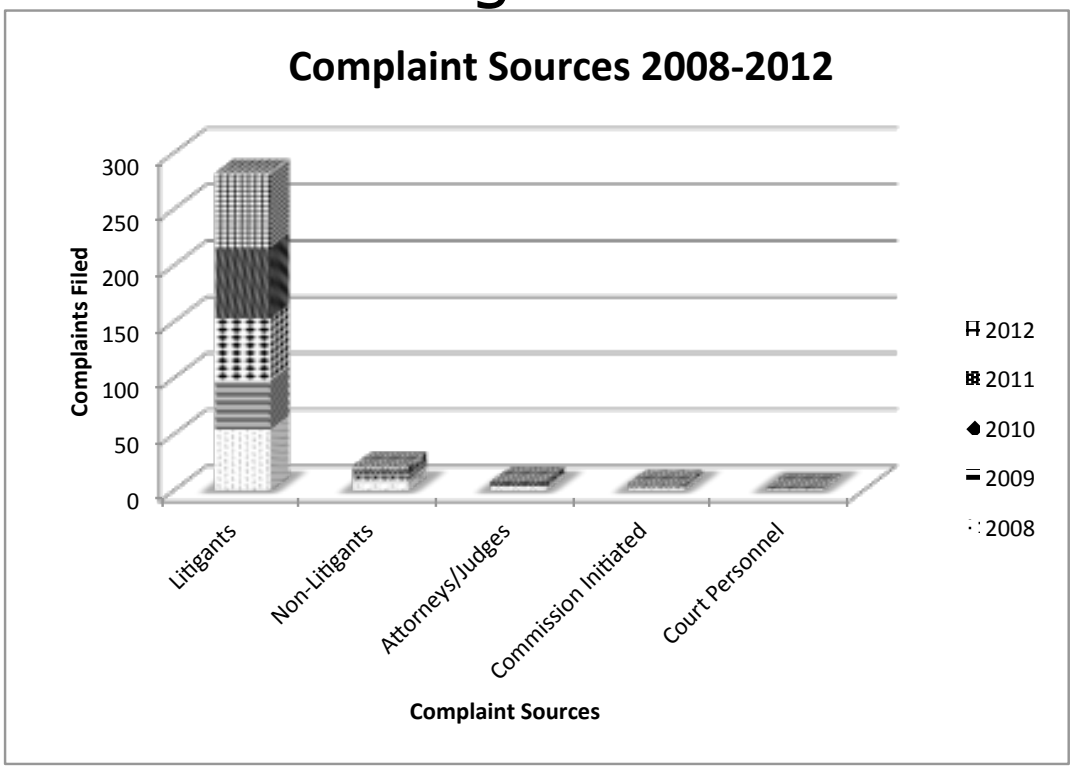
### (Jurisdictional and Non-Jurisdictional)

| Complaint Sources | 2008* | 2009 | 2010 | 2011 | 2012** |
|---|---|---|---|---|---|
| Litigants | 54 | 44 | 55 | 62 | 67 |
| Non-Litigants | 6 | 2 | 6 | 4 | 4 |
| Attorneys/Judges | 2 | 1 | 1 | 4 | 0 |
| Commission Initiated | 1 | 1 | 1 | 2 | 1 |
| Court Personnel | 0 | 1 | 1 | 0 | 0 |

*In 2008:There was a non-litigant and a litigant that filed the same complaint. Also, a lawyer and a non-litigant that filed the same compliant

**In 2012: One compliant was filed by an unidentified complaint source.

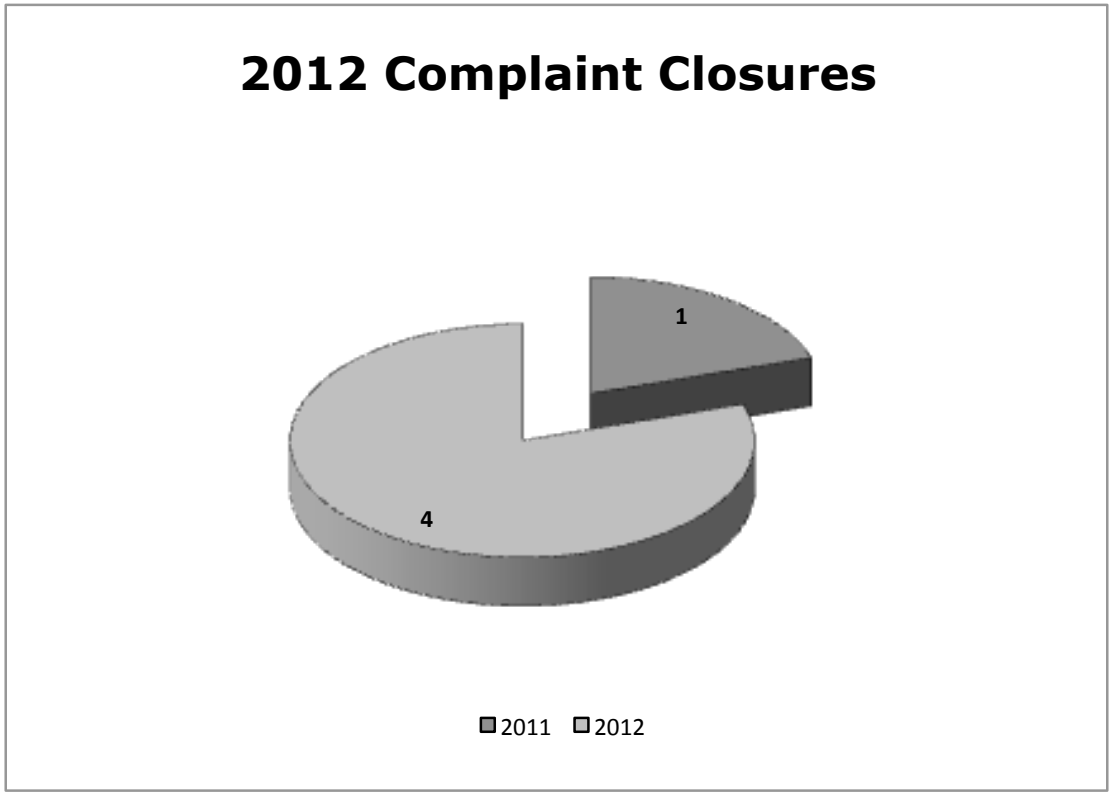
# Figure 3



# Table 4
## 2012 Complaint Closures

| | |
|---|---|
| 2011 | 1 |
| 2012 | 4 |

# Figure 4



# Table 5
## 2012 Complaint Dispositions

### *Complaints Outside the Commission's Authority*

| | |
|---|---|
| Dissatisfaction with Legal Ruling | 56 |
| Complaints Against a Magistrate or Master | 1 |
| Complaints Against an Attorney | 1 |
| Other | 3 |
| **Total Non-Jurisdictional Complaints Processed** | **61** |

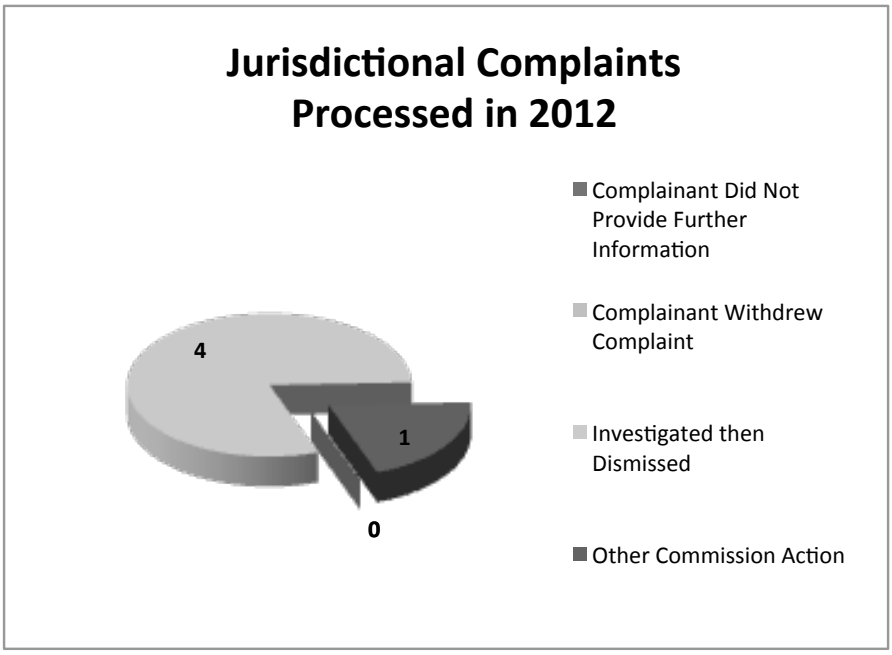
### *Complaints Within the Commission's Authority*

| | |
|---|---|
| Complainant Did Not Provide Further Information | 0 |
| Complainant Withdrew Complaint | 0 |
| Investigated then Dismissed | 4 * |
| Other Commission Action | 1 |
| **Total Jurisdictional Complaints Processed** | **5** * |

* 1 filed in 2011 and acted on in 2012

# Figure 5A

# Figure 5B



# Table 6
## Comparison With Previous Years Closures*

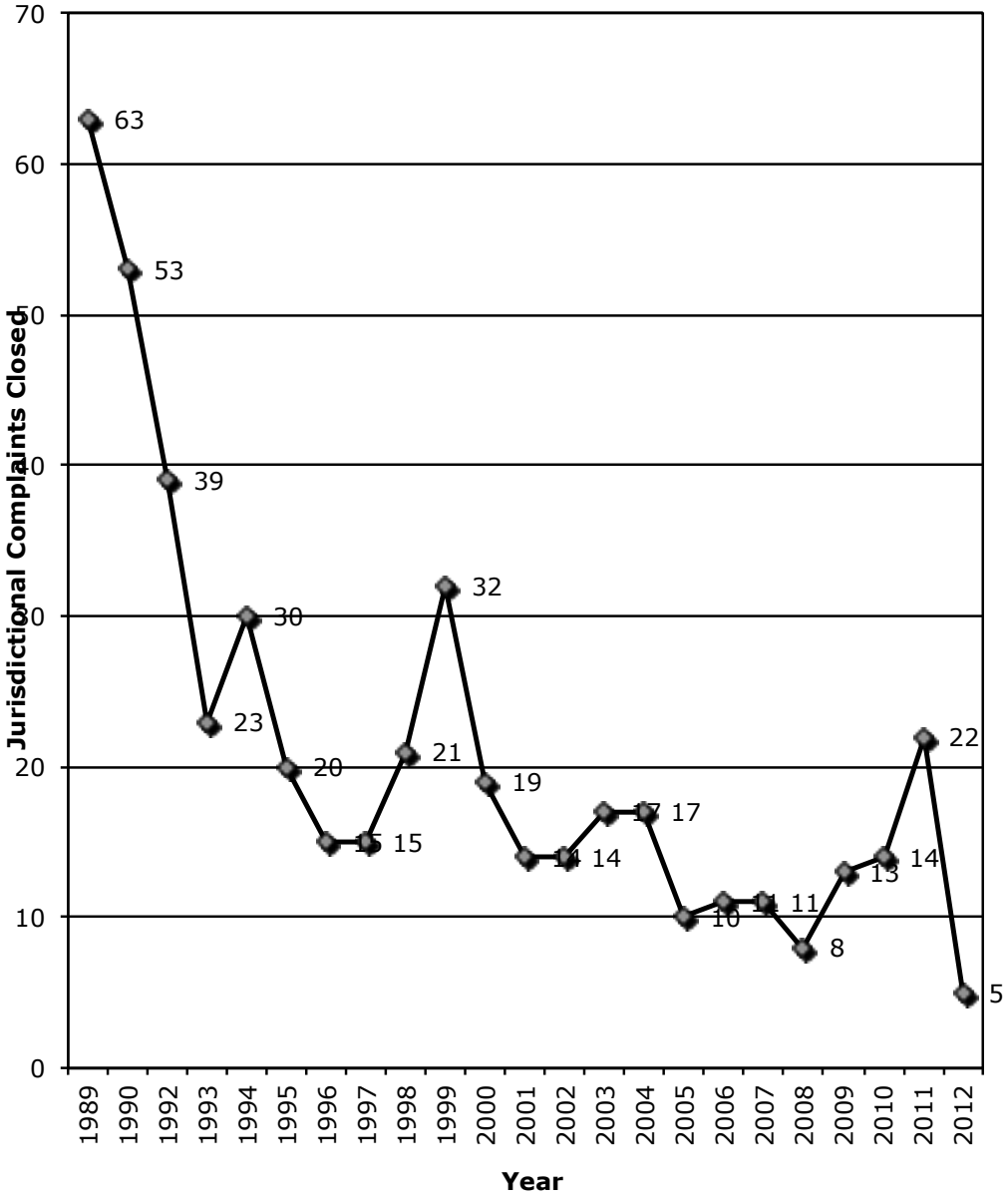
### Total Jurisdictional Complaints Closed

| | |
|---|---|
| 2012 | 5 |
| 2011 | 22 |
| 2010 | 14 |
| 2009 | 13 |
| 2008 | 8 |
| 2007 | 11 |
| 2006 | 11 |
| 2005 | 10 |
| 2004 | 17 |
| 2003 | 17 |
| 2002 | 14 |
| 2001 | 14 |
| 2000 | 19 |
| 1999 | 32 |
| 1998 | 21 |
| 1997 | 15 |
| 1996 | 15 |
| 1995 | 20 |
| 1994 | 30 |
| 1993 | 23 |
| 1992 | 39 |
| 1990 | 53 |
| 1989 | 63 |

* Prior to 1989, it was the Commission's Policy to open a complaint for every inquiry made with the Commission's office. After 1989, the Commission opened files only for those matters that, on their face, were within the Commission's authority. Therefore, the numbers before 1989 are not directly comparable to those during 1989 and after.

# Figure 6

## Jurisdictional Complaints Closed Compared to Prior Years



# Table 7

## Pending Jurisdictional Complaints By Year Filed

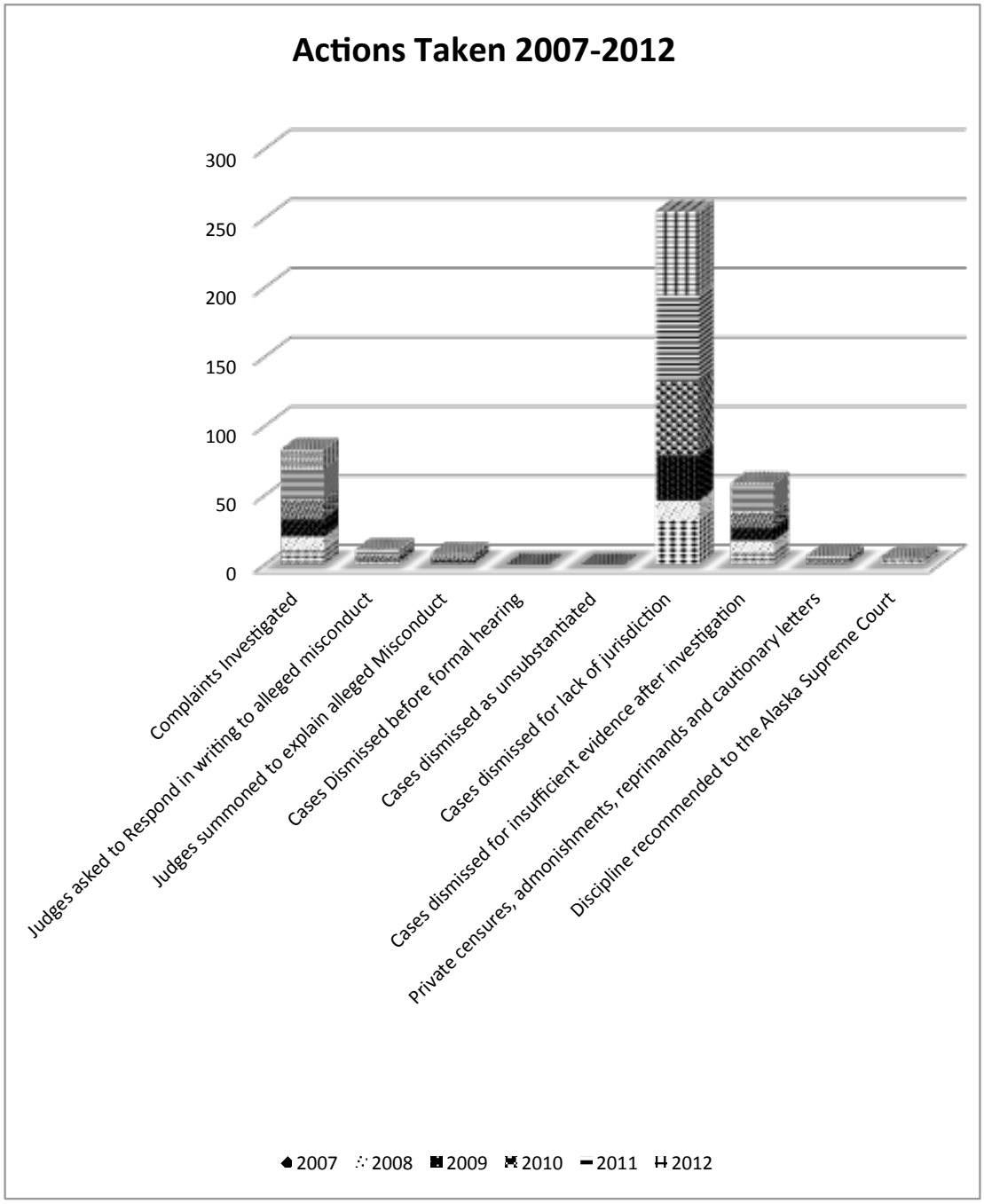
(As of December 31, 2012)

| | |
|---|---|
| 2012 | 8 |
| 2011 | 3 |

# Table 8
## Actions Taken 2007-2012

| Actions Taken | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|
| Complaints Investigated | 11 | 9 | 13 | 14 | 22 | 14 |
| Judges asked to Respond in writing to alleged misconduct | 1 | 1 | 1 | 4 | 3 | 1 |
| Judges summoned to explain alleged Misconduct | 0 | 1 | 2 | 3 | 0 | 2 |
| Cases Dismissed before formal hearing | 0 | 0 | 0 | 0 | 0 | 0 |
| Cases dismissed as unsubstantiated | 0 | 0 | 0 | 0 | 0 | 0 |
| Cases dismissed for lack of jurisdiction | 32 | 14 | 33 | 53 | 62 | 61 |
| Cases dismissed for insufficient evidence after investigation | 9 | 8 | 10 | 11 | 20 | 1 |
| Private censures, admonishments, reprimands and cautionary letters | 1 | 0 | 1 | 1 | 2 | 1 |
| Discipline recommended to the Alaska Supreme Court | 1 | 1 | 0 | 2 | 0 | 1 |

# Figure 8


Actions Taken 2007-2012
300
250
200
150
100
50
0
Complaints Investigated
Judges asked to Respond in writing to alleged misconduct
Judges summoned to explain alleged Misconduct
Cases Dismissed before formal hearing
Cases dismissed as unsubstantiated
Cases dismissed for lack of jurisdiction
Cases dismissed for insufficient evidence after investigation
Private censures, admonishments, reprimands and cautionary letters
Discipline recommended to the Alaska Supreme Court
2007
2008
2009
2010
2011
2012

# Table 9

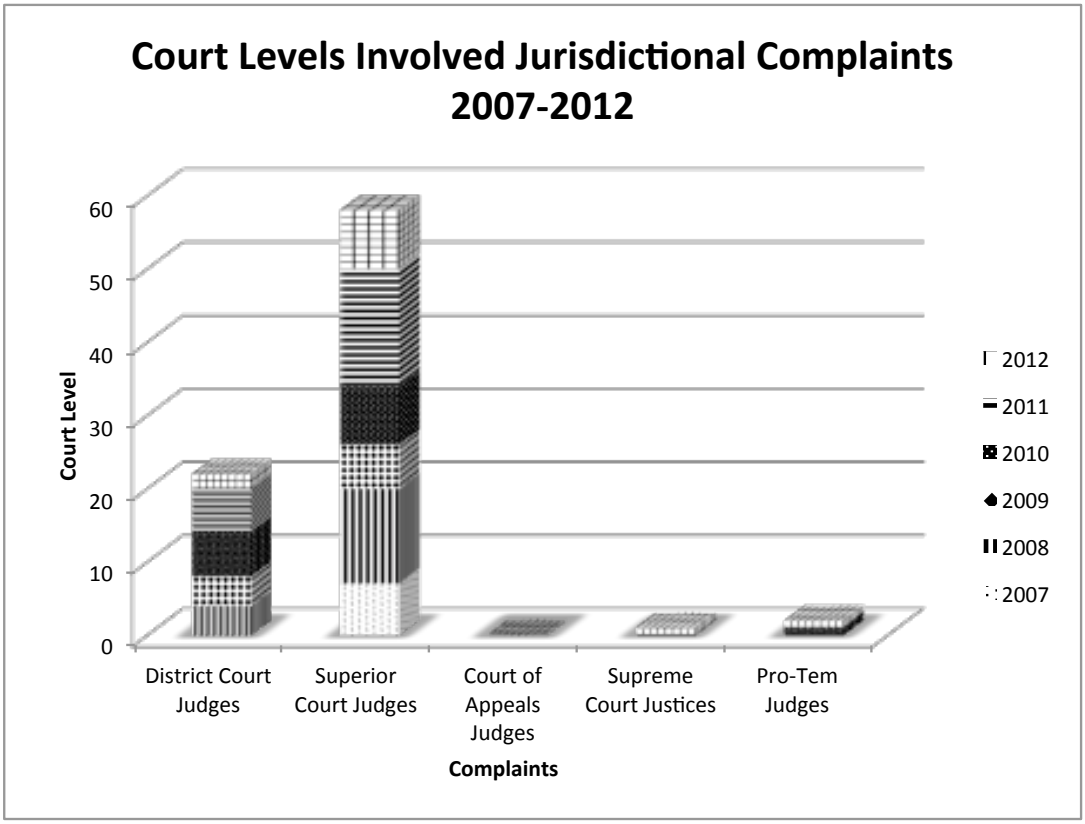
## Court Levels Involved

### Jurisdictional Complaints 2007-2012

| Court Levels Involved | 2007* | 2008* | 2009* | 2010* | 2011* | 2012* |
|---|---|---|---|---|---|---|
| District Court Judges | 0 | 4 | 4 | 6 | 6 | 2 |
| Superior Court Judges | 7 | 13 | 6 | 8 | 16 | 8 |
| Court of Appeals Judges | 0 | 0 | 0 | 0 | 0 | 0 |
| Supreme Court Justices | 0 | 0 | 0 | 0 | 0 | 1 |
| Pro-Tem Judges | 0 | 0 | 0 | 1 | 0 | 1 |

*Not a total of the category. Some complaints include more than one judge/justice

# Figure 9

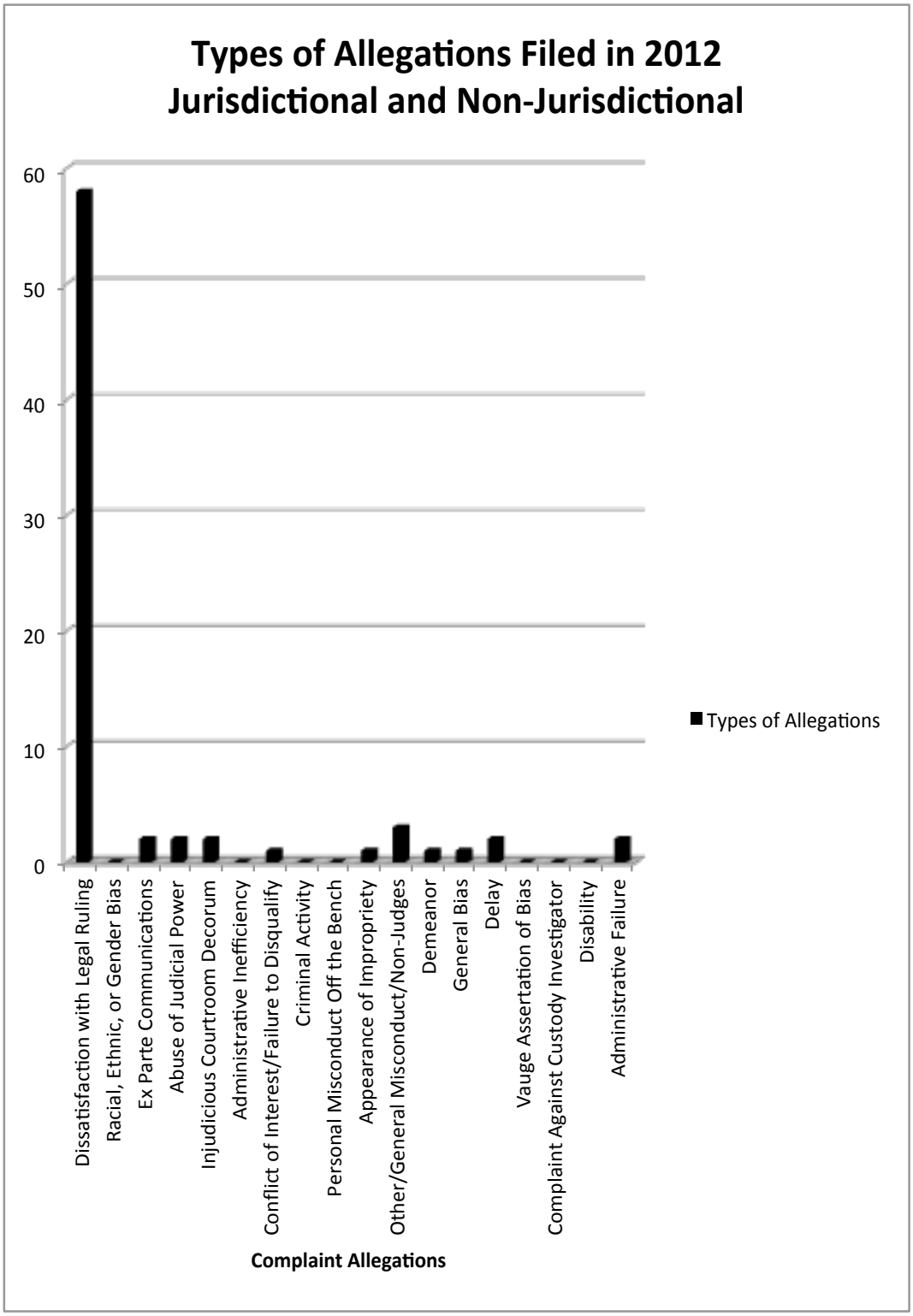


# Table 10
## Types of Allegations
### Filed in 2012
### (Jurisdictional and Non-Jurisdictional)

| **Types of Allegations** | **2012** |
|---|---|
| Dissatisfaction with Legal Ruling | 58 |
| Racial, Ethnic, or Gender Bias | 0 |
| Ex Parte Communications | 2 |
| Abuse of Judicial Power | 2 |
| Injudicious Courtroom Decorum | 2 |
| Administrative Inefficiency | 0 |
| Conflict of Interest/Failure to Disqualify | 1 |
| Criminal Activity | 0 |
| Personal Misconduct Off the Bench | 0 |
| Appearance of Impropriety | 1 |
| Other/General Misconduct/Non-Judges | 3 |
| Demeanor | 1 |
| General Bias | 1 |
| Delay | 2 |
| Vauge Assertation of Bias | 0 |
| Complaint Against Custody Investigator | 0 |
| Disability | 0 |
| Administrative Failure | 2 |

* some complaints have more than one type of allegation

# Figure 10


Types of Allegations Filed in 2012
Jurisdictional and Non-Jurisdictional
60
50
40
30
20
10
0
Dissatisfaction with Legal Ruling
Racial, Ethnic, or Gender Bias
Ex Parte Communications
Abuse of Judicial Power
Injudicious Courtroom Decorum
Administrative Inefficiency
Conflict of Interest/Failure to Disqualify
Criminal Activity
Personal Misconduct Off the Bench
Appearance of Impropriety
Other/General Misconduct/Non-Judges
Demeanor
General Bias
Delay
Vauge Assertation of Bias
Complaint Against Custody Investigator
Disability
Administrative Failure
Complaint Allegations
Types of Allegations

# Table 11
## 2012 Recusals By Commissioners and Staff

**Total Complaints Voted on in 2012 57**

| | |
|---|---|
| Judge Member Recusals | 1 |
| Attorney Member Recusals | 1 |
| Public Member Recusals | 0 |
| Staff Member Recusals | 1 |

## B. Commission Meetings

During 2012, the Commission held two regular meetings. With a full-time staff of two, the Commission continues to increase its case processing and fine-tune its procedures. Staff consistently works to increase staff responsiveness. Increased responsiveness increases the Commission's accessibility and has resulted in increased interaction with the public. Current funding levels allow for four regular meetings a year in Anchorage.

### 2012 Regular Meeting Locations

| | |
|---|---|
| March 16 & 17 2012 | Anchorage |
| Oct 8, 2012 | Anchorage |

### 2012 Special Meetings Locations

No special meetings were held in 2012

## C. Outreach

Commission brochures inform the public of its purpose and functions. Brochures are available to the general public free of charge, through the Commission's office. In addition, Commission members and staff address bar associations, court administrators, local community groups, and judicial programs. The Commission also maintains membership in the American Judicature Society's Center for Judicial Conduct Organizations.

## D. Formal Proceedings

The Commission held one formal proceeding in March 2012. The hearing resulted in a recommendation of removal from office. The recommendation was filed with the Alaska Supreme Court April 3, 2012 (In re Cummings).

## E. Rules of Procedure

The Commission's operations are governed by its own Rules of Procedure. While the statutes relating to the Commission broadly outline the Commission's responsibilities, the Rules of Procedure define how the Commission operates. In 1991, the Commission revised its rules clarifying many rules and increasing their scope. In 1998 a committee consisting of four commission members, one attorney member, one public member, and two judge members, was established for the purpose of refining and modifying the Rules of Procedure. The Commission adopted this revision on December 1, 2000.

The Rules Revision Committee's work focused on enhancing the rules in the areas such as discovery, evidence, motions, role of the chair, executive director's role and authority, standards for reopening complaints, deliberative process, the formal hearing, and settlement. In June 2003, the Notice Rule was revised to allow notice to a judge in anticipation of action at an upcoming meeting. Most recently, Rule 5(e) was revised to specify the form that information would be released pursuant to a waiver.

The rules revisions are circulated for public comment prior to their adoption. The Commission's efforts are directed toward improving its public responsiveness, creating the fairest procedures, and fulfilling its directive under the state constitution. The Commission's current Rules of Procedure are included in **Appendix I**.

## F. Staffing

The Commission staff currently consists of an executive director and an administrative assistant.

# IV. COMMISSION FINANCES AND BUDGET

The Commission's finances are planned according to the state fiscal year (July 1 - June 30). Each year the Commission on Judicial Conduct submits its budget request to the legislature. The Commission's resources are appropriated from the state general operating fund.

## A. Fiscal Year 2014 Budget

In FY 2013, the legislature appropriated $388,600.00 to the commission. This money enables the Commission to operate a staff of one executive director and one administrative assistant.

## B. Fiscal Year 2012 Activity

All but one of the previous year's pending complaints were closed in 2012; however, eight 2012 complaints are pending investigation.

# V. FUTURE ACTIVITIES

## A. Commission Meetings

| | |
|---|---|
| January 18, 2013 | Anchorage |
| April 26, 2013 | Anchorage |
| July 2013 | Anchorage |
| October 2013 | Anchorage |

## B. Caseload

In 2013, the Commission anticipates receiving approximately 60 complaints against judicial officers, of which 20 may require staff investigation.

## C. Legislation

At the Commission's request, the House Judiciary Committee introduced a bill in 1989 that opened the Commission's formal hearings to the public. House Bill 268, passed in May 1990, also established a standard deadline of six years for complaints against judges to be filed with the Commission. (The former law required a period of not more than six years before the start of the judge's current term; creating different time limits for different judges.) The law also explicitly includes part-time or temporary judges within the Commission's authority. That law's enactment also made all Commission formal hearings and recommendations to the Alaska Supreme Court open to the public. In 1997, the Commission conducted its first public hearing under this legislation.

## D. Formal Ethics Opinions

In 1991, the Commission issued its first Formal Ethics Opinions. These opinions are based on actual Commission complaints that resulted in some form of private informal action. Formal Ethics Opinions are reported in a way that protects confidentiality. Only the minimum facts necessary to an understanding of the opinion are reported. The Commission continues to adopt new formal ethics opinions as the situations arise. These opinions are included in **Appendix G.**

## E. Advisory Opinions

At the March 1, 1996, meeting, the Commission adopted a rule authorizing the issuance of advisory opinions to judges who would like guidance regarding ethical dilemmas. Special committees of the Commission draft opinions in response to written requests. A final opinion issues from the Commission and is confidential unless the requesting judge asks that it be public. In 2012, the Commission did not adopt any new advisory opinions. Advisory opinions are included in **Appendix H**.

Staff also provided over 100 informal ethics opinions to judicial officers and court personnel.

## F. Other Activities

In 2013, the Commission will continue developing and conducting educational programs for judicial officers on various judicial conduct issues. While advisory opinions provide guidance to individual judges addressing specific ethical issues, there is an ongoing need to provide general guidance to all judges in this changing field.

Again in 2012, the Commission provided self-study materials, covering a variety of ethics topics for both new and experienced judges. In addition, the Commission continues to participate with the court system's judicial education committee and presents judicial programs periodically addressing a variety of ethical issues.

In 2000, the Commission jointly published Alaska Judicial Applicant Guidelines with the Alaska Judicial Council and the Alaska Bar Association. The publication gives guidance to judicial applicants and their supporters regarding the ethical considerations when soliciting support from others. There are suggestions for preferred methods and tone of communications as well as an appendix of resource materials. This publication was reprinted in 2003.

Other outreach activities will continue and expand to further general public awareness of the Commission functions. Staff will continue to address community groups and meet individually with members of the general public. In addition, the Commission will periodically pay for display newspaper advertisements that highlight the Commission's purpose and invite public participation.

The Commission also hopes to continue work with the state and local bar associations to identify areas of concern that attorneys have encountered. A very small percentage of current complaints against judges are filed by attorneys.

# APPENDIX A

## Constitutional Provisions

## Relating to the Commission on Judicial Conduct

# CONSTITUTION OF ALASKA

## Art. IV, § 10

**Section 10. Commission on Judicial Conduct.** The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the Justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law. [Amendment approved November 2, 1982]

**Cross references.**—For provisions on the powers and duties of the Commission on Judicial Conduct, see AS 22.30.11. For proceedings when a successful candidate for judicial retention or the campaign treasurer or deputy campaign treasurer of such a candidate has been convicted of a violation of the state elections campaign laws, see AS 15.13.120(f)(8).

**Effect of amendments.** — The amendment, effective November 2, 1982 (12th Legislature's LR 36), substituted "Conduct" for "Qualifications" following "Commission on Judicial," substituted "three persons who are justices or judges of the state courts" for "one justice of the supreme court" preceding "elected by the justices," substituted "and judges of the state courts" for "of the supreme court; three judges of the superior court; one judge of the district court, elected by the judges of the district court" following "elected by the justices," substituted "three" for "two" preceding "members who have practiced law," added "governor from nominations made by the" preceding "governing body of the organized bar," added "and subject to confirmation by a majority of the members of the legislature in joint session" following "governing body of the organized bar" and substituted "three for "two" preceding "persons who are not judges."

### NOTES TO DECISIONS

**Scope of commission's powers.** — This section only empowers the commission to recommend sanctions to the Alaska Supreme Court. Granting the commission the authority to impose sanctions is not permitted. In re Inquiry Concerning a Judge, 762 P.2d 1292 (Alaska 1988) **Cited** in Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985)

**Cross reference.**—For statutory provisions regarding Commission on Judicial Qualifications, see AS 22.30.010 — 22.30.080.

**Effect of amendment.** — The amendment approved August 27, 1968 (5th Legislature's 2d FCCS SCS CSHJR 74) rewrote this section to establish the commission and provide for "disqualification" of judges. Formerly, this section dealt only with incapacity and retirement of judges.

**Basis of 1968 amendment.** — The Alaska Commission on Judicial Qualifications was created by a constitutional amendment which became effective in 1968. This amendment is based on a 1966 revision of the judicial article of the California Constitution. In re Hanson, Sup. Ct. Op. No. 1117 (File No. 2311), 532 P.2d 303 (1975).

This section vests in the supreme court the ultimate authority in disciplinary matters affecting the judiciary. In re Hanson, Sup. Ct. Op. No. 1117 (File No. 2311), 532 P.2d 303 (1975).

This section and AS 22.30.070(c) unambiguously establish the supreme court of Alaska as the body entrusted with the ultimate dispositive decision in a judicial qualifications matter. In re Hanson, Sup. Ct. Op. No. 1117 (File No. 2311), 532 P.2d 303 (1975).

# CONSTITUTION OF ALASKA
## Art. IV, § 10

**Power of supreme court to sanction judge under this section.**—Concerning the subject of sanctions this section and AS 22.30.070(c)(2) provide that upon recommendation of the Commission on Judicial Qualifications the supreme court of Alaska may suspend, remove, retire or censure a judge. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**Supreme court is to exercise independent judgment.** — Normally considerable weight will be accorded to a given recommendation from the Commission on Judicial Qualifications, if supported by an adequate factual basis. Nevertheless, both this section and AS 22.30.070(c)(2) clearly establish that the supreme court of Alaska is to exercise its independent judgment in determining an appropriate sanction, if any, as to any recommendation made by the commission. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).
The supreme court's scope of review in a judicial qualifications proceeding should be that of an independent evaluation of the evidence. In re Hanson, Sup. Ct. Op. No. 1117 (File No. 2311), 532 P.2d 303 (1975).

**And cannot adopt commission's sanction recommendations automatically.**—It would be tantamount to an abdication of its constitutional and statutory obligations if the supreme court were to adopt the sanction recommendations of the Commission on Judicial Qualifications automatically. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**Substantial evidence test employed in reviewing commission's findings of fact.** — Regarding the scope of review which the supreme court should exercise in reviewing findings of fact of the Commission on Judicial Qualifications, there is no reason to depart from the substantial evidence test which has heretofore been employed in reviewing matters coming to the supreme court from administrative agencies and other governmental bodies. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**But review of commission's recommendation is broader than substantial evidence criterion.** — Under the discretionary grant of power to the supreme court under this section and AS 22.30.070(c)(2), supreme court review of a particular recommendation by the commission is necessarily broader than the substantial evidence criterion adopted for review of findings of fact made by the commission. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**Duties of supreme court in cases concerning suspension, etc., of judge.** — In every case concerning the suspension, removal, retirement or censorship of a judge, the supreme court must insure that procedural due process has been accorded the judicial officer proceeded against and that requisite findings of fact have been made and are supported by substantial evidence. The supreme court is further obligated to decide whether the commission's recommended sanction is justified by the record and is in accord with the objectives of the commission as reflected in the relevant constitutional and statutory provisions. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**Imposition of more serious sanction than censure held inappropriate.** — Where judicial conduct which had been prejudicial to the administration of justice and had brought the judicial office into disrepute, was weighed against the relative judicial inexperience of petitioner at the time, the supreme court concluded that imposition of a more serious sanction than censure would be inappropriate. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**Supreme court sanction decision made part of public record.**—Where the actions of a judge were serious enough infractions to justify its following the censure recommendation of the Commission on Judicial Qualifications, the supreme court was of the opinion that given the necessity for the creation of such a commission and the need for enforcement of standards of judicial conduct and canons of judicial ethics, these ends were more fully served by making of record its sanction decision. By making its sanction part of the public record, the supreme court believed that the public's confidence would be maintained, both in the workings of the commission and in the ability of the judicial branch of government to insure its continued integrity. Inquiry Concerning Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).
**Applied** in Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).
**Quoted** in Delahay v. State, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970).

**Section 11. Retirement.** Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.

**Cross reference.** For provisions relating to judicial retirement, see AS 22.25.
**Quoted** in Delahay v. State, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970).

**NOTES TO DECISIONS**

**Applied** in Native Village v. GC Contractors, 658 P.2d 756 (Alaska 1983); Bentley Family Trust v. Lynx Enters., Inc., 658 P.2d 761 (Alaska 1983); Sharrow v. Archer, 658 P.2d 1331 (Alaska 1983).

**Cited** in Sterud v. Chugach Elec. Ass'n, 640 P.2d 823 (Alaska 1982); Hillard T. Roach & Equestrian Acres Dev. Corp. v. First Nat'l Bank, 643 P.2d 690 (Alaska 1982); Moloso v. State, 644 P.2d 205 (Alaska 1982); Newell v. National Bank, 646 P.2d 224 (Alaska 1982); Fedpac Int'l, Inc. v. State, 646 P.2d 240 (Alaska 1982); McMillan v. Anchorage Community Hosp., 646 P.2d 857 (Alaska 1982); Robbins v. Robbins, 647 P.2d 589 (Alaska 1982); Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982); Peter Pan Seafoods, Inc. v. Stepanoff, 650 P.2d 375 (Alaska 1982); A.B.M. v. M.H., 651 P.2d 1170 (Alaska 1982); Curran v. Mount, 657 P.2d 389 (Alaska 1982).

**Section 12. Impeachment.** Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.

**Quoted** in Delahay v. State, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970).

**Section 13. Compensation.** Justices, judges, and members of the judicial council and the Commission on Judicial Conduct shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State. [Amendment approved August 27, 1968]

**Effect of amendment.** — The amendment, approved August 27, 1968 (5th Legislature's 2d FCCS SCS CSHJR 74), inserted "and the Commission on Judicial Qualifications" in the first sentence.

**"Term".**—With the exception of this article, wherever "term" or "service at the pleasure of" appears in the constitutional text originally adopted, the reference is to a period of service for a particular office, thus allowing the drafters to be precise in their terminology. The language of this section and § 4 of this article, on the other hand, applies to any judge of any court the legislature might create, and "term" in that context may intend only the more general, though equally valid connotation of any limitation on a period of service. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

**NOTES TO DECISIONS**

**"Term".** "Term of Office" as used in this section means the time to which a justice or judge is entitled to hold office and does not relate to the 10-year or six-year intervals between retention elections for justices and judges. Hudson v. Johnstone, 660 P.2d 1180 (Alaska 1983).

**Section 14. Restrictions.** Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

**Meaning of phrase "position of profit".**—See Begich v. Jefferson, Sup. Ct. Op. No. 481 (File No. 894), 441 P.2d 27 (1968).
**And its intent.**—The term "position of profit" was intended to prohibit all other salaried non-temporary employment under the United States or the State of Alaska. Begich v. Jefferson, Sup. Ct. Op. No. 481 (File No. 894), 441 P.2d 27 (1968).
**The prohibition against dual office holding is literally enforced** in Alaska. December 27, 1976, Op. Att'y Gen.
**The purpose of the prohibition** against dual office holding is to guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers in regard to the exercise of the executive, judicial, and legislative functions of the state government. December 27,1976, Op. Att'y Gen.
**Judge may not sit as regent while holding office.** — Since the Board of Regents of the University of Alaska is not an inter branch commission, a judge may not sit as a regent while holding office. December 27, 1976, Op. Att'y Gen.
A judge does not sit on the Board of Regents in a representative capacity of the judicial branch. When he sits as a regent he is not exercising judicial power but rather certain executive powers of control vested in the regents over the state's sole institution of higher learning. This he may not do. December 27,1976, Op. Att'y Gen.
The University of Alaska is an instrumentality of the state, and membership on its Board of Regents is necessarily an office under the state. December 27,1976, Op. Att'y Gen.

**NOTES TO DECISIONS**

**Applied** in Acevedo v. City of North Pole, 672 P.2d 130 (Alaska 1983).

# APPENDIX B

## Statutory Provisions

## Relating to the Commission on Judicial Conduct

# Chapter 30. Judicial Conduct.

Section
10. Commission on Judicial Conduct
11. Powers and duties of the commission
15. Term of office
20. Employment and compensation generally
30. Travel expenses and per diem
40. Preparation of budget
50. Validity of acts of the commission
60. Rules and confidentiality
66. Inquiry
68. Minority Reports
70. Disqualification, suspension, removal, retirement and censure of judges
80. Definitions

**Sec. 22.30.010. Commission on judicial conduct.** The Commission on Judicial Conduct shall consist of nine members as follows: three persons who are justices or judges of state courts, elected by the justices and judges of the state courts; three members who have practiced law in this state for 10 years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three citizens who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. Commission membership terminates if a member ceases to hold the position that qualified that person for appointment. A person may not serve on the commission and on the judicial council simultaneously. A quorum of the commission must include at least one person who is a justice or judge, at least one person appointed by the governor who has practiced law in the state for 10 years, and at least one citizen member who is not a justice, judge, or member of the state bar. The commission shall elect one of its members to serve as chairman for a term prescribed by the commission. A vacancy shall be filled by the appointing power for the remainder of the term. (§ 1 ch 213 SLA 1968; am § 23 ch 71 SLA 1972; am § 1 ch 160 SLA 1984; am § 2 ch 135 SLA 1990)

**Effect of amendments.**—The 1990 amendment added the fourth sentence, relating to a quorum of the commission.

**Sec. 22.30.011. Powers and duties of the commission.** (a) The commission shall on its own motion or on receipt of a written complaint inquire into an allegation that a judge

(l) has been convicted of a crime punishable as a felony under state or federal law or convicted of a crime that involves moral turpitude under state or federal law;

(2) suffers from a disability that seriously interferes with the performance of judicial duties and that is or may become permanent;

(3) within a period of not more than six years before the filing of the complaint or before the beginning of the commission's inquiry based on its own motion, committed an act or acts that constitute

(A) willful misconduct in office;

(B) willful and persistent failure to perform judicial duties;

(C) conduct prejudicial to the administration of justice;

(D) conduct that brings the judicial office into disrepute; or

(E) conduct in violation of the code of judicial conduct; or

(4) is habitually intemperate.

(b) After preliminary informal consideration of an allegation, the commission may exonerate the judge, informally and privately admonish the judge, or recommend counseling. Upon a finding of probable cause, the commission shall hold a formal hearing on the allegation. A hearing under this subsection is public. Proceedings and records pertaining to proceedings that occur before the commission holds a public hearing on an allegation are confidential, subject to the provisions of AS 22.30.060(b).

(c) A judge appearing before the commission at the hearing is entitled to counsel, may present evidence, and may cross-examine witnesses.

(d) The commission shall, after a hearing held under (b) of this section,

(l) exonerate the judge of the charges; or

(2) refer the matter to the supreme court with a recommendation that the judge be reprimanded, suspended, removed, or retired from office or publicly or privately censured by the supreme court.

(e), (f) *[Repealed, § 3 ch 135 SLA 1990.]*

(g) If the commission exonerates a judge, a copy of the proceedings and report of the commission may be made public on the request of the judge.

(h) If a judge has been publicly reprimanded, suspended, or publicly censured under this section and the judge has filed a declaration of candidacy for retention in office, the commission shall report to the judicial council for inclusion in the statement filed by the judicial council under AS 15.58.050 each public reprimand, suspension, or public censure received by the judge

(l) since appointment; or

(2) if the judge has been retained by election, since the last retention election of the judge. (§ 1 ch 58 SLA 1981; am §§ 2—4 ch 160 SLA 1984; am § 13 ch 38 SLA 1987; am §§ 3—5, 11 ch 135 SLA 1990)

**Effect of amendments.**—The 1990 amendment, in subsection (a), substituted "filing of the complaint or before the beginning of the commission's inquiry based on its own motion" for "start of the current term" in paragraph (3); rewrote subsection (b); in subsection (d), substituted "shall" for "may" in the introductory language, deleted former paragraphs (2) and (3), renumbering former paragraph (4) as present paragraph (2) and making a related grammatical change, and inserted "reprimanded" in present paragraph (2); and repealed subsections (e) and (f).

**NOTES TO DECISIONS**

**Former paragraph (d)(3) unconstitutional.**—Alaska Const., Art. IV, § 10 only empowers the commission to recommend sanctions to the Alaska Supreme Court, not to impose them; and therefore former paragraph (d)(3) of this section, repealed in 1990, which empowered the commission to reprimand a judge publicly, was in conflict with the constitution. In re Inquiry Concerning a Judge, 762 P.2d 1292 (Alaska 1988).

**Private reprimand.** — Judge's self validation of reduced fare tickets through a defunct airline created an appearance of impropriety which warranted the sanction of a private reprimand. In re Inquiry Concerning a Judge, 788 P.2d 716 (Alaska 1990).

**Sec. 22.30.015. Term of office.** The term of office for a commission member is four years. (§ 1 ch 312 SLA 1968; am § 56 ch 59 SLA 1982)

**Cross references.** — For terms of members appointed or elected after July 1, 1984, see § 10, ch. 160, SLA 1984 in the Temporary and Special Acts.

**Sec. 22.30.020. Employment and compensation generally.** The commission may employ officers, assistants, and other employees that it considers necessary for the performance of the duties and exercise of the powers conferred upon the commission; it may arrange for and compensate medical and other experts and reporters, may arrange for the attendance of witnesses, including witnesses not subject to subpoena, and may pay from funds available to it all expenses reasonably necessary for effectuating the purposes of § 10, art. IV, Constitution of the State of Alaska. The attorney general shall, if requested by the commission, act as its counsel generally or in any particular investigation or proceeding. The commission may employ special counsel from time to time when it considers it necessary. (§ 1 ch 213 SLA 1968)

**NOTES TO DECISIONS**

**Attorney's fees not directly provided for.**—The statutory scheme implementing the constitutional provision mandating a Commission on Judicial Qualifications does not directly provide for attorney's fees. In re Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**But arguably they might be treated as expense under this section.** -- Arguably attorney's fees might be treated as an expense "reasonably necessary for effectuating the purpose of the judicial qualifications section of the Alaska Constitution." In re Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**Prevailing judge may be allowed reasonable attorney's fees**—In order to effectuate a judge's right of counsel and not to be forced to appear as his or her own attorney, a judge prevailing in a proceeding before the Commission on Judicial Qualifications may, in the discretion of the commission, be allowed reasonable attorney's fees. In re Robson, Sup. Ct. Op. No. 825 (File No. 1552), 500 P.2d 657 (1972).

**Sec. 22.30.030. Travel expenses and per diem.** Each member of the commission shall be allowed travel expenses and per diem as provided by AS 39.20.180, but may not receive compensation for services. (§ 1 ch 213 SLA 1968)

**Sec. 22.30.040. Preparation of budget.** The commission shall be responsible for preparing and presenting to the legislature its proposed annual budgets. (§ 1 ch 213 SLA 1968; am § 5 ch 160 SLA 1984)

**Effect of amendments.** —The 1984 amendment rewrote this section, which formerly read "The Alaska court system shall be responsible for preparing and presenting to the legislature proposed annual budgets for the commission."

**Sec. 22.30.050. Validity of acts of the commission.** An act of the commission is not valid unless concurred in by a majority of the members serving on the commission at the time the act is taken. (§ 1 ch 213 SLA 1968; am § 6 ch 160 SLA 1984)

**Effect of amendments.**—The 1984 serving on the commission at the time the amendment substituted "the members act is taken" for "its members."

**NOTES TO DECISIONS**

**The appropriate standard to be applied in regard to commission proceedings** is that of clear and convincing evidence. In re Hanson, Sup. Ct. Op. No. 1117 (File No. 2311), 532 P.2d 303 (1975).

**Sec. 22.30.060. Rules and confidentiality.** (a) The commission shall adopt rules implementing this chapter and providing for confidentiality of proceedings.

(b) A11 proceedings, records, files, and reports of the commission are confidential and disclosure may not be made except

(l) upon waiver in writing by the judge at any stage of the proceedings;

(2) if the subject matter or the fact of the filing of charges has become public, in which case the commission may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, or to state that the judge denies the allegations; or

(3) upon filing of formal charges, in which case only the charges, the subsequent formal hearing, and the commission's ultimate decision and minority report, if any, are public; even after formal charges are filed, the deliberations of the commission concerning the case are confidential. (§ 1 ch 213 SLA 1968; am § 7 ch 160 SLA 1984; am § 6 ch 135 SLA 1990)

**Effect of amendments.**—The 1990 amendment rewrote paragraph (b)(3).

**Sec. 22.30.066. Inquiry.** (a) The commission may subpoena witnesses, administer oaths, take the testimony of any person under oath, and require the production for examination of documents or records relating to its inquiry under AS 22.30.011.

(b) In the course of an inquiry under AS 22.30.011 into judicial misconduct or the disability of a judge, the commission may request the judge to submit to a physical or mental examination. If the judge refuses to submit to the examination, the commission shall determine the issue for which the examination was required adversely to the judge. (§ 2 ch 58 SLA 1981; am § 8 ch 160 SLA 1984)

**Effect of amendment.**—The 1984 amendment added subsection (b).

**Collateral references.**— Confidentiality of proceedings or reports of judicial board or commission. 5 ALR 4th 730.

**Sec. 22.30.068. Minority reports.** A member of the commission who believes that the commission failed to impose an appropriate disciplinary measure after a hearing under AS 22.30.011(b) may submit a report recommending a different disciplinary measure. The report shall accompany the majority report and may be submitted by the member to the chief justice of the supreme court, the attorney general, and the chair of the senate and house judiciary committees. (§ 7 ch 135 SLA 1990)

**Effective dates.**—Section 7, ch. 135, SLA 1990, which enacted this section, took effect on September 12. 1990.

**Sec. 22.30.070. Disqualification, suspension, removal, retirement and censure of judges.** (a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (l) an indictment or an information charging the judge in the United States with a crime punishable as a felony under Alaska or federal law, or (2) a recommendation to the supreme court by the commission for the removal or retirement of the judge.

(b) On recommendation of the commission, the supreme court may reprimand, publicly or privately censure, or suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under state or federal law or of a crime that involves moral turpitude under state or federal law. If the conviction is reversed, suspension terminates, and the judge shall be paid the judge's salary for the period of suspension. If the judge is suspended and the conviction becomes final, the supreme court shall remove the judge from office.

(c) On recommendation of the commission, the supreme court may (l) retire a judge for disability that seriously interferes with the performance of duties and that is or may become permanent, and (2) reprimand, publicly or privately censure, or remove a judge for action occurring not more than six years before the commencement of the judge's current term which constitutes willful misconduct in the office, willful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute. The effective date of retirement under (l) of this subsection is the first day of the month coinciding with or after the date that the supreme court files written notice with the commissioner of administration that the judge was retired for disability. A duplicate copy of the notice shall be filed with the judicial council.

(d) A judge retired by the supreme court shall be considered to have retired voluntarily. A judge removed by the supreme court is ineligible for judicial office for a period of three years.

(e) A supreme court justice who has participated in proceedings involving a judge or justice of any court may not participate in an appeal involving that judge or justice in that particular matter. (§ 1 ch 213 SLA 1968; am §§ 3, 4 ch 58 SLA 1981; am § 14 ch 38 SLA 1987; am §§ 8, 9 ch 135 SLA 1990)

**Effect of amendments.**—The 1990 amendment deleted "or after an appeal under AS 22.30.011(e)" after "recommendation of the commission" and inserted "reprimand" before "publicly" and made punctuation changes in the first sentences of subsections (b) and (c).

**Sec. 22.30.080.** Definitions. In this chapter

(l) "commission" means the Commission on Judicial Conduct provided for in § 10, art. IV, Constitution of the State of Alaska and this chapter;

(2) "judge" means a justice of the supreme court, a judge of the court of appeals, a judge of the superior court, or a judge of the district court who is the subject of an investigation or proceeding under § 10, art. IV, Constitution of the State of Alaska and this chapter, including a justice or judge who is serving in a full-time, part-time, permanent, or temporary position. (§ 1 ch 213 SLA 1968; am § 19 ch 12 SLA 1980; am § 9 ch 160 SLA 1984; am § 10 ch 135 SLA 1990)

**Effect of amendments.**—The 1990 amendment added the phrase beginning "including a justice" to the end of paragraph (2).

# APPENDIX C

## Appellate Rule 406

# RULES OF APPELLATE PROCEDURE

## ALASKA RULES OF COURT

# RULE 406

**Rule 406. Review of Proceedings of Commission on Judicial Conduct.**

(a) A petition to the supreme court to modify or reject a recommendation of the Commission on Judicial Conduct for reprimand, censure, removal or retirement of a judge may be filed within 30 days after the filing with the clerk of the supreme court and service upon the judge of a certified copy of the recommendation. The petition shall specify the grounds relied on and shall be accompanied by petitioner's brief and proof of service on the chairman of the commission. Within 30 days after receipt of the petition the commission may serve and file a respondent's brief. Within 20 days after service of such brief, the petitioner may file a reply brief which shall be served on the commission.

(b) If no petition is filed the matter may be considered on the merits based upon the record filed by the commission.

(c) Upon recommendation of the commission that a judge be suspended pursuant to AS 22.30.070(b) or on the supreme court's own motion for a suspension, a judge, upon request, shall be provided a hearing before the supreme court.

(d) The rules governing appeals from the superior court in civil cases shall apply to proceedings in the supreme court for review of a recommendation of the commission except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

(e) The records of all proceedings in the supreme court shall be public from the time of filing the petition in the supreme court.

(f) When the proceedings involve a supreme court justice, no justice may participate in the review, and the chief justice shall appoint a panel from among the court of appeals and superior court judges as justices pro tempore to review the proceedings. If the proceedings involve the chief justice, the justice having the longest tenure on the supreme court who has not participated in the proceedings shall appoint the panel.

(SCO 439 effective November 15,1980; amended by SCO 569 effective June 1,1983; by SCO 1153 effective July 15, 1994; and by SCO 1298 effective January 15, 1998)

# APPENDIX D

## Code of Judicial Conduct

# Alaska Code Of Judicial Conduct

## Effective July 15, 1998

### As Amended through October 14, 2011

***Published June 1998***

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# ALASKA CODE OF JUDICIAL CONDUCT

## PREAMBLE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all Sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of this Preamble, broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Preamble, the Canons, and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions or to limit judges' legal rights.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system. See ABA Standards Relating to Judicial Discipline and Disability Retirement.‡

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

While the Alaska Code of Judicial Conduct is based on the American Bar Association's Model Code of Judicial Conduct, there have been significant changes both to specific rules set forth in the Sections and to the Commentary.

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‡ 1. Judicial disciplinary procedures adopted in the jurisdictions should comport with the requirements of due process. The ABA Standards Relating to Judicial Discipline and Disability Retirement are cited as an example of how these due process requirements may be satisfied.

Keys to Symbols on Special or Limited Applicability of Sections

| | |
|---|---|
| ‡ | means that Section does not apply to senior judges or applies to them only during periods of active judicial service. |
| ◊ | means that Section does not apply or has limited application to part-time magistrates or deputy magistrates. |
| ▪ | means that Section applies to special masters. |

**Full-time judicial officers must comply with all provisions of this Code.**

**Terms marked with asterisk (*) are defined in Terminology Section**

## CANON 1 A Judge Shall Uphold the Integrity and Independence of the Judiciary.

■ An independent and honorable judiciary is indispensable to achieving justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of judicial conduct. The provisions of this Code are intended to preserve the integrity and the independence of the judiciary; the Code should be construed and applied to further these objectives.

*Commentary. - Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. Public confidence in the impartiality of the judiciary is maintained when judges adhere to the provisions of this Code. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.*

(Adopted by SCO 1322 effective July 15, 1998)

## CANON 2 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities.

■ A. In all activities, a judge shall exhibit respect for the rule of law, comply with the law,* avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary.

*Commentary. - Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.*

*The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, and other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.*

*See also Commentary to Section 2C.*

■ B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not use or lend the prestige of judicial office to advance the private interests of the judge or others. A judge shall not knowingly* convey or permit others to convey the impression that anyone is in a special position to influence the judge. A judge shall not testify voluntarily as a character witness, except that a judge may testify as a character witness in a criminal proceeding if the judge or a member of the judge's family* is a victim of the offense or if the defendant is a member of the judge's family.

***Commentary.*** *-- Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in aft of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as differential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.*

*A judge must avoid lending the prestige of judicial office for advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.*

*Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, except in very limited circumstances, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer. A judge may provide to such persons information for the record in response to a formal request. A judge may also initiate the communication of information for the record if the judge or a member of the judge's family was a victim of the offense or the defendant is a member of the judge's family.*

*Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.*

*A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned and in the special circumstances described in the last sentence of this Section.*

C. A judge shall not hold membership in any organization that the judge knows* practices invidious discrimination on the basis of race, sex, religion or national origin, nor shall a judge regularly use the facilities of such an organization. A judge shall not arrange to use the facilities of an organization that the judge knows* practices invidious discrimination on the basis of race, sex, religion, or national origin unless there are no alternative facilities in the community and use of the facilities would not give rise to an appearance of endorsing the discriminatory practices of the organization.

***Commentary****. -- This Section prohibits a judge from holding membership in any organization that the judge knows engages in invidious discrimination on the basis of race, sex, religion or national origin. The membership of a judge in an organization that practices such discrimination gives rise to perceptions among the public that a judge is insensitive to minorities, women, and others protected against discrimination.*

*The common judicial definition of invidious discrimination "is a classification which is arbitrary, irrational and not reasonably related to a legitimate purpose."* ***McLaughlin v. Florida****; 379 U.S. 1984 (1964). Whether an organization practices invidious discrimination is often a complex question which requires careful consideration by the judge. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or*

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* See "Terminology" for definition

*cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership.* ***See New York State Club Ass'n v. City of New York****, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988);* ***Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte****, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987);* ***Roberts v. United States Jaycees****, 468 U.S. 609, 104 S.Ct. 3244, 82 L. Ed. 2d 462 (1984).*

*Judges in Alaska must be particularly sensitive to this inquiry. Alaska's Human Rights Act has been narrowly construed as it applies to membership discrimination. Compare* ***United States Jaycees v. Richardet****, 666 P. 2d 1008 (Alaska 1983) with* ***Roberts v. Jaycees****, 468 U.S. 609 (1984). Consequently, discriminatory practices which would not be illegal in Alaska may nevertheless be arbitrary, irrational, and unrelated to a legitimate organizational purpose, and thus covered by the prohibition in Section 2C. Nonetheless, some discrimination is viewed as innocuous when measured by contemporary standards and therefore not invidious.*

*Section 2C prohibits regular use by a judge of the facilities of an organization which invidiously discriminates. It does not prohibit incidental use of such facilities, for example, attending a wedding reception in such a facility.*

*When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.*

*Nothing in Section 2C should be interpreted to diminish a judge's right to the free exercise of religion.*

(Adopted by SCO 1322 effective July 15, 1998)

## CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

■ A. **Primacy of Judicial Duties** . The judicial duties* of a judge take precedence over all the judge's other activities. A judge's judicial duties include all the duties of the judge's office prescribed by law.* In performance of these duties, the following standards apply.

B. **Adjudicative Responsibilities**.

■ (1) A judge shall consider and decide all matters assigned to the judge except those in which the judge's disqualification is required.

*Commentary. - See Feichtinger v. State, 779 P.2d 344, 348 (Alaska App. 1989) ("Judges will frequently be assigned cases involving unpleasant issues and difficult problems. Often litigants and their attorneys will be particularly vexatious. In many cases, publicity adverse to the judge is virtually certain no matter what decision he or she reaches. In such cases, judges insufficiently attuned to their responsibilities might readily welcome a baseless request for recusal as an escape from a difficult case. To surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage. While we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility.")*

■ (2) (a) A judge shall maintain professional competence in the law.*

(b) A judge shall be faithful to the law.* A judge shall not deviate from the law to appease public clamor, to avoid criticism, or to advance an improper interest.

■ (3) A judge shall take reasonable steps to maintain and insure order and decorum in judicial proceedings before that judge.

***Commentary****. -- Section 3B(3) addresses a judge's responsibility to preserve order and decorum in court proceedings. "Order" refers to the level of regularity and civility required to guarantee that the business of the court will be accomplished in conformity with the rules governing the proceeding. "Decorum" refers to the atmosphere of attentiveness and earnest endeavor which communicates, both to the participants and to the public, that the matter before the court is receiving serious and fair consideration.*

*Clearly, individual judges have differing ideas and standards concerning the appropriateness of particular behavior, language, and dress for the attorneys and litigants appearing before them. What one judge may perceive to be an obvious departure from propriety, another judge may deem a harmless eccentricity or no departure at all. Also, some proceedings call for more formality than others. Thus, at any given time, courtrooms around the state will inevitably manifest a broad range of "order" and "decorum."*

*Section 3B(3) is not intended to establish a uniform standard of what constitutes "order" and "decorum." Rather, the Section requires a judge to take reasonable steps to achieve and maintain the level of order and decorum necessary to accomplish the business of the court in a manner that is both regular and fair, while at the same time giving attorneys, litigants, and onlookers assurance of that regularity and fairness..*

■ (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. The judge shall take reasonable steps to maintain and insure similar conduct from lawyers and from court staff and others subject to the judge's direction and control.

*Commentary. - The duty to hear all proceedings with patience, dignity, and courtesy is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.*

■ (5) In the performance of judicial duties,* a judge shall act without bias or prejudice* and shall not manifest, by words or conduct, bias or prejudice based upon race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status. A judge shall not permit court staff and others subject to the judge's direction and control to deviate from these standards in their duties.

*Commentary. - A judge must refrain from speech, gestures, or other conduct that manifests bias or prejudice, including sexual harassment,*

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* See "Terminology" for definition

*and must require the same standard of conduct from others subject to the judge's direction and control.*

*A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as an expression of prejudice.*

■ (6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice* based upon race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status. This Section 3B(6) does not preclude legitimate advocacy when race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation or social or economic status, or other similar factors, are issues in the proceeding.

*Commentary. - This Section is intended to prohibit not only express judicial support for the bias or prejudice but also speech, gestures, or inaction that could reasonably be interpreted as implicit approval of the expressed bias or prejudice. A judge may not ignore or overlook expressions of bias or prejudice in any judicial proceeding, even informal proceedings such as scheduling or settlement conferences. Appropriate action will depend on the circumstances. In some instances, a polite correction might be sufficient. However, deliberate or particularly offensive conduct will require more significant action, such as a specific direction from the judge, a private admonition, an admonition on the record, or, if the attorney repeats the misconduct after being warned, contempt.*

■ (7) A judge shall accord to every person the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except as allowed by this Section. A judge shall make reasonable efforts to see that law clerks and other court staff carrying out similar functions under the judge's supervision do not violate the provisions of this Section.

(a) A judge may initiate or consider an ex parte communication when expressly authorized by law* to do so.

(b) When circumstances require, a judge may engage in ex parte communications for scheduling or other administrative purposes, provided that:

(i) the communications do not deal with substantive matters or the merits of the issues litigated,

(ii) the judge reasonably believes no party will gain a procedural or tactical advantage because the communication is ex parte, and

(iii) the judge takes reasonable steps to notify all other parties promptly of the substance of the ex parte communication and, when practicable, allows them an opportunity to respond. This subsection does not apply to ex parte communications by law clerks or other court staff concerning scheduling or administrative matters.

(c) If all the parties have agreed to this procedure beforehand, either in writing or on the record, a judge may engage in ex parte communication on specified administrative topics with one or more parties.

(d) A judge may consult other judges and law clerks or other court staff whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

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

*Commentary. - The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.*

*Whenever presence of a party or notice to a party is required by Section 3B(7), 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.*

*A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.*

*If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.*

*The first sentence of Section 3B(7) ("A judge shall accord to every person the right to be heard according to law.") is not intended to expand or alter the law of standing (a person's right to bring an action), nor is it intended to expand or alter the procedural rules governing the scope and manner of a person's right to be heard in a case.*

*Judges should endeavor to create some form of record of ex parte communications whenever possible, even when the communications are authorized under this Section.*

*Section 3B(7)(a) permits an ex parte communication when it is expressly authorized by law, including communications that may reveal privileged information. For example, a judge may engage in an ex parte communication when the judge must question a criminal defendant about the defendant's request for appointment of a different attorney, and the judge determines that privileged information will be revealed.*

*Under Section 3B(7)(b), a judge may engage in ex parte communications for "scheduling or other administrative purposes." For example, a judge may make or receive an ex parte communication when the sole purpose of the communication is to provide courtesy notification to the parties or to the court of a delay or change in scheduling. Another example of an ex parte communication contemplated by this Section is when a defense attorney notifies the judge that the defendant cannot be located, that the scheduled trial should be called off, and that the defense concedes that a bench warrant should be issued for the defendant's arrest.*

*Section 3B(7)(b) requires a judge to take reasonable steps to promptly notify all parties of any ex parte communication. The continuing development of communications technology will affect what steps are "reasonable." Telephone communication is now virtually ubiquitous and telefax communication is widespread. In the near future, it may be common to notify lawyers through computer mail or computer bulletin boards. A judge should consider these alternatives when deciding the most expeditious means of communication reasonably available to the court and the parties.*

*A judge's secretary or law clerk may also engage in ex parte communications to discuss scheduling or other administrative matters. Such communications are permitted as long as the requirements of Sections 3(B)(7)(b)(i) and (ii) are satisfied, that is, as long as the*

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* See "Terminology" for definition

*communications do not deal with the substance or merits of the litigation and no party gains an advantage as a result of the ex parte contact. When the communication is with a staff member rather than a judge, Section 3B(7)(b)(iii) does not apply. Thus, if an attorney asks about the status of a pending motion, the judge's secretary may provide this information without notifying the other parties of the communication or including them in a conference call.*

*Section 3B(7)(c) allows the various parties in multi-party litigation to designate a "lead" party for their side and have that party appear at pretrial hearings to deal with issues such as scheduling and discovery.*

*Section 3B(7)(d) assumes that the other judge or member of the judge's adjudicative staff is not disqualified from participating in the decision of the case. Thus, it would be improper for a judge to consult another judge who had been challenged either peremptorily or for cause, and it would likewise be improper for a judge to consult another judge, a law clerk, or anyone else who the judge knows has a disqualifying interest in the proceeding. Likewise, it would be improper for the judge to consult a member of an appellate court whose duty it would be to review the judge's decision.*

*The verb "consult" is intended to mean "engage in discussions regarding the substance or merits of the case." Just as a presiding judge may continue to perform purely administrative functions following his or her peremptory challenge - see Criminal Rule 25(d)(3) - a disqualified judge may engage in limited, purely administrative communication with the successor judge. Thus, when a new judge is assigned to a case following a judicial disqualification, the successor judge may speak to the disqualified judge about purely administrative matters (the dates already scheduled for court proceedings, the identities of the attorneys, etc.). However, the new judge may not speak to the disqualified judge about the merits of any pending issues, the merits of any previously decided issues, or the substance of any proceedings already held in the case. The new judge's information on these topics is to be gleaned from the court file or from the attorneys.*

*Section 3B(7)(d) is not intended to authorize a judge to engage in ex parte consultation with court staff such as custody investigators and court-employed juvenile intake officers, whose function is to provide evidence in the proceeding.*

*A judge may not ex parte seek advice on the law applicable to a proceeding from a disinterested expert.*

■ (8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

*Commentary. - In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but should not coerce parties into surrendering the right to have their controversy resolved by the courts.*

*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 insist that court officials, litigants and their lawyers cooperate with the judge to that end.*

■ (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness, or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall take reasonable steps to maintain and insure similar abstention on the part of court staff subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

*Commentary. - The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Alaska Rules of Professional Conduct.*

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

*Commentary. - 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.*

■ (11) A judge who acquires nonpublic information* in a judicial capacity shall not disclose the information for any purpose unrelated to the judge's judicial duties, nor shall the judge use the information for the financial gain of the judge or any other person.

*Commentary. - The ABA's version of this Section prohibits a judge from disclosing or using nonpublic information acquired in a judicial capacity for any purpose unrelated to judicial duties. This rule does not adequately address the problem presented when a judge obtains confidential information that has relevance to the judge's personal life outside of the financial sphere. A judge hearing a confidential proceeding might obtain information about a doctor that has potentially crucial relevance to the judge's decision of which doctor to employ. A judge who hears a search warrant application might obtain information that would affect the judge's decision regarding what day-care center to use or what restaurant to patronize. Even though the judge reveals this information to no one, it would not strain the English language to say that a judge who makes decisions based on this information has "used" the nonpublic information for a purpose unrelated to the judge's official duties.*

*The Alaska version of the Section recognizes that a judge cannot reasonably be expected to disregard nonpublic information when it comes to the health or safety of the judge's immediate family. The first clause of the Alaska rule forbids "disclosure" of such information for any non-judicial purpose (thus allowing the judge to "use" the information for personal purposes so long as the judge does not violate the second clause).*

*The second clause forbids the "use" of nonpublic information for anyone's financial gain. A judge who wishes to misuse confidential information for financial gain will often not need to disclose the information to anyone else; indeed, the amount of the improper financial gain may be directly proportionate to the judge's success in concealing the information from all other persons.*

■ (12) Without prior notice to the parties and an opportunity to respond, a judge shall not engage in independent ex parte investigation of the facts of a case.

*Commentary. - This Section does not prohibit a judge from exercising the judge's authority to independently call witnesses if the judge believes that these witnesses might shed light on the issues being*

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* See "Terminology" for definition

*litigated or to take judicial notice of certain facts. See Evidence Rules 614 & 201.*

### C. **Administrative Responsibilities**.

■ (1) A judge shall maintain professional competence in judicial administration, and should cooperate with other judges and court staff in the administration of court business. A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice.*

*Commentary. - See Terminology, "bias or prejudice."*

*The definition of "bias or prejudice" found in the terminology Section was written in an exclusionary manner to allow judges, with regard to administrative matters, to countenance legitimate distinctions relevant to the policies or decisions involved.*

*To the extent judges have administrative authority over other judges, that authority should likewise be exercised in such a way as to provide the best use of judicial resources and the optimum development of all judicial officers. Just as the individual court must perform judicial administration without bias or prejudice, so too, judges with administrative authority over others must do the same with respect to the judicial officers subject to their orders.*

■ (2) A judge shall take reasonable steps to insure that court staff and others subject to the judge's direction and control observe the standards of fidelity to the law* and diligence in the performance of their duties that apply to the judge and refrain from manifesting bias or prejudice* in the performance of their official duties.

■ (3) A presiding judge or any other judge with supervisory authority over other judges shall take reasonable steps to assure that, for matters within the supervising judge's scope of authority, the other judges properly perform their judicial responsibilities.

■ (4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

*Commentary. - Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).*

### D. **Disciplinary Responsibilities**.

■ (1) A judge having information establishing a likelihood that another judge has violated this Code shall take appropriate action. A judge having knowledge* that another judge has engaged in conduct reflecting the other judge's lack of fitness for judicial office shall inform the appropriate disciplinary authority,* unless the judge reasonably believes that the misconduct has been or will otherwise be reported. Conduct reflecting lack of fitness for judicial office includes:

(a) soliciting or accepting a bribe or otherwise acting dishonestly in reaching a judicial or administrative decision,

(b) improperly using or threatening to use the judge's judicial power in a manner adverse to someone else's interests for the purpose of inducing that person to bestow a benefit upon the judge or upon someone else pursuant to the judge's wishes, or

(c) commission of a felony.

■ (2) A judge having information establishing a likelihood that a lawyer has violated the Rules of Professional Conduct shall take appropriate action. A judge who obtains information establishing a likelihood that a lawyer has committed a violation of the Rules of Professional Conduct by an act of dishonesty, obstruction of justice, or breach of fiduciary* duty shall inform the appropriate disciplinary authority,* unless the judge reasonably believes that the misconduct has been or will otherwise be reported.

■ (3) A judge possessing nonprivileged information pertaining to another judge's potential violation of this Code shall fully reveal this information upon proper request of the appropriate disciplinary authority* or of any other tribunal empowered to investigate or act upon judicial misconduct. A judge possessing nonprivileged information pertaining to a lawyer's potential violation of the Rules of Professional Conduct shall fully reveal this information upon proper request of the appropriate disciplinary authority or of any other tribunal empowered to investigate or act upon attorney misconduct.

■ (4) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1), 3D(2), and 3D(3) are part of a judge's judicial duties*.

***Commentary**. -- Section 3D establishes a judge's duty to take action in response to the misconduct of another judge (Section 3D(1)) or the misconduct of a lawyer (Section 3D(2)). In many instances, Section 3D allows a judge a degree of discretion in determining how he or she should respond to misconduct; the Section specifies only that the judge shall take "appropriate action." Thus, a judge who learns that another judge has engaged in an improper but de minimis ex parte contact, or who learns that a judge has engaged in a fundraising activity for a charity, may believe that the only action needed is to point out to the other judge that his or her conduct violates the Code. Similarly, a judge who learns that another judge is suffering from alcohol or drug addiction might direct that other judge to counseling or might seek the help of the other judge's colleagues or friends or refer the matter to a judicial assistance committee. On the other hand, if the other judge refuses to admit the problem or submit to ameliorative measures, and if the other judge's intoxication is interfering with his or her judicial duties (so as to constitute a violation of Canon 1 and Section 3A), then a judge who knows of this problem may be obliged to report it to the Commission on Judicial Conduct, unless that judge is a senior judge acting as a member of a judicial assistance committee.*

*Appropriate action will vary with particular situations and with particular individuals. There will generally be a range of reasonable responses available to the judge who learns of misconduct. However, a judge who learns of misconduct must respond reasonably. For example, the judge may not "respond" by explicitly or implicitly condoning the misconduct.*

*A judge's discretion to determine an appropriate response to misconduct is circumscribed in certain instances. Both Sections 3D(1) and 3D(2) grant no discretion - they require the judge to report misconduct to the appropriate disciplinary authority - if (a) the misconduct is serious and (b) the judge's awareness of the misconduct rises to the specified level of certainty.*

*With regard to this level of awareness, a judge must report judicial misconduct if he or she "knows" that another judge has engaged in serious misconduct, while a judge must report attorney misconduct if he or she has information "establishing a likelihood" that an attorney has*

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* See "Terminology" for definition

*engaged in serious misconduct. The term "knows" is defined in the Terminology Section. The term "likelihood" is used in the sense of "more probable than not," a preponderance of the evidence.*

*If the misconduct the judge learns of is not among the serious types of misconduct, or if the misconduct is serious but the judge's level of awareness of the misconduct does not rise to the specified degree of certainty, there is no absolute duty to report. However, the judge who is aware of a likelihood of misconduct will still be under the more general obligation to take appropriate action.*

*A judge is not required to report all conduct that indicates lack of fitness for judicial office, only conduct of the same seriousness as that described in subsections 3D(1)(a)-(c).*

*Section 3D applies to magistrates. However, a magistrate may report serious misconduct to the presiding judge or chief justice instead of the Judicial Conduct Commission.*

E. **Disqualification.**

■ (1) Unless all grounds for disqualification are waived as permitted by Section 3F, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

*Commentary. - Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.*

*A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.*

*By decisional law, 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 the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.*

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during their association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

*Commentary. - A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.*

(c) the judge knows* that he or she, individually or as a fiduciary,* or the judge's spouse,* parent, or child wherever residing, or any other member of the judge's family* residing in the judge's household:

(i) has an economic interest* in the subject matter in controversy, or

(ii) is employed by or is a partner in a party to the proceeding or a law firm involved in the proceeding, or

(iii) has any other, more than de minimis interest* that could be substantially affected by the proceeding, or

(iv) is likely to be a material witness in the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse* of such a person:

(i) is a party to the proceeding or is known* by the judge to be an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known* by the judge to have a more than de minimis interest* that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

(e) For purposes of this Section, when a party is a governmental entity, a person is "employed by" the party when the person is employed by the agency, commission, department or (if the department is broken into divisions) division, or other unit of government directly involved in the matter to be litigated.

*Commentary. - 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 of itself disqualify the judge under Section 3E(1)(d). Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.*

*Cross Reference. - Additional grounds for disqualification are set out in AS 22.20.020(a). This statute provides:*

*(a) A judicial officer may not act in a matter in which*

*(1) the judicial officer is a party;*

*(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;*

*(3) the judicial officer is a material witness;*

*(4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;*

*(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;*

*(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;*

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* See "Terminology" for definition

*(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;*

*(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;*

*(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.*

*Most of the grounds for disqualification under AS 22.20.020(a) are also listed as grounds for disqualification under Section 3E(1) of the Code. But the statute requires a judge to disqualify himself or herself in four situations that are not expressly covered by Section 3E(1):*

*· Under AS 22.20.020(a)(5), a judge must disqualify himself or herself if the judge served as an attorney for one of the parties within two years preceding assignment of the case to the judge. This disqualification does not apply if the party is the state or a municipality.*

*· Under AS 22.20.020(a)(6), a judge must disqualify himself or herself if the judge was opposing counsel in a matter involving one of the parties within two years preceding assignment of the case to the judge. Again, this disqualification does not apply if the party is the state or a municipality.*

*· Under AS 22.20.020(a)(7), a judge must disqualify himself or herself if an attorney in the case represented the judge, either in the judge's public or private capacity, within two years preceding the filing of the action. A judge must also disqualify himself or herself if an attorney in the case was opposing counsel in a matter involving the judge within two years preceding the filing of the action.*

*· Under AS 22.20.020(a)(8), a judge must disqualify himself or herself if the judge's former law firm is representing one of the parties in the case or has represented one of the parties with respect to the matter, and the judge was associated with the law firm within the two years preceding the filing of the case.*

*The first two of these disqualifications would only be of concern to judges who have been on the bench less than two years.*

■ (2) A judge shall keep informed about the judge's personal and fiduciary* economic interests* and make reasonable effort to keep informed about the personal economic interests of the judge's spouse* and minor children residing in the judge's household.

*Commentary. - Many judges and their families either are or will be the beneficiaries of law firm annuities or pensions. Depending upon the type of pension or annuity arrangement, the law firm's success or failure in major litigation may affect the value or collectibility of pension or annuity benefits. When this economic interest is present, Sections E3(1)(c)(iii) or 3E(1)(d)(iii) may require a judge's disqualification from litigation involving the law firm, even though Sections 3E(1)(b), 3E(1)(c)(ii), and 3E(1)(d)(ii) would not otherwise require disqualification.*

F. **Waiver of Disqualification**.

■ (1) A judge shall not seek or accept a waiver of disqualification when the judge has a personal bias or prejudice concerning a party or a lawyer, when, for any other reason, the judge believes that he or she cannot be fair and impartial, or when a waiver is not permitted under AS 22.20.020. In other circumstances, a judge who would be disqualified by the terms of Section 3E may disclose on the record the basis or bases of the judge's disqualification and ask the parties to consider whether they wish to waive disqualification. A judge is not bound by the parties' decision to waive a disqualification.

■ (2) The judge shall not participate in the parties' discussions and shall require the parties to hold their discussions outside the presence of the judge. The judge shall not comment in any manner on the merits or advisability of waiver, other than to explain the right of disqualification or to further elucidate the ground or grounds of disqualification if requested by the parties. The judge is permitted to advise the parties that he or she is willing to participate in the case with the agreement of all the parties. But the judge must tell the parties that the decision whether to waive the ground of disqualification rests with each of them.

■ (3) The judge may ask the parties to affirmatively indicate their position on the judge's disqualification, or give the parties a reasonable length of time to waive the disqualification, telling the parties either (a) that their failure to act will be construed as a decision to waive the potential disqualification or (b) that their failure to act will be construed as a decision not to waive the potential disqualification. If all parties decide to waive the potential disqualification, and if the judge is then willing to participate, the judge may participate in the proceeding.

■ (4) All the communications between the judge and the parties must be incorporated in the record of the proceeding.

*Commentary. - A waiver procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. Under AS 22.20.020(b), the following disqualifications may not be waived:*

*(1) the judicial officer is a party;*

*(2) the judicial officer is a material witness;*

*(3) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial in the matter;*

*(4) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.*

*The decision whether or not to waive a disqualification is not one that must be made by the client. An attorney may make the decision without consulting with the client if the client is not present or readily available, or if the attorney decides that consultation is unnecessary.*

*All aspects of the communications between the judge and the parties (but not the parties' discussions among themselves) must either be in writing and included in the case file or on the record in court.*

(Adopted by SCO 1322 effective July 15, 1998; amended by SCO 1724 effective October 15, 2010; and by SCO 1768 effective October 14, 2011)

## CANON 4 A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations.

■ A. **Extra-Judicial Activities in General**. A judge shall conduct all of the judge's extra-judicial activities so as to comply with the requirements of this Code and so that these activities do not:

* See "Terminology" for definition

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.*

*Commentary. - Extra-judicial activities are intended to include both the quasi-judicial activities covered by Canon 4 and the extra-judicial activities covered by Canon 5 of the 1973 Code of Judicial Conduct.*

*Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.*

*Even outside the judicial role, a judge who expresses bias or prejudice may cast reasonable doubt on the judge's capacity to act impartially as a judge. Such expressions include jokes or other remarks demeaning individuals on the basis of their race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status. See Section 2C and accompanying Commentary.*

*The ABA added the phrase "demean the judicial office" in Section 4A(2) in place of the phrase "detract from the dignity of his office" which appeared in the prior Code. According to the Reporter's Notes to the 1990 Model Code, the new language is intended "to proscribe injurious conduct, not necessarily undignified conduct, as the latter might in some cases be permissible. For example, a judge's appearing in a skit as part of the entertainment at a judicial organization's event might be at once undignified and perfectly proper."*

*Section 4A(2) is a legitimate limitation on a judge's extra-judicial activities to the extent that it forbids a judge from flagrantly violating community standards or engaging in activities that clearly bring disrepute to the courts or the legal system. However, Section 4A(2) should not be interpreted so broadly as to authorize disciplinary bodies to censure or penalize a judge for engaging in a non-conformist lifestyle or for privately pursuing interests or activities that might be offensive to segments of the community.*

■ B. **Educational Activities.** As part of the judicial role, a judge is encouraged to render public service to the community. Judges have a professional responsibility to educate the public about the judicial system and the judicial office, subject to the requirements of this Code. A judge may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law,* the legal system, the administration of justice, and non-legal topics, subject to the requirements of this Code.

***Commentary**. -- As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the legal profession. A judge may also encourage community involvement in court-affiliated programs and may invite public suggestions for the improvement of the law, the legal system, or the legal profession. In conducting these activities, judges should be mindful to comply with Canon 2 when recommending specific programs or activities.*

*The responsibility to educate the public is not intended to be enforced through the disciplinary process.*

C. **Governmental, Civic, or Charitable Activities.**

◊ ■ (1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law,* the legal system, or the administration of justice, or except when acting pro se in a matter involving the judge or the judge's interests.

***Commentary**. -- See Section 2B regarding the obligation to avoid improper influence.*

*"Administration of justice" matters include seeking funding for public service organizations that provide or seek increased access to justice such as Alaska Legal Services, so long as the organization is not identified with a particular cause that may come before the courts. When testifying as an individual judge on administration of justice matters, the judge should be clear that the observations are based on his or her experience as a judge and that other judges may have different observations.*

*Section 4C(1) permits a judge to appear before a governmental body or government official on a matter concerning the judge's interests. The word "interests" should be interpreted broadly. A judge may speak on matters concerning the judge's social interests as well as matters affecting the judge's economic interests.*

‡ ◊ (2) A judge shall not accept appointment to or serve on a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law,* the legal system, or the administration of justice. A judge may, however, represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, cultural, or athletic activities.

*Commentary. - Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, the legal system, or the administration of justice as authorized by Section 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.*

*Section 4C(2) does not govern a judge's service in a non-governmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system, or the administration of justice and with educational, religious, charitable, fraternal, or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).*

(3) A judge may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law,* the legal system, or the administration of justice, or of an educational, religious, charitable, fraternal, cultural, athletic, or civic organization not conducted for profit, subject to the following limitations:

*Commentary. - Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).*

*Participation by a judge in a non-profit organization may be governed by other provisions of Canon 4 in addition to Section 4C. For*

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* See "Terminology" for definition

*example, a judge is prohibited by Section 4G from serving as a legal advisor to a non-profit organization.*

*Section 4C(3) does not prohibit mere membership in a legal professional association that occasionally takes controversial or political positions.*

(a) A judge shall not serve as an officer, director, trustee, or non-legal advisor if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the judge's court.

*Commentary. - The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.*

(b) Regardless of the judge's role within the organization, a judge:

(i) may assist the organization in planning fundraising activities and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or be the speaker or guest of honor at the organization's fundraising event, except that the judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public or private fund-granting organizations on projects and programs concerning the law,* the legal system, or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive;

(iv) shall not personally participate in membership solicitation, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fundraising mechanism;

(v) shall not use or permit anyone else to use the prestige of judicial office for fundraising or membership solicitation.

*Commentary. - A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and it not essentially a fundraising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing, or by telephone except in the following cases: (1) a judge may solicit other judges over whom the judge does not exercise supervisory or appellate authority, (2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves, and (3) a judge who is an officer of a Section 4C(3) organization may send a general membership solicitation mailing over the judge's signature.*

*Use of an organization letterhead for fundraising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.*

*Section 4C(3)(b)(i) is intended to prohibit the direct solicitation of funds. Being the speaker or guest of honor at an organization's fundraising event is the functional equivalent of solicitation. However, judges may participate as workers at fundraising events such as car washes and carnivals, purchase admission to fundraising social events, and purchase goods and services (e.g., candy bars, commemorative buttons, or a car wash) that are being sold as a fundraising effort.*

*The limited exception allowing judges to be speakers or guests of honor for public service organizations that assist access to justice is meant to include not-for-profit organizations that exist to enhance access to justice or to seek improvement in the administration of justice, but judges should be mindful of the need to avoid creating the appearance that they are identifying with a particular cause or issue that is likely to come before them or before other judges on their court. See Canon 2 and accompanying Commentary. "Access to justice" includes increasing minority representation on the bench, preserving judicial independence, and assisting the advancement of the legal profession.*

D. **Financial Activities**.

(1) Generally.

■ (a) A judge shall not engage in financial or business dealings, or permit his or her name to be used in connection with any business venture or commercial advertising program, with or without compensation, if the activity might reasonably be perceived to exploit the judge's judicial position.

‡ ◊ (b) A judge shall not enter into financial or business dealings that would involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

***Commentary**. -- See Time for Compliance, Section 6E.*

*When a judge acquires information in a judicial capacity, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).*

*A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of a judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.*

*Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on the impartiality of the judge, demean the judicial office, or interfere with the proper performance of judicial duties. Such*

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* See "Terminology" for definition

*participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1.*

*Under Section 4D(1)(b), a judge may enter into financial or business dealings with a lawyer who is a relative or close friend whose appearance or interest in a case would in any event require the judge's disqualification under Section 3E.*

(2) *Judge as Investor*. A judge may hold and manage investments of the judge and members of the judge's family,* including real estate. In addition, a judge may participate as a passive investor in any business. For purposes of this Section, "passive investor" means that the judge is not a director, officer, manager, partner (except a limited partner in a limited partnership), advisor, employee, or controlling shareholder of the business.

*Commentary. - See Time for Compliance, Section 6E. For active investments and other business interests, see Section 4D(3).*

(3) A judge may actively engage in business or other remunerative activity, as long as the judge would not expect the business or remunerative activity to:

(a) involve the judge or the judge's business associates in lobbying legislative or regulatory bodies within Alaska, or

(b) involve the judge or the judge's business associates in frequent appearances in front of legislative or regulatory bodies within Alaska, or

‡ ◊ (c) have a major effect on the economic life of the community in which the judge serves. A business has a "major effect on the economic life of the community" when it employs more than five percent of the local work-force, when it provides essential financial services (for example, banking or insurance) or essential utilities (for example, electricity, oil, gas, sewage treatment) to the community, or when it is the sole provider of an essential good or service within the community.

*Commentary. - See Time for Compliance, Section 6E.*

‡ (4) A judge shall manage investments and business and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and business and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family* residing in the judge's household not to accept a gift, bequest, favor, or loan from anyone, except for:

*Commentary. - Section 4D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.*

*Because a gift, bequest, favor, or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.*

(a) a gift incident to a public testimonial, or books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse* or guest to attend a bar-related function or an activity devoted to the improvement of the law,* the legal system, or the administration of justice;

*Commentary. - Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).*

*A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B.*

(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse* or other family member* residing in the judge's household, including gifts, awards, and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided that the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;*

(c) ordinary social hospitality;

(d) a gift from a relative or friend for a special occasion such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

*Commentary. - A gift of excessive value to a judge or to a member of the judge's family living in the judge's household raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge when disqualification would not otherwise be required. See, however, Section 4D(5)(e).*

(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require the judge's disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor, or loan, but only if the donor is not a person who has come or is likely to come before the judge, and if the person's interests have not come and are unlikely to come before the judge. If the value of the gift, bequest, favor, or loan exceeds $150.00, the judge shall report the gift, bequest, favor, or loan in the same manner as the judge reports compensation under Section 4H.

*Commentary. - Section 4D(5)(h) prohibits judges from accepting gifts, favors, bequests, or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests, or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.*

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* See "Terminology" for definition

E. **Fiduciary Activities**.

‡ ◊ (1) A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary* except on behalf of 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 the judge's judicial duties.*

‡ (2) A judge shall not serve as a fiduciary* if it is likely that the judge, in his or her fiduciary capacity, will 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 a court under its appellate jurisdiction.

■ (3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary* capacity.

*Commentary. - See Time for Compliance, Section 6E. The restrictions imposed by Canon 4 may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if, by virtue of Sections 4D(4) and 4E(3), the judge would be obliged to sell or trade trust assets to the detriment of the trust.*

‡ F. **Service as Arbitrator or Mediator**. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.*

*Commentary. - Section 4F does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties. A senior judge may act as a private arbitrator or mediator subject to Administrative Rule 23(f), which states:*

*(f) **Private Arbitration and Mediation**. If a retired judge acts as a private arbitrator or mediator, the judge must comply with the following rules to remain eligible for pro tempore appointment:*

*(1) The judge shall refrain from soliciting or accepting employment as an arbitrator or mediator from a lawyer or party who is currently appearing in a case assigned to the judge.*

*(2) The judge shall disqualify himself or herself from sitting as a pro tem judge in a case if the judge has previously served as an arbitrator or mediator in the same matter. This disqualification may be waived under Section 3F of the Code of Judicial Conduct.*

*(3) The judge shall disqualify himself or herself from sitting as a pro tem judge in a case if the judge is currently serving or scheduled to serve as an arbitrator or mediator for a lawyer or party in the case. This disqualification may be waived under Section 3F of the Code of Judicial Conduct.*

*(4) If within two years prior to the filing of a case assigned to a pro tem judge the judge has served as an arbitrator or mediator for a lawyer or party in that case, the judge shall disclose that fact on the record and disqualify himself or herself from sitting as a pro tem judge in that case. Disclosure must be made under this paragraph regardless of the amount of compensation that the judge received from the arbitration or mediation. This disqualification may be waived under Section 3F of the Code of Judicial Conduct.*

*(5) The judge shall refrain from accepting employment as an arbitrator or mediator from a lawyer or party who has appeared in a case assigned to the judge within the last six months.*

◊ G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.*

*Commentary. - This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2B.*

*The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, provided the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.*

*Even though Section 4G does not apply to part-time magistrates and deputy magistrates, Administrative Rule 2 prohibits employees of the Alaska Court System from engaging directly or indirectly in the practice of law in any of the courts of the state.*

H. **Compensation, Reimbursement, and Reporting**.

(1) *Compensation and Reimbursement Defined.*

a) "Compensation" is income received by the judge for personal services or from business activities. It does not include income from a business or property that the judge does not actively manage.

(b) "Reimbursement" is money paid to defray a judge's expenses or any credit or discount given to reduce these expenses. Expense reimbursement other than government-approved per diem shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, when appropriate to the occasion, the judge's spouse* or guest. Any payment, credit, or discount in excess of these limits is compensation.

(2) *Limits on Compensation and Reimbursement.* A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code if the source of these payments does not give the appearance of influencing the judge's performance of judicial duties* or otherwise give the appearance of impropriety. Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(3) *Public Reports of Compensation.* At least once a year a judge shall report the date, place, and nature of any extra-judicial activity for which the judge received compensation, the name of the payor, and the amount of compensation received. Compensation or income of a spouse* that is attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge for purposes of this Code. The judge's report shall be submitted at the times and in the form prescribed by the Administrator Director of the Alaska Court System. The report shall be filed as a public document in the office of the Administrative Director.

***Commentary**. -- See Section 4D(5) regarding reporting of gifts,*

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* See "Terminology" for definition

*bequests, and loans.*

*Section 4H is divided into three Sections. Section 1 contains the definitions of the terms "compensation" and "reimbursement." Section 2 prescribes the limits on compensation and reimbursement permitted by the Code for extra-judicial activities. Section 3 requires a judge to report compensation (not reimbursement) at least annually.*

*Section 4H(1)(a) defines "compensation." In general terms, this definition is intended to cover "earned income" -- that is, salary, wages, professional fees, tips, and any other income generated by the judge's personal efforts. Compensation does not include income generated by a judge's investments or by partnerships or businesses in which the judge is a passive participant (a limited partner, for example).*

*Section 4H(1)(b) defines "reimbursement" of expenses. The first sentence gives the general definition of reimbursement: any money, credit, or discount that defrays or reduces a judge's expenses. Reimbursement in the form of government per diem can exceed actual expenses and still not be classified as "compensation."*

*Section 4H(3) requires a judge to report any extra-judicial activity for which the judge received compensation. The second sentence applies to retired justices and judges who are serving in a pro tempore capacity. If that judge acts as a private arbitrator or mediator, the judge may comply with this section by filing a copy of Schedule A of the Public Official Financial disclosure Statement that the judge files with the Alaska Public Offices Commission. That statement lists the names of self-employment businesses and the names of each client who paid the business over $5000. The judge is not required to individually name every client of the business, or to list the amounts received from each client. The judge is nonetheless required, under Administrative Rule 23, to disclose on the record if, within the two years prior to the filing of the assigned case, the judge has served as an arbitrator or mediator for a lawyer or a party in a case; the judge is also required to disqualify himself or herself from sitting pro tem in that case, unless the disqualification is waived.*

*This Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to use his or her judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.*

■ I. Disclosure of a judge's income, debts, and investments and other assets is required only to the extent specified in this Canon and in Sections 3E and 3F, or as otherwise required by law.*

*Commentary. - Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest" as explained in the Terminology Section. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties. Section 4H requires a judge to report all compensation the judge received for activities outside judicial office. A judge's financial affairs are private except to the extent disclosure is required by law.*

(Adopted by SCO 1322 effective July 15, 1998; amended by SCO 1559 effective July 15, 2005; by SCO 1617 effective July 15, 2006; by SCO 1629 effective December 31, 2006; and by SCO 1657 effective nunc pro tunc to July 10, 2007)

## CANON 5 A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity.

A. **All Judges and Candidates**.

(1) Except as authorized in Sections 5B(2) and 5C, a judge or a candidate* for appointment to judicial office shall not:

(a) act as a leader of or hold office in a political organization.*

(b) publicly endorse or publicly oppose a candidate for any public office. However, when false information concerning a judicial candidate* is made public, a judge or candidate having knowledge* of contrary facts may make the facts public.

(c) make speeches on behalf of a political organization.*

◊ (d) attend political gatherings.

◊ (e) solicit funds for any political organization* or candidate for public office, pay an assessment or make a contribution to a political organization or candidate for public office, purchase tickets for a political organization's dinners or other functions.

***Commentary***. *-- A judge or candidate for judicial office retains the right to participate in the political process as a voter.*

*Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office. Nor does this section restrict the Chief Justice, acting in the role of Chair of the Alaska Judicial Council, when explaining the Judicial Council's retention recommendations to the public.*

*Judges should be able to take part in the public debate over proposals to change the legal system or the administration of justice; judges' training and experience make them a valuable resource to the electorate wishing to decide these issues. Since many speeches are given in forums sponsored by political organizations, a question arises concerning the relationship between, on the one hand, a judge's right to speak publicly on issues concerning the legal system and the administration of justice, and, on the other hand, the prohibition contained in Section 5A(1)(d) -- that a judge shall not attend the gathering of a political organization. Despite a judge's freedom to speak on legal issues, a judge shall not do so on behalf of a political organization or at a political gathering.*

◊ (2) A judge shall resign upon becoming a candidate* in either a primary or general election for any non-judicial office except the office of delegate to a state or federal constitutional convention.

(3) A candidate for judicial office:*

(a) 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 that apply to the candidate. "Members of the candidate's family" means the candidate's spouse,* children, grandchildren, parents, grandparents, and other relatives or persons with whom the candidate maintains a close familial relationship.

*Commentary. - Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political*

* See "Terminology" for definition

*conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.*

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage all other employees and officials subject to the candidate's direction and control, from doing anything on the candidate's behalf that is forbidden to the candidate under these rules.

(c) shall not authorize or permit any person to take actions forbidden to the candidate under these rules, except when these rules specifically allow other people to take actions that would be forbidden to the candidate personally.

(d) shall not:

(i) make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office;

(ii) make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly* misrepresent any fact concerning the candidate or an opposing candidate for judicial office.

***Commentary***. *-- Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies, or issues likely to come before the court. As a corollary, a candidate for judicial office should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8. 2 of the Alaska Rules of Professional Conduct.*

*In* ***Buckley v. Illinois Judicial Inquiry Board****, 997 F. 2d 224 (7th Cir. 1993), the Seventh Circuit ruled that the ABA's proposed Section 5A(3)(d)(i) and the 1972 predecessor to the ABA's proposed Section 5A(3)(d)(ii) represent an unconstitutional abridgement of judicial candidates' right of free speech.*

*The Illinois rule at issue in* ***Buckley*** *prohibited judges and judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and further prohibited judges and judicial candidates from "announc[ing] [their] views on disputed legal or political issues." These same restrictions are currently the law of Alaska: see Alaska Code of Judicial Conduct, Section 7B(1)(c). The Seventh Circuit held that these two restrictions on judges' speech are unconstitutionally overbroad.*

***Buckley*** *involved two plaintiffs. The first plaintiff was a judge from the intermediate appeals court who ran for the state supreme court; the Judicial Inquiry Board disciplined him for declaring, during the campaign, that he had "never written an opinion reversing a rape conviction." The second plaintiff was a legislator who campaigned for (and was elected to) a seat on the Cook County Circuit Court; he sought relief because "the risk of being sanctioned for violating [the judicial conduct rule] deterred him from speaking out in his campaign on issues that he believed to be important to Illinois voters, including capital punishment, abortion, the state's budget, and public school education."*

*The Seventh Circuit noted that* ***Buckley*** *presented the collision of two competing political principles: First, "Candidates for public office should be free to express their views on all matters of interest to the electorate." Second, "Judges [must] decide cases in accordance with law rather than [in accordance] with any express or implied commitments that they may have made to their campaign supporters or to others."* ***Buckley****, 997 F. 2d at 227.*

*The court declared that "only a fanatic would suppose that. . .freedom of speech should. . .entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases[.]" On the other hand, the court likewise disavowed the idea "that the principle of impartial legal justice should . . . prevent a [judicial] candidate . . . from furnishing any information or opinion to the electorate beyond his name, rank, and serial number."* ***Id****. The court went on to state:*

*The difficulty with crafting a rule to prevent [a judicial candidate from making commitments] is that a commitment can be implicit as well as explicit. . . The candidate might make an explicit commitment to do something that was not, in so many words, taking sides in a particular case or class of cases but would be so understood by the electorate; he might for example promise always to give paramount weight to public safety or to a woman's right of privacy. Or he might discuss a particular case or class of cases in a way that was understood as a commitment to rule in a particular way, even though he avoided the language of pledges, promises, or commitments.*

*The "pledges or promises" clause is not limited to pledges or promises to rule a particular way in particular cases or classes of case;* ***all*** *pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office. The "announce" clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. The rule certainly deals effectively with the abuse that the draftsmen were concerned with; but in so doing it gags the judicial candidate. He can say nothing in public about his judicial philosophy, he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize* ***Roe v. Wade****. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability -- or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform. . .All these are disputed legal or political issues.*

*The rule this reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election. Indeed, the only safe response to Illinois Supreme Court Rule 67(B)(1)(c) is silence. True, the silencing is temporary. It is limited to the duration of the campaign. But [the rule's] interference with the marketplace of ideas and opinions is at its zenith when the "customers" are most avid for the market's "product." The only time the public takes much interest in the ideas and opinions of judges or judicial candidates is when an important judicial office has to be filled . . . .*

***Id****. at 228-29. The Seventh Circuit noted, but expressed no opinion on, the ABA's proposed revision of the "announce his views" clause. In the 1990 version of the model Code, the ABA has amended this Section so that it now prohibits a judge or judicial candidate from making "statements that commit or appear to commit the judge to a particular view or decision with respect to cases, controversies, or issues . . . likely to come before [the judge's] court." According to the ABA commentary to Section 5A(3)(d)(ii), the predecessor "announce" rule was felt to be too broad.*

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* See "Terminology" for definition

*The Seventh Circuit points out in **Buckley** that, even with this change, the ABA provisions may run afoul of First Amendment protections. For example, read too broadly, a Section that prohibits a judge from making any pledge or promise (other than to do a good job) could be used as a basis for disciplinary action against a judicial candidate who declared that he or she believed the courts should actively pursue sentencing alternatives to imprisonment. Conceivably, this same provision could subject a judge to discipline for declaring, as Ruth Ginsberg told the Senate Judiciary Committee on July 20, 1993 [as reported in the Anchorage Daily News of 7/21/93], "My approach [to service on the supreme court] is rooted in the [belief] that the place of the judiciary. . .in our democratic society [is] third in line behind the people and their elected representatives" -- a comment that might be construed as a pledge to broadly construe the powers of the legislative branch and to narrowly circumscribe the reach of the Bill of Rights as a check on legislative activity. The Code should be interpreted in a manner that does not infringe First Amendment rights.*

(e) may respond to personal attacks or attacks on the candidate's record, as long as the response contains no knowing misrepresentation of fact and does not violate Section 5A(3)(d).

◊ B. **Candidates Seeking Appointment to Judicial or Other Governmental Office.**

(1) A candidate* for appointment to judicial office or a judge seeking appointment to another governmental office shall not solicit or accept any funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate* for appointment to judicial office or a judge seeking appointment to another governmental office may not engage in any political activity* to secure appointment, with the following exceptions:

(a) subject to Section 5A(3), such persons may:

(i) communicate with the appointing authority, including any selection, screening, or nominating bodies;

(ii) seek privately-communicated support or endorsement from organizations and individuals; and

(iii) provide information regarding his or her qualifications for office to organizations and individuals from whom the candidate seeks support;

(b) a non-judge candidate* for appointment to judicial office may, in addition, unless otherwise prohibited by law:*

(i) retain an office in a political organization,*

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and dues to political organizations* and to purchase tickets for political party dinners or other functions.

*Commentary. - Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may support their own candidacy and seek appropriate support from others.*

*Sections 5B(2)(a)(ii) and (iii) should be read to allow judicial candidates, including judges who are candidates for appointment to other judicial office, to promote their candidacy by circulating letters to the general membership of the bar and to organizations interested in judicial selection. Similarly, a judge need not object when individual lawyers or groups of lawyers decide to circulate a letter in support of the judge's candidacy. However, these letters must not contain promises or statements forbidden by Section 5A(3)(d) (regarding the candidate's likely decisions or action is appointed), must not contain false statements, and, in general, must not violate any other provision of the Code.*

*A different problem is presented when a judicial candidate approaches individual lawyers or organizations and seeks their endorsement of his or her candidacy. Even though Canon 5 generally tries to make the rules of political conduct uniform for all judicial candidates (both current judges and lawyers applying to be judges), a sitting judge's approach to individual lawyers inevitably presents problems that do not arise when a non-judge candidate approaches other members of the bar. Because a sitting judge will wield judicial power whether or not the judge's campaign for a different office is successful, a judge who asks individuals for political support runs the risk that the request will give the appearance of abuse of office. Because there is a latent potential for subtle coercion in such requests, a judge's request for the personal endorsement of a lawyer must be circumspect and framed cautiously. A judge must take pains to avoid even giving the appearance that he or she is using or threatening to use the power of judicial office to obtain endorsements.*

*Section 5B(2)(a)(ii) allows a candidate to seek privately-communicated support or endorsement. Under this provision, a candidate may ask individuals and organizations to send a letter to the Alaska Judicial Council or to the governor, or to speak in support of the candidate at a public hearing held by the Judicial Council or at a private meeting with the governor or the governor's staff. However, a candidate may not ask or authorize individuals or organizations to run newspaper advertisements endorsing the candidate or to send letters to their membership or to other organizations encouraging them to support the candidate. If the candidate is a judge, the candidate should ask individuals and organizations not to send copies of endorsement letters to the candidate.*

*Although under Section 5B(2)(b) non-judge candidates seeking appointment to judicial office are permitted during their candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during their candidacy. See Sections 5E and Application Section.*

C. **Judges Seeking Retention.**

(1) A judge who is a candidate* for retention in judicial office may engage in the following political activity to secure retention:

(a) submit a photograph and a statement supporting his or her candidacy for inclusion in the state election pamphlet under AS 15.58;

(b) in response to an unsolicited request,

(i) speak to public gatherings on behalf of his or her candidacy;

(ii) appear on television and radio programs to discuss his or her candidacy; and

(iii) grant interviews regarding his or her candidacy;

(c) form an election committee of responsible persons to conduct an election campaign in anticipation of active opposition to the judge's candidacy; and

(d) reserve media space, domains, and locations, and design

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* See "Terminology" for definition

and prepare campaign materials in anticipation of active opposition to the judge's candidacy and spend necessary funds for these activities.

(2) A judge who is a candidate* for retention in judicial office may engage in the following additional political activity when there is active opposition to the judge's candidacy:

(a) advertise in newspapers, on television, and in other media in support of his or her candidacy; and

(b) distribute pamphlets and other promotional literature supporting his or her candidacy.

*Commentary. - Sections 5C(1) and (2) permit a judge who is a candidate for retention to be involved in limited political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity.*

*Section 5C(2) allows judges seeking retention in office to engage in overt political activity if there is "active opposition" to their candidacy. This Code, like the prior Code, does not define "active opposition." However, the term is meant to be broadly construed. A negative recommendation by the Alaska Judicial Council constitutes active opposition. Holding a press conference, advertising, distributing brochures or leaflets, and sending letters to voters are all forms of active opposition. On the other hand, statements made by individual speakers at Judicial Council meetings rarely constitute active opposition, regardless of what is said. Active opposition may be conducted by individuals acting alone as well as by groups. The opposition need not be specifically targeted at one particular judge or at a discrete group of judges - a newspaper advertisement urging the rejection of all judges standing for retention would be viewed as active opposition to the candidacy of each individual judge. If a judge has information and believes that active opposition is imminent, the judge may document the basis of this belief to the Judicial Conduct Commission and may then proceed as if there were active opposition to the judge's candidacy.*

(3) A judge who is a candidate* for retention in judicial office shall not personally solicit or accept any funds to support his or her candidacy or personally solicit publicly stated support for his or her candidacy. However, if there is active opposition to the judge's candidacy, the judge's election committees may engage in media advertisements, brochures, mailings, candidate forums, and any other legal methods of pursuing the judge's election. Such committees may solicit and accept reasonable campaign contributions, manage and expend these funds on behalf of the judge's election campaign and solicit and obtain public statements of support for the judge's candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committee may solicit contributions and public support for the candidate's campaign preceding the election and for 90 days thereafter. A judge shall not make private use of campaign funds raised by an election committee or use these funds for the private benefit of any other person or permit anyone else to use these funds for the private benefit of any person.

*Commentary. - Section 5C(2) permits a judge who is a candidate for retention to establish a campaign committee to solicit and accept public support and reasonable financial contributions if there is active opposition to the judge's candidacy. At the start of the campaign, the judge must instruct his or her campaign committee to solicit or accept only contributions that are reasonable under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.*

*Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fundraising, to the extent possible.*

*Section 5C(2) does not prohibit a judge who is a candidate for retention from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.*

*Sections 5C and 5D are intended to restrict fundraising by and on behalf of individual judges. These Sections are not intended to prohibit an organization of judges from soliciting money from judges to establish a campaign fund to assist judges who face active opposition to their retention.*

*They are not intended to restrict the ability of judges to spend their own funds in support of their own candidacies.*

(4) A judge who is a candidate* for selection as a delegate to a federal or state constitutional convention may engage in any political activity* to secure election allowed to other candidates for that office.

D. **Incumbent Judges**. A judge shall not engage in any political activity* except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law,* the legal system, or the administration of justice, or (iii) as expressly authorized by another provision of law.

*Commentary. - Neither Section 5D nor any other Section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system, and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.*

E. **Applicability**. Canon 5 applies to all incumbent judges and judicial candidates.* A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2(b) of the Alaska Rules of Professional Conduct.

(Adopted by SCO 1322 effective July 15, 1998; amended by SCO 1762 effective July 1, 2011)

## APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. **Full-Time Judicial Officers**. The following judicial officers shall comply with all provisions of this Code:

(1) active justices of the supreme court and active judges of the court of appeals, the superior court, and the district court (including acting district court judges);

(2) full-time magistrates;

(3) committing magistrates; and

(4) standing masters .

B. **Senior Judges.**

(1) Senior judges (retired justices of the supreme court and

* See "Terminology" for definition

retired judges of the court of appeals, the superior court, and the district court who are eligible for judicial service under Administrative Rule 23) shall comply with all provisions of this Code except:

(a) 4D(1)(b) (transactions with persons likely to come before the judge's court);

(b) 4D(4) (management of financial resources to minimize disqualification);

(c) 4E(1) (fiduciary service for persons other than family members);

(d) 4E(2) (fiduciary service where proceedings likely before judge's court);

(e) 4F (service as arbitrator or mediator). However, a senior judge who serves as an arbitrator or mediator must comply with Administrative Rule 23 (f); and

(f) a senior judge may speak publicly regarding the qualification of a judge seeking retention who faces active opposition.

(2) In addition, a senior judge need not comply with Section 4C(2) (appointment to government positions) except during periods of appointment to active judicial service under Administrative Rule 23.

(3) Senior judges who serve as members of a judicial assistance committee have additional ethical obligations to maintain the confidentiality of communications received in that capacity, including the identities of those seeking the services of the committee or those referring matters to the committee. Consequently, senior judges serving in this capacity may not report any failure of a judge referred to the committee to admit the problem or submit to treatment.

***Commentary***. *-- A senior judge -- a retired justice or judge who is eligible for judicial service under Administrative Rule 23 -- must comply with all provisions of the Code except those listed. Thus, a senior judge may engage in financial and business dealings with any person and has no duty to manage investments and business and financial interests to minimize the number of cases in which the judge is disqualified. A senior judge may serve as a personal representative, trustee, guardian, or other fiduciary for persons other than family members. Although senior judges may not engage in the practice of law, they may serve as private arbitrators or mediators and may maintain private arbitration and mediation businesses, even during periods of pro tem service. However, in order to be eligible for judicial service, a judge who performs private arbitration or mediation must comply with the disclosure requirements and employment restrictions set out in Administrative Rule 23(e).*

*Senior judges may publicly speak regarding the qualifications of judges facing active opposition. This limited exception to Canon 5A(1)(b) preserves the general insulation of judges from political pressures while allowing for an informed public debate on the qualifications of a judge up for retention.*

*A senior judge may serve on a government committee or commission or hold a government position except during periods of pro tem service.*

*Despite the relaxation of restrictions on senior judges' financial dealings, they remain subject to the disqualification provisions of Section 3E.*

*The special confidentiality obligations when serving as a member of a judicial assistance committee are narrowly tailored to provide for candid reporting to the judicial assistance committee.*

C. **Part-time Magistrates and Deputy Magistrates**. Part-time magistrates and deputy magistrates shall comply with all provisions of this Code except:

(1) Section 4C(1) (appearance before or consultation with executive or legislative bodies) if the magistrate or deputy magistrate holds an office or position of profit under the United States, the state, or its political subdivisions and must engage in Section 4C(1) activities in order to perform the duties of this office or position;

(2) Section 4C(2) (appointment to government positions);

(3) Section 4D(1)(b) (transactions with persons likely to come before the judge's court);

(4) Section 4D(3)(c) (participation in business activity that has major effect on economic life of community);

(5) Section 4E(1) (fiduciary service for persons other than family members);

(6) Section 4G (practice of law);

(7) Section 5A(1)(d) (attendance at political gatherings) if the magistrate or deputy magistrate holds or is seeking non-judicial public office;

(8) Section 5A(1)(e) (solicitation and contribution of campaign funds) to the extent that the magistrate or deputy magistrate is soliciting funds for or contributing funds to the magistrate's own campaign for non-judicial public office;

(9) Section 5A(2) (resignation upon becoming a candidate for nonjudicial office); and

(10) Sections 5B (political activity to secure appointment to public office).

*Commentary.- AS 22.15.210(b) guarantees magistrates a conditional right to seek and hold any other office or position of profit under the United States, this State, or its political subdivisions, and to engage in the conduct of any profession or business that does not interfere with the performance of judicial duties or necessitate repeated disqualifications. Because of this statute, part-time magistrates are exempt from the restrictions on holding non-judicial public office. They are also permitted to engage in political activity necessary to secure and perform the duties of non-judicial public office. Note, however, that political activity by court system employees is also limited by Personnel Rule PX9.0. Under this rule, a court system employee forfeits his or her position upon becoming a candidate for state or national elective political office, other than the office of delegate to a state or federal constitutional convention.*

*The Code exempts part-time magistrates from two restrictions on business activity, the duty to avoid financial and business dealings with persons likely to come before the magistrate's court, and the duty to*

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* See "Terminology" for definition

*avoid business activity that has a major effect on the economic life of the community. In a small community, it may be difficult for a magistrate to avoid business dealings with persons likely to come before the magistrate's court, and even a moderately-sized business venture may have a major effect on the community's economic life. Thus, these restrictions could make it impossible for a part-time magistrate to carry on outside business activity in order to supplement his or her part-time judicial salary. Part-time magistrates remain subject to Section 4D(4), which requires that they manage their financial dealings to minimize the number of cases in which they are disqualified. They also remain subject to the disqualification provisions of Section 3E. They are also subject to Personnel Rule PX5.04, which regulates outside employment by court system employees.*

*A part-time magistrate may serve as a fiduciary for persons other than family members, subject to Sections 4E(2) and 4E(3). A part-time magistrate who is an attorney may practice law, subject to Administrative Rule 2(d), which prohibits court system employees from engaging, directly or indirectly, in the practice of law in any of the courts of this state.*

D. **Special Masters**.

(1) A special master who is not an active judge, magistrate, or standing master shall comply with the following provisions of this Code:

(a) Canon 1 (duty to uphold the integrity and independence of the judiciary);

(b) Canon 3 (judicial duties); however, a special master need not comply with Section 3B(9) to the extent this Section would prohibit the special master from commenting about pending or impending proceedings that are unrelated to the proceeding in which he or she is a special master;

(c) Section 4A (extra-judicial activities in general);

(d) Section 4B (avocational activities);

(e) Section 4C(1); however, a special master need not comply with Section 4C(1) to the extent this Section would prohibit the special master from appearing at public hearings or lobbying on matters that are unrelated to the proceeding in which he or she is a special master;

(f) Section 4D(1)(a) (financial or business dealings that appear to exploit judicial position);

(g) Section 4E(3) (restrictions on financial activity that apply personally also apply while acting as fiduciary); and

(h) Section 4I (financial affairs are private except where disclosure required by law).

(2) In addition, during periods of appointment as a master, a special master must comply with Section 2A (duty to avoid impropriety and appearance of impropriety) and 2B (inappropriate influence and misuse of judicial office).

(3) A person who has been a special master in a proceeding shall not act as a lawyer in that proceeding or in any other proceeding related thereto, except as otherwise permitted by Rule 1.12(a) of the Alaska Rules of Professional Conduct.

E. **Time for Compliance**. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2) and 4D(3) (which pertain to business activities) and Section 4E (which pertains to fiduciary activities) and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

*Commentary. - If serving as a fiduciary when selected as a judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no even longer than one year. Similarly, if engaged at the time of judicial selection in a business activity that is not permitted by Section 4D(3), a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.*

(Adopted by SCO 1322 effective July 15, 1998; amended by SCO 1427 effective April 15, 2001; by SCO 1762 effective July 1, 2011; and by SCO 1768 effective October 14, 2011)

## TERMINOLOGY

Terms defined below are marked with an asterisk in the Sections where they appear. In addition, each definition cross-references the Sections where the defined term appears.

"Appropriate disciplinary authority" means the governmental or quasi-governmental agency whose responsibility for initiation of the disciplinary process covers the violation to be reported. See Sections 3D(1), 3D(2), and 3D(3).

"Bias or prejudice" does not include references to or distinctions based upon race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status when these factors are legitimately relevant to the advocacy or decision of the proceeding, or, with regard to administrative matters, when these factors are legitimately relevant to the policies or decisions involved. See Sections 3B(5), 3B(6), 3C(1), and 3C(2).

*Commentary.-The definition of "bias or prejudice" was written in an exclusionary manner to allow courts to countenance legitimate distinctions relevant to litigation before them. See Section 3B(6).*

*The definition implies the obvious - that a court demonstrates impermissible bias or prejudice if it uses constitutionally or statutorily protected categories as a basis for unfairly discriminating. Bias or prejudice may also arise from other than legally impermissible categorization and still be something a court should recognize and avoid.*

*As the symbols and bastions of justice in our society it is important for courts to provide their services to all on essentially the same basis.*

"Candidate" means a person seeking any public office. A person becomes a candidate as soon as he or she makes a public announcement of candidacy, or declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or public support. See Preamble and Sections 5A(1), 5A(2), 5B(1), 5B(2), 5B(2)(b), 5C(1), 5C(2), 5C(3), and 5C(4).

"Candidate for judicial office" means a candidate seeking selection for or retention in judicial office, whether by election

* See "Terminology" for definition

or appointment. This term is used interchangeably with "judicial candidate." See Sections 5A(1)(b), 5A(3), and 5E.

"De minimis interest" means an insignificant interest that would not lead reasonable persons to question a judge's impartiality. See Sections 3E(1)(c) and 3E(1)(d).

"Economic interest" means ownership of a more than de minimis legal or equitable interest or a relationship as an officer, director, advisor, or other legal participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a judge's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

See Sections 3E(1)(c) and 3E(2).

"Fiduciary" means a person who has undertaken a duty to conduct financial or other affairs for another person's benefit. The term includes any person acting as executor, administrator, personal representative, trustee, guardian, or attorney in fact for another. It also includes any other person who, because of his or her relationship to another person, is obliged to give paramount consideration to the benefit of that other person and to abide by duties of care, good faith, and candor in the conduct of matters falling within the scope of the relationship, even when doing so conflicts with the self-interest of the fiduciary. See Sections 3D(2), 3E(1)(c), 3E(2), 4E(1), 4E(2), and 4E(3).

"Governmental office" means the four types of office a judge may seek without resigning:

(i) retention in the judge's current judicial office;

(ii) selection to a different judicial office;

(iii) selection as a delegate to a constitutional convention; or

(iv) selection to an appointive non-judicial public office.

See Sections 5B(1) and 5B(2).

*Commentary.- Canon 5 speaks of judges who are candidates for government office - both appointive government office (Section 5B) and elective government office (Section 5C(4)). However, Section 5A(2) requires judges to resign upon becoming a candidate for elective non-judicial office. Thus, the phrase "governmental office" is necessarily limited to the four types of office a judge may seek without resigning.*

"Judicial duties" means all the duties of a judge in connection with judicial proceedings and acts of the judge in discharge of disciplinary responsibilities required or permitted by Section 3D. See Sections 3A, 3B(5), 3B(11), 3D(4), 4A(3), 4D(5)(b), 4E(1), and 4H(2).

"Knowingly," "knowledge," "known," and "knows" mean that a person is aware of the existence of the fact or circumstance in question, or is aware of the substantial probability of its existence. However, a person does not "know" or have "knowledge" or act "knowingly" if the person actually believes, despite any indications to the contrary, that the fact or circumstance does not exist. See Sections 2B, 2C, 3D(1), 3E(1)(a), 3E(1)(c), 3E(1)(d), 5A(1)(b), and 5A(3)(d).

"Law" means court rules as well as statutes, constitutional provisions, and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 3B(7)(a), 3C(2), 4B, 4C(1), 4C(2), 4C(3), 4C(3)(b), 4D(5)(a), 4F, 4I, 5B(2)(b), and 5D.

"Member of the judge's family" means a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 2B, 3E(1)(c), 4E(1), and 4G.

"Nonpublic information" means information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, information impounded or communicated in camera, and information offered in grand jury proceedings, pre-sentencing reports, dependency cases, or psychiatric reports. See Section 3B(11).

"Political activity" means:

(i) becoming a candidate for elective public office;

(ii) serving as an officer of a political party, a member of a national, state, or local committee of a political party, an officer or member of a committee of any other political organization, or becoming a candidate for any of these positions;

(iii) serving as a delegate, alternate, or proxy to a political party convention;

(iv) addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a candidate for public office or political party office;

(v) organizing or re-organizing a political party or organization;

(vi) taking part in a political campaign to elect someone to public office or political party office, to recall someone from such an office, or to enact or defeat a ballot proposition;

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* See “Terminology” for definition

(vii) taking any other part in the management of a political party or organization, or a political candidate, or a group for or against a ballot proposition;

(viii) soliciting votes in support of or in opposition to a candidate's election to public office or political party office, or in support of or in opposition to an incumbent's recall from such an office, or in support of or in opposition to a ballot proposition;

(ix) publicly endorsing or opposing a candidate for public office or political party office, or publicly endorsing or opposing a ballot proposition, whether in a speech, a published letter, a political advertisement or broadcast, campaign literature, or any similar material;

(x) initiating or circulating a nominating petition, recall petition, or petition to put a ballot proposition before the voters.

(xi) directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a political purpose;

(xii) organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a candidate, political party, or political organization; or

(xiii) acting as a recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or a candidate, or driving voters to the polls on behalf of a political party or a candidate, or doing any other act as an official or unofficial representative of a political party or candidate;

(xiv) but "political activity" does not include:

(a) being a member of a political party;

(b) registering and voting;

(c) expressing one's opinion in private on political subjects and candidates;

(d) participating in the non-partisan activities of a civic, community, social, labor, or professional organization; or

(e) speaking or writing in support of or in opposition to proposals to change the legal system or the administration of justice.

See Sections 5B(2), 5C(4), and 5D.

"Political organization" means a party, committee, association, club, foundation, fund, or any other organization, whether incorporated or not, whose primary purpose is to:

(i) influence the selection, nomination, election or appointment of any individual to public office or to office in a political party, or

(ii) influence the outcome of any recall effort or ballot proposition, or

(iii) further or defeat proposals to change the law in matters other than the improvement of the law, the legal system, or the administration of justice.

See Sections 5A(1)(a), 5A(1)(c), 5A(1)(e), and 5B(2)(b).

The words "shall" and "shall not" mean a binding obligation on judicial officers, and a judge's failure to comply with this obligation is a ground for disciplinary action.

The words "should" and "should not" mean conduct or a course of action to which judicial officers should aspire, but a judge's failure to meet such an aspirational goal is not a ground for disciplinary action.

"Spouse" includes not only a husband or wife but also any person with whom the judge maintains a shared household and conjugal relations. See Sections 3E(1)(c), 3E(1)(d), 3E(2), 4D(5)(a), 4D(5)(b), 4H(1)(b), 4H(3), and 5A(3)(a).

*Commentary.-Because the same potential conflicts of interest and loyalty arise when a judge maintains a shared household and conjugal relations with another person to whom the judge is not married, the provisions of Canons 3 and 4 should apply more broadly than simply to legally recognized spouses. Rather than try to reword each affected provision, this Code retains the ABA's use of "spouse" but includes an expanded definition of spouse in the Terminology Section.*

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Section 3E(1)(d).

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* See "Terminology" for definition

# APPENDIX E

## Alaska Statute Relating

## to Judicial Disqualification

# Chapter 20. Officers and Employees

**Article**

1. Judicial Officers (§ 22.20.020)

## Article 1. Judicial Officers.

**Section**

20. Disqualification of judicial officer for cause.

### Sec. 22.20.020. Disqualification of judicial officer for cause.

(a) A judicial officer may not act in a matter in which

(1) the judicial officer is a party;

(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;

(3) the judicial officer is a material witness;

(4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;

(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;

(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;

(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

(b) A judicial officer shall disclose, on the record, a reason for disqualification specified in (a) of this section at the commencement of a matter in which the judicial officer participates. The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.

(c) If a judicial officer is disqualified on the officer's own motion or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge. (§ 54-2-1 ACLA 1949; am § 1 ch 48 SLA 1967; am §§ 10, 11 ch 38 SLA 1987; am § 38 ch 50 SLA 1989)

**Effect of amendments.**—The 1987 amendment rewrote subsections (a) and (b). The 1989 amendment, effective May 27, 1989, substituted "is disqualified on the officer's own motion" for "disqualifies himself or herself" in the first sentence of subsection (c).

## NOTES TO DECISIONS

I. General Consideration.
II. Bases for Disqualification.

### I. GENERAL CONSIDERATION.

**"Presiding judge of the next higher level of courts" referred** to in subsection (c) could appoint himself to consider a recusal motion. Feichtinger v. State, 779 P.2d 344 (Alaska Ct. App. 1989).

**Motion to recuse judges before whom case had never been assigned.** — Judge appointed to consider a challenge to another judge pursuant to subsection (c) did not err by concluding that a motion to recuse all trial court judges, including judges to whom the case had never been assigned and who therefore had never had the opportunity to exercise discretion, was improper. Feichtinger v. State, 779 P.2d 344 (Alaska Ct. App. 1989).

**Scope of review.**—The sole legislative authority for disqualification of a trial judge, over the judge's objection, is found in this section. Such a decision may only be overturned where there is an abuse of discretion. Feichtinger v. State, 779 P.2d 344 (Alaska Ct. App. 1989). **Quoted** in Denardo v. Michalski, Sup. Ct. Op. No. 3691 (File No. S-3871), P.2d (1991). **Cited** in Standard Alaska Prod. Co. v. Schaible, 874 F.2d 624 (9th Cir. 1989).

### II. BASES FOR DISQUALIFICATION.

**Maintenance of appearance of impartiality.**

Judge erred in declining to recuse himself from a sentencing hearing after having presided over a prior juvenile waiver hearing based on the same conduct, where, considering the totality of the circumstances, fair-minded persons apprised of the objective facts would have concluded that the judge's participation in the sentencing hearing created an appearance of partiality. Perotti v. State, 806 P.2d 325 (Alaska Ct. App. 1991).

**Review of decisions under paragraph (a)(9).**

A judge challenged under subsection (a)(9) is independently required to consider not only actual impartiality, but also the appearance that is likely to flow from participation in the case at issue. Moreover, the need to consider the appearance of impartiality seems implicit in the language of subsection (a)(9), for whenever it is predictable that an unmistakable appearance of bias will arise from a judge's participation in a case, there will be "reason" for concluding that "a fair and impartial decision cannot be given." Perotti v. State, 806 P.2d 325 (Alaska Ct. App. 1991).

**A judge's exposure to inadmissible evidence** does not necessarily result in prejudice warranting recusal. Likewise, the fact that a judge commits error in the course of a proceeding does not automatically give rise to an inference of actual bias. Perotti v. State, 806 P.2d 325 (Alaska Ct. App. 1991).

## Sec. 22.20.022. Peremptory disqualification of a judge.

**Editor's notes.**—Section l(c), ch. 18, SLA 1991 states that it "was not the intent of the legislature in enacting AS 22.20.022 to allow the disqualification of a judge, if the judge has no financial interest in the outcome of the case other than that of a taxpayer or a permanent fund dividend recipient."

# APPENDIX F

## Complaint Form

# Alaska Commission on Judicial Conduct

510 L Street, Suite 585, Anchorage, Alaska 99501
(907) 272-1033 In Alaska (800) 478-1033 Fax (907) 272-9309
E-mail: mgreenstein@acjc.state.ak.us

Marla N. Greenstein
Executive Director

## Complaint About An Alaska State Court Judge

Date:_____

**Name of Judge:** _____

**Court:** **Supreme** _____ **Appeals** _____ **Superior**_____ **District**_____
**Court Location:** _____

**Case Name(*If Relevant*):** _____

**Case Number(*If Relevant*):** _____

**Your Name:** _____

Use of your name: **If the box below is not checked, the Commission will proceed at its own discretion.**

☐ (√) **The Commission may use my name in any communications with the judge related to the Commission's disciplinary functions.**

**Your Telephone No:** _____ _____
(*Day*) (*Evening*)

**Your Address:** _____

_____

**Your Signature:** _____

***Please specify exactly, in your own words, what action or behavior of the judge is the basis of your complaint. Please provide relevant dates and names of others who witnessed the action or behavior.***
***You may use additional paper, or reverse side if necessary.***

_____

_____

_____

_____

## IMPORTANT NOTICE

## REQUIREMENT OF CONFIDENTIALITY

In accordance with Alaska law and the Procedural Rules for the Alaska Commission on Judicial Conduct, the contents of your complaint and the fact that you filed it, must be kept in strict confidence.

Confidentiality is defined by section 22.30.060 of the Alaska Statutes as:

**Sec. 22.30.060. Rules and confidentiality.** (a) The commission shall adopt rules implementing this chapter and providing for confidentiality of proceedings. (b) A11 proceedings, records, files, and reports of the commission are confidential and disclosure may not be made except

**(l)** upon waiver in writing by the judge at any stage of the proceedings;

**(2)** if the subject matter or the fact of the filing of charges has become public, in which case the commission may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, or to state that the judge denies the allegations; or

**(3)** upon filing of formal charges, in which case only the charges, the subsequent formal hearing, and the commission's ultimate decision and minority report, if any, are public; even after formal charges are filed, the deliberations of the commission concerning the case are confidential. (§ 1 ch 213 SLA 1968; am § 7 160 SLA 1984; am § 6 ch 135 SLA 1990)

rev. 02/05

# APPENDIX G

## Formal Ethics Opinions

# Alaska Commission on Judicial Conduct

# Formal Ethics Opinions

# FORMAL ETHICS OPINIONS

Each of the following opinions arose from an actual complaint filed with the Commission. These reflect all informal sanctions issued by the Commission. Informal sanctions in the past have included: private reprimands, private admonishments, and cautionary letters. Because the sanctions were private, the only facts that are included are those necessary to an understanding of the stated ethical rule.

# ALASKA COMMISSION ON JUDICIAL CONDUCT

# FORMAL ETHICS OPINIONS

**Opinion #001**

Judges who criticize jurors verbally, directly to them, for their work as jurors, violate Canons 2A and 3A (3) of the Code of Judicial Conduct.

**Opinion #002**

Judges who abuse the contempt power by jailing without basis or explanation act in an arbitrary and capricious manner that violates Canons 1, 2A, and 3A (4) of the Code of Judicial Conduct.

**Opinion #003**

Judges who use abusive and profane language off the bench towards attorneys appearing in their courtroom, violate Canons 1, 2 A, and 3 A (3) of the Code of Judicial Conduct.

**Opinion #004**

Judges who make racially oriented comments from the bench on issues that are not raised by the parties or without evidence taken, act in a way that constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

**Opinion #005**

Judges who make derogatory sexual comments while off the bench to female attorneys and witnesses in a pending proceeding violate AS 22.30.011 (a)(3)(C) and (D).

**Opinion #006**

Judges who write one party in a proceeding without copying the other side and fail to notify the other side of a meeting between the judge and a party act in a way that constitutes improper ex parte communication that are prejudicial to the administration of justice violating Canon 3A(4) of the Code of Judicial Conduct.

**Opinion #007**

Judges who make racist jokes at public events violate Canons 1 and 2 of the Code of Judicial Conduct. Such jokes are worse than profanity. While profanity may offend some and not others, racial slurs offend an identifiable class of people who have struggled to achieve equality.

**Opinion #008**

Judges who become involved with administrative matters of case assignments to other judges for personal reasons violate Canons 1, 2A, 2B, 3A(4) and 3C(1).

**Opinion #009**

Judges who have an overly brusque manner in dealing with court personnel do not violate the Code of Judicial Conduct but should be aware of the need to control and moderate demeanor when relating to court staff.

**Opinion #010**

Presiding judges who, on a single occasion, may not have adequately investigated a complaint against a magistrate do not violate the Code of Judicial Conduct but should devote adequate time and resources when investigating those complaints.

**Opinion #011**

Judges who give speeches on general legal issues at political party fundraising events violate Canons 7A (1) (b) and (c) of the Code of Judicial Conduct.

**Opinion #012**

Judges who use the title "judge" in promotional literature for their businesses and use the court system phone number to conduct business, violate Canon 5 C(1) by improperly exploiting the judges' position.

**Opinion #013**

Judges who share a home telephone line with a spouse's law practice should obtain a separate phone line for the law practice. Sharing a personal phone line with a spouse's law practice could lead to the perception that the judge was also practicing law, and, potentially to inadvertent ex parte communications.

## Opinion #014

A judge who held a questionable ex parte evidence hearing did not violate the ethical prohibition on ex parte communications where there was an arguable legal basis for holding the hearing ex parte. The Commission could not conclude by clear and convincing evidence that objectively the actions were "obviously wrong in the circumstances." Under the facts of the case, the defendant posed an extreme security risk, the defendant acted as his own co-counsel (requiring his presence if defense counsel were allowed into the hearing), and the judge preserved the entire transaction on record for review. *(Approved August 28, 1992)*

## Opinion #015

A judge's phone call to the head of a state office responsible for handling criminal litigation regarding the state of the law under a landmark case, violated Canons 3A(4) and Canon 2A. The judge intended to use the information to draft jury instructions in a pending criminal matter before him. Though the judge did not know that the attorney had given advice to counsel in the case, the judge was aware that the office was part of the litigation team. The judge's subjective belief that the head of the office was a "disinterested expert" under Canon 3A(4) was not determinative. The Commission found that a reasonable prudent judge would not have reached the conclusion that the attorney was a disinterested expert. Because the attorney was visibly a part of the litigation team, the attorneys and public could reasonably conclude that the judge's phone call created an appearance of impropriety as well. *(Approved August 28, 1992)*

## Opinion #016

A judge who had an inadvertent informal contact with a witness in a former related proceeding and did not disclose that contact to the parties at a hearing that immediately followed that contact, created an appearance of bias on the part of the court. At a minimum, the judge would have stated that nature of the judge's communication with the witness on the record before making other comments. The fact that the judge did not hold the hearing as scheduled, but instead used the opportunity to make brief statements to one party concerning prior orders, contributed to the appearance of bias. *(Approved February 12, 1993)*

## Opinion #017

A judge who became aware of a witness's illegal drug trafficking during the course of civil litigation is under no affirmative ethical duty to report the criminal activity to appropriate authorities. While a judge is free to report the activity at a time and in a manner what will not affect any ongoing litigation before the judge, a judge has no obligation to do so. *(Approved February 12, 1993)*

## Opinion #018

A judge was under no obligation to disqualify from hearing a case in which one of the appearing attorneys was serving as a discovery master for the judge in a pending unrelated case. While there was no absolute requirement to disqualify where the working relationship with the master was minimal and where the original appointment of the master was by another judge, a judge does have a duty to use reasonable efforts to disclose an ongoing relationship. Judicial appointments to paid positions like masters may give the public impression that the judge is conferring a monetary benefit and creating a special close professional relationship with the attorney who receives the appointment. Disclosure, by conveying the nature of the relationship, can enhance the public's trust in the process and the integrity of the judge. *(Approved as modified December 10, 1993)*

## Opinion #019

Canon 5B(2), prohibits fund solicitation for charitable or civic organizations; it does not, however, require a judge to direct the organization to remove the judge's name from a list of officers, trustees, or directors where the listing is not a prominent part of the fund solicitation. A judge generally should not use the title of the judicial office in connection with any list of officers, trustees, or directors. The title, however, may be used to describe the judge's occupation if all officers, trustees, or directors are listed in a similar manner. *(Approved as modified August 26, 1994)*

## Opinion #020

A judge who independently researched the prior convictions of a defendant that the judge sentenced, did not violate Canons 2A and 3A(4) of the Alaska Code of Judicial Conduct. Routine checking of court files is not improper, but fact-finding that goes beyond courts records may be. *(Approved August 21, 1995)*

## Opinion # 021

A judge who, immediately following a hearing, had lunch with one of the attorneys in the proceeding, violated Canon 2A by creating an appearance of impropriety. While nothing improper was discussed at lunch, the closeness in time between the hearing and the social lunch could create to a reasonable observor that the attorney had more influence over the judge based on their social relationship.

## Opinion # 022

A judge who routinely provides care for or supervises the judge's child in chambers violates Canons 2 and 3 A by giving the appearance that the judge's non- emergency family duties are paramount over judicial duties during court hours.

## Opinion # 023

A judge engages in improper political activity, violating Canon 5 A (1) (d), by moderating a partisan political debate. The debate represented all candidates for the political office and was not sponsored by a political party, nonetheless political debates by their nature engage the moderator in political discourse inappropriate to judicial office. Such a debate improperly lends the prestige of judicial office to the event in a state with a non-elected judiciary.

## Opinion #024

A judge who recused from one hearing in a criminal case, but not from the case as a whole, did not conform to the requirements of Canon 3E of the Code of Judicial Conduct or the requirements of AS 22.20.020, Alaska's disqualification statute. The judge granted a motion to disqualify for cause from an evidentiary hearing in the case but retained the ability to sit on the other aspects of the matter. Ethical standards do not allow for a partial disqualification for cause.

## Opinion #025

A judicial officer who accepted rides from law enforcement while on duty in a small village without any form of public transportation did not violate the Code of Judicial Conduct where no ex parte communication concerning the pending criminal matter occurred. The circumstances in rural Alaska often create a need for accommodations that would not be suitable if there were other alternatives. Where these accommodations include assistance by law enforcement officers, great care should be given to avoiding any discussion of official matters while outside the courtroom. The best practice would be to disclose the special needs and accommodations on the record at the beginning of the court proceeding to avoid appearance of impropriety questions.

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# APPENDIX H

Advisory Opinions

# Alaska Commission on Judicial Conduct

# Advisory Opinions

Adopted March 1, 1996 through December 31, 2012

## Advisory Opinion #97-1

**(adopted February 7, 1997 and amended June 6, 1997)**

**Question:** *May a judge write an unsolicited reference letter to the Alaska Judicial Council concerning an applicant for a judgeship?*

**Opinion:** A judge may write a letter to the Judicial Council concerning the qualities and abilities of an applicant for a judicial position. The letter need not be solicited by the Council, but its content should be limited to addressing those qualities about which the judge has direct knowledge and which relate to the criteria used by the Council in evaluating the applicant. A judge may ethically permit the Council to forward the letter to the governor.

The restriction on content should be extended to all official reference letters by judges, regardless of who the recipient may be. Any use of the judicial office to persuade and influence decision-makers, beyond comments addressing the qualifications of the individual concerned, is not proper. In addition, while sending an unsolicited letter to the Judicial Council is not improper, sending an unsolicited letter to the Governor is improper. The Governor's role in the selection process is political and any written unsolicited comments regarding the selection could be viewed as political.

## Advisory Opinion #97-2

**(adopted June 6, 1997)**

**Question:** *May a judge contribute to charitable organizations that also are involved in political activity such as domestic violence groups?*

**Opinion:** Pursuant to Canon 7 A (1) (c) a judge should not contribute to a "political organization or candidate." While political organization is not defined in the Alaska Code of Judicial Conduct, it has been defined in the 1990 ABA Model Code of Judicial Conduct. That Code defines "political organization" as denoting "a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office." The Alaska Public Offices Commission has a similar definition, viewing such a group as any combination of two or more people "acting jointly who take action the major purpose of which is to influence the outcome of an election." Charitable organizations that also engage in some political activities are not considered political organizations under either of these definitions. Judges may, therefore, contribute to charitable organizations that also engage in some political activities if those organizations are primarily engaged in nonpolitical charitable work. Domestic violence groups, for example, generally have primary purposes such as running shelters and counseling programs that are not political in nature.

Judges should be aware, however, that making contributions to groups that have an interest in matters before the court may create a disqualification issue for that judge. These situations should be examined by each individual judge as the specific cases may arise.

## Advisory Opinion #98-1

**(adopted January 23, 1998)**

**Question:** *May a judge allow a state official of the executive or legislative branch to sit on the bench next to the judge or in-court clerk while observing court in session?*

**Opinion:** Providing any preferential seating to visiting state officials that is not available to the general public while court is in session creates an appearance of impropriety in violation of Canon 2 of the Code of Judicial Conduct. State officials hold positions of power within state government that, through the doctrine of separation of powers, is meant to be distinct from the role of state courts. Treating a state official differently from any other member of the public by giving that official preferential seating, creates the appearance to the average observer that the official has special access to the court and its decision-making. While state officials have a special interest in observing how the courts are run to assist in proper legislative or executive decision-making, any questions regarding the court process can be addressed to the judge in private outside of the official public court session. So too, special demonstrations of equipment can be arranged for private observation by state officials, separate from the official court proceeding or special seating arrangements can be provided to both the officials and the public generally to allow observation of court equipment during proceedings.

Other special observers may not necessarily come under this opinion. Often school children tour the courts and are seated in special places, at times on the bench. Children are not in a position of power and, therefore, do not create an appearance of improper influence especially when their presence is explained to be for an educational purpose.

**Advisory Opinon #98-2**

**(was later adopted as #99-1)**

## Advisory Opinion 98-3

**(adopted September 14, 1998)**

**Question:** *May a judge contribute to another judge's retention campaign fund?*

**Opinion:** A judge should not contribute to another judge's retention campaign fund. Canon 5 A (1) (b) and (c) of the Alaska Code of Judicial Conduct prohibits judges from engaging in political activity and expressly prohibits judges from financially contributing to political campaigns. The terminology section of the Code defines candidate for public office and judicial candidate separately. Arguably, candidates in a retention election are not necessarily candidates for "public" office under the Code. The purpose of these Code provisions is to insulate judges from the political pressures that campaigns and campaign fundraising necessarily entail. While judicial retention elections do not typically involve political positions and influence, when a judge's retention is contested it necessarily entails an organized opposition with defined issues. While the judge under attack clearly has the right to respond to that opposition, engaging other judges in the dialogue unnecessarily politicizes their positions as well.

## Advisory Opinion #98-4

**(adopted September 14, 1998)**

**Question:** *Can a judge ethically financially contribute to The Alaska Legal Services Corporation?*

**Opinion:** Judges may contribute financially to The Alaska Legal Services Corporation without violating the Code of Judicial Conduct. In all other respects, judges must comply with Canon 4 C of the Alaska Code of Judicial Conduct regarding charitable activities. Judges should disclose the fact that they are contributors in any case involving a legal services attorney or if the judge knows that the attorney is participating in the case as part of the pro bono program. In fundraising efforts by The Alaska Legal Services Corporation, judges may be listed in the same manner as other contributors or may be listed anonymously but should not hold leadership positions in the organization. The sole exception is the Chief Justice of Alaska, who, as chief administrator of the state courts, may endorse and participate in the program in that role.

## Advisory Opinion #99-1 [originally drafted as 98-2]

**(adopted January 22, 1999)**

**Question:** *When is a sitting judge obligated in court proceedings to disclose discussions concerning future employment with an entity involved in litigation before the judge?*

**Opinion:** A judge should disclose the fact that the judge is discussing employment with an entity involved in litigation before the judge. For purposes of this opinion, "an entity involved in litigation before the judge" refers to any party, witness, attorney, government entity, or law firm directly involved in the litigation. Once disclosure has occurred, the judge should offer to recuse. Once the judge has accepted the job, the judge should recuse and disclose the basis for the recusal.

**Advisory Opinion #99-2**
***Confidential***

**(adopted April 2, 1999)**

## Advisory Opinion #99-3

**(adopted September 8, 1999)**

**Question:** *When a judicial officer receives an ex parte communication by a court employee concerning facts affecting a pending case before that judicial officer, does full disclosure of the communication include disclosure of the identity of the employee who initiated the communication?*

**Opinion:** Canon 3B(7) prohibits judges from initiating or considering "ex parte communications or other communications made to the judge outside the presence of the parties…." The only partial exception is for scheduling or other administrative purposes. It has been noted that while the "Code of Judicial Conduct does not address the question of remedies…courts have held that prompt disclosure of the ex parte communication to all affected parties may avoid the need for other corrective action." SHAMAN, LUBET, ALFINI, JUDICIAL CONDUCT AND ETHICS at 164 (2d ed. 1995).

Disclosure of ex parte communications should be a full disclosure. While the identity of the individual who initiated the communication may not always be a necessary element of full disclosure, where the parties have inquired as to the identity of that individual, absent any legal basis for maintaining the anonymity of that individual, the name should be disclosed. Court employees, in general, have no special privileges and should respect the integrity of the court process by insulating the judicial officer from factual information outside of the court record.

## Advisory Opinion #99-4

**(adopted December 14, 1999)**

**Question:** *May a judge be a member of the Association of Trial Lawyers of America or other specialty bar associations?*

**Opinion:** Maintaining the appearance of impartiality is essential to an effective judiciary. Canon 2 Alaska Code of Judicial Conduct. While judges are generally encouraged to participate in bar associations, specialty bar associations are different. Specialty bar associations have been defined as those associations of lawyers who mainly represent a particular class of clients or engage in a specialized practice or reflect a partisan view on legal issues.

Judges are not permitted to be members of special bar associations, as it would convey the appearance of a special relationship to one side in the adversarial process. "An organization need not be racist or vitriolic, however, in order to give the appearance of partiality. Membership on the board of directors of a legal aid society might convey the impression that a judge was predisposed in favor of its lawyers. . . . Thus, judges should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse or are dedicated to a particular legal philosophy or position." SHAMAN, LUBET, ALFINI, JUDICIAL CONDUCT AND ETHICS at 296 (2d ed. 1995). The Association of Trial Lawyers of America is a plaintiff's bar association. It promotes itself as leading the fight for the rights of injured persons and engages in lobbying activity against efforts to limit defendant liability.

Because the Association of Trial Lawyers of America advocates the position of plaintiffs in civil disputes, a judge's membership in that organization could convey a sense that the judge is predisposed toward plaintiffs. Special categories of membership or affiliation do not obviate the problem. Consequently, judges should not be members of the Association of Trial Lawyers of America, regardless of whether the membership is general or limited, free or paid. (*See also* Arkansas Advisory Opinion 99-04)

## Advisory Opinion #99-5

**(adopted December 14, 1999)**

**Question:** *May a judge receive free conference travel to a judicial conference sponsored by The Roscoe Pound Foundation, a not-for-profit arm of the Association of Trial Lawyers of America?*

**Opinion:** A judge should not accept an offer of conference travel to a judicial conference sponsored by The Roscoe Pound Foundation. Judges are not permitted to be members of special bar associations as it would convey a special relationship to one side in the adversarial process (*see Advisory Opinion 99-4*). The Association of Trial Lawyers of America, as a plaintiff's bar association, would not be a permissible organization for judges to join. The Roscoe Pound Foundation is a trust set up for educational purposes by the Association of Trial Lawyers of America. The by-laws of the foundation, however, indicate strong links to the Association of Trial Lawyers of America. For example: the trustees of the foundation are elected at the annual ATLA convention; one of the members of the executive committee is the ATLA President; the purpose stated is "to promote the well-doing or well-being of mankind and especially of injured persons"; and, the trust declaration notes an $800,000 loan by this foundation to ATLA. Consequently, any judicial conference sponsored by this foundation would give the appearance of a plaintiff supported conference and any gift of travel to the conference would give the appearance of a gift by the plaintiff's bar to judges.

Other states have noted that judges should not be guests of special bar associations at conferences. For example, Tennessee Advisory Opinion 96-4 states that judges should not be guests of a defense lawyers' association at its meeting or convention where the judges' registration, lodging, and travel would be paid by the association. Gifts of travel by specialty bar associations give the appearance of influence.

## Advisory Opinion #2000-01

**(Adopted September 11, 2000)**

**Question:** *May a Children's Court Master serve on a local juvenile corrections facility's citizens' advisory committee? May a Superior Court Judge serve on a community committee to plan for a Child Advocacy Center (a facility for children who are victims of physical or sexual abuse)?*

**Opinion:** Canon 4C(2) of the Alaska Code of Judicial Conduct provides: "A judge shall not accept appointment to or serve on a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice." Canon 4C(3) explicitly allows judges to serve as officers, directors, trustees, or advisors of organizations or government agencies "devoted to the improvement of the law, the legal system, or the administration of justice" or of other not-for-profit organizations subject to two basic limitations. The two limitations are: (1) That a judge cannot serve "if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the judge's court." (2) Regardless of the nature of the organization or its role, the judge cannot engage in fund solicitation.

Judges also are obligated to avoid impropriety and the appearance of impropriety and to maintain the appearance of impartiality. Specifically, Canon 4A requires judges to conduct all activities so that they do not "cast reasonable doubt on the judge's capacity to act impartially as a judge." Fundamentally, whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge.

Both a juvenile corrections facility and a child advocacy center can be construed as being related to the administration of justice, as can an increasingly large number of various social service organizations. Consequently, the key issue will be whether a judge's participation as a member would create an appearance of partiality. Several factors will contribute to whether that appearance is created. These factors may include:

(1) whether its members represent only one point of view or whether membership in the group is balanced;

(2) whether the group will discuss controversial legal issues and those issues likely to come before the courts or merely administrative or procedural concerns;

(3) whether the group will be viewed by the public as a political or an advocacy group or merely as an administrative group;

(4) whether the group will take public policy positions that are more appropriate to the other two branches of government than to the courts or whether the policy positions could be viewed as clearly central to the administration of justice.

Regardless of any of these factors, judges may provide information on matters concerning the law or the administration of justice to groups in which their membership would be precluded by the Code.

Applying these factors to the two groups that the judicial officers presented, one appears permissible, the other does not. The citizens' advisory committee for the juvenile corrections facility appears to be permissible for judicial membership as it is composed of a cross-section of interested parties who will not be advocates for any particular single interest and the group will be limited to administrative concerns. The child advocacy center planning committee is not appropriate for judicial membership as its membership is prosecutorial in nature and it appears to be fundamentally an advocacy group regardless of the purely administrative function of this particular committee.

Finally, judges who participate as members of permissible groups should constantly keep in mind the Commentary to Canon 4C(3): "The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation."

## Advisory Opinion #2000-02

**(Adopted October 16, 2000)**

**Question:** *May a judge contribute to an aggregate campaign fund that supports the retention of one or more judicial candidates?*

**Opinion:** A judge may not contribute to any campaign fund for public office regardless of whether the fund is an aggregate fund or an individual fund or whether the fund supports the retention of a judicial candidate or exists for another elective purpose. This opinion reaffirms Advisory Opinion #98-3. That opinion noted that the purpose of the Code provisions in Canon 5 is to insulate judges from "the political pressures that campaigns and fundraising necessarily entail." Canon 5A(1)(e) specifically prohibits judges from making "a contribution to a political organization or candidate for public office." The only exception is for judges who are candidates seeking retention and are covered by Canon 5C. That Canon allows judges who are candidates for retention to engage in limited political activity to secure their own retention. There are no other express exceptions to the Canon 5A(1)(e) prohibitions. However, there is arguably a different definition for "candidate for public office" and "candidate" for judicial retention. If there is a differentiation between the two, neither the language of the Code's Canons, themselves, nor the terminology section of the Code makes that distinction clear.

While the commentary to Canon 5C(3) (permitting limited political fundraising activity by retention judges) states that the sections of the Canon "are not intended to prohibit an organization of judges from soliciting money from judges to establish a campaign fund to assist judges who face active opposition to their retention," it does not address the prohibited political contribution activity of non-retention judges under Canon 5A(1). As stated above, that Canon addresses the ability of judges to contribute to political campaigns. The 5C(3) commentary seems to attempt to permit judges to do indirectly what they are prohibited from doing directly. In other words, the commentary implies that an organization of judges could solicit money from judges for a campaign fund (and necessarily that judges could then contribute to the campaign fund) that would not be permitted if the campaign fund were created by a single judge facing active opposition under Canon 5C(3). Judges should not be permitted to do indirectly what the Code prohibits directly.

The public will view an aggregate campaign fund supporting the retention of one or more judges as political activity opposing the various positions that the active opposition espouses. Aggregate funds, like those of individual judicial retention campaigns, necessarily engage the judges in the political forum. The commentary to Canon 5C(3) is unique to Alaska; other states with merit selection and retention systems do not permit judicial contributions. To best protect the non-political nature of Alaska's judiciary, judges should be insulated as much as possible from political influence and the appearance of political influence. Prohibiting judicial contributions to judicial retention campaign funds, individually or as an aggregate, provides the necessary insulation.

## Advisory Opinion #2001-01

**(Adopted February 26, 2001)**

**Question:** *May a Superior Court Judge serve on a state Children's Justice Act task force created by federal statute and requiring state judge membership?*

**Opinion:** This opinion supplements our Advisory Opinion #2000-01 in which we noted how Canon 4C(2) of the Alaska Code of Judicial Conduct restricts outside community activities of judges. That opinion summarized the Code's restrictions by stating: "Fundamentally, whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge."

To assist judges in determining whether any commission, task force, or committee is appropriate for judicial membership, Advisory Opinion #2000-01 set out four factors as follows:

(1) whether its members represent only one point of view or whether membership in the group is balanced;

(2) whether the group will discuss controversial legal issues, issues likely to come before the courts, or merely administrative or procedural concerns;

(3) whether the group will be viewed by the public as a political or an advocacy group or merely as an administrative group;

(4) whether the group will take public policy positions that are more appropriate to the other two branches of government than to the courts or whether the policy positions could be viewed as clearly central to the administration of justice.

Regardless of any of these factors, judges may provide information on matters concerning the law or the administration of justice to groups in which their membership would be precluded by the Code.

The mere fact that federal legislation requires state judge membership on a task force as a prerequisite for funding, does not preclude an independent ethics analysis by appropriate state judicial conduct commissions as to the propriety of state judges sitting in that capacity. Applying the listed factors to the state task force under the federal Children's Justice Act, Alaska judges may be members of the state task force if they limit their involvement to public policy positions that are appropriate for the courts and are not legislative or executive in nature. The task force has balanced membership, including both defense and prosecution, and appears to be chiefly concerned with administrative solutions to child- abuse problems.

One other state has addressed judge membership on a Children's Justice Act task force. That state, South Carolina, restricted the judge's membership to a court coordination subcommittee of the task force. In noting its restriction, the South Carolina Advisory Committee observed that the subcommittee was designed to "narrowly address matters concerning the administration of justice." (South Carolina Opinion no. 8-1996) The South Carolina view, consistent with our own, was concerned with judicial membership on "governmental advisory committees because the scope of the judge's involvement was vague and could extend into issues of fact or policy matters other than the improvement of the law, the legal system and the administration of justice." (S.C. Op. 8-1996)

While there is no indication that at the present the Alaska judges' involvement on the state task force will be limited to a "court coordination subcommittee," vigilance by the judge members in limiting their participation to matters directly concerning the administration of justice can achieve the same result. The judge members should avoid that aspect of the task force's work that concerns the investigation and prosecution of child abuse and neglect. Those areas are most appropriate for the legislative and executive agencies of our state government. Once the task force is constituted, the judge members should explicitly define their membership roles and advise the entire task force of the ethical limitations on their participation.

## Advisory Opinion # 2003-01

**(Adopted September 11, 2003)**

**Question:** *May a Superior Court Judge who sentenced a felon write a letter to the pardon board or parole board at the request of the convicted felon?*

**Opinion:** Canon 2 B of the Alaska Code of Judicial Conduct states, in part, that "A judge shall not use or lend the prestige of judicial office to advance the private interests of the judge or others." The relevant commentary to that section states: "Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, except in very limited circumstances, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer. A judge may provide to such persons information for the record in response to a formal request."

A judge should not write a letter at the request of the convicted person nor write a letter on the judge's own initiative. Either a sentencing judge or a judge who presided over the criminal trial may respond to an official request by the pardon or parole board for information that the judge had at the time of sentencing or trial. That request is an official formal request that clearly addresses the judge in the judge's official capacity.

Trial or sentencing judges should not initiate letters to pardon or parole boards without a request by the board. A response that is either initiated by the judge or is at the request of an individual may lead a reasonable observer to believe that the judge has a personal interest in the matter and is using the prestige of judicial office to further that interest. The judge would also be wise to follow an U.S. advisory committee's view (*see U.S. Advisory Opinion 65*[*]*(1980)* that allows a judge to convey only objective information that would assist in the determination. These judges should also refrain from personal opinions, values, or conjecture about the character of the person in any letter and the content should be narrowly drafted to address the criteria used by the pardon or parole board. Because the only permissible communications are "official" communications, official court stationary should be used for the letters to the pardon or parole board.

This opinion is not intended to restrict the ability of judges to act in their personal capacity when a member of their immediate family is either the victim of the crime or the convicted person coming before the board.

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[*] U.S. Advisory Opinions are published by a committee of the Judicial Conference of the United States called the Committee on Codes of Conduct. Its opinions are addressed to federal court judges. The published advisory opinions are available in the Federal Judiciary's Guide to Judiciary Policies & Procedures or online at www.uscourts.gov/guide/bgol2/ch4.html

## Advisory Opinion # 2004-01

**(Adopted February 2, 2004)**

**Question:** *What types of activities may judges perform to help further pro bono participation by attorneys?*

**Opinion:** Resolution of this question requires the Commission to address what judges may do to help further this participation, in response to the Alaska Supreme Court's application of a 50-hour pro bono aspirational rule to judges, while adhering to Canon 2's requirement that a judge "avoid impropriety and appearance of impropriety in all of the judge's activities," and Canon 4's requirement to "conduct the judge's extra-judicial activities [so] as to minimize the risk of a conflict with judicial obligations."

Alaska Supreme Court Order No. 1496, effective April 15, 2003, amended Rule 6.1 of the Alaska Rules of Professional Conduct. It adopted an annual aspirational goal of 50 hours of pro bono publico legal service for all lawyers, including judges. See, Paragraph 5 of the Commentary. Judge may satisfy their pro bono obligation through participation in "activities for improving the law, the legal system or the legal profession." This Order, with its commentary, is consistent with the provisions of Canon 4C of the Code of Judicial Conduct.

A judge may make monetary contributions to further pro bono activities. See, Alaska Commission on Judicial Conduct Advisory Opinion #98-4. The commentary to Rule 6.1 allows for the satisfaction of some or all of the judge's pro bono obligation by contributions. These contributions should be "reasonably equivalent to the value of the hours of service that would have otherwise been provided." However, a judge may not personally participate in any solicitation of funds or be a guest or speaker at a fundraising event, even on behalf of an organization devoted to the improvement of the law, the legal system, or the administration of justice. The sole exception to this limitation is that a judge may solicit funds from other judges, if the judge holds no supervisory or appellate authority over the judge solicited. See, Canon 4C(3)(b)(i).

Judicial ethics opinions from a number of jurisdictions suggest strongly that it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs. Solicitations on behalf of specific organizations may lead to "the impression that they are in a special position to influence the judge." This is a violation of Canon 2B. Additionally, since such solicitations ask the attorney to contribute time, which is equivalent to money, it could be considered fundraising. Consequently, it is impermissible for a judge to individually solicit attorneys to participate in pro bono organizations or to accept particular cases. However, general appeals to participate in pro bono efforts are permissible. And a judge's reference to a list of available pro bono programs is also allowed.

The commentary to Canon 4B makes clear that a judge should undertake efforts to improve the law, the legal system, and the administration of justice. Encouraging attorneys to fulfill their obligation to perform pro bono work, through speaking in support

of pro bono activities, serving on the board of a particular pro bono program (see below), or teaching at seminars for pro bono attorneys, would further this ethical responsibility. However, these activities should not refer attorneys to any particular pro bono program or specific cases.

Judges may be active in civic and/or charitable activities. Canon 4C(3) allows a judge to serve as an officer or director for an organization that is devoted to the improvement of the law, the legal system, or the administration of justice, subject to some specific limitations. Those limitations are of two types. The first is a general limitation that prohibits judges from serving as an officer or director for any organization that is involved in frequent adversary proceedings that would come before the judge, the court of which the judge is a member or a court over which the judge has appellate jurisdiction. The commentary to Canon 4C(3) directs judges to regularly reexamine the goals and activities of any organization to which he or she belongs to avoid this problem. The second severely limits the judge's involvement in the financial affairs of the civic or charitable organization.

Additionally, judges may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system and the administration of justice. See, Canon 4B. Examples of this activity could include participating in a workshop or CLE seminar that is made available at no (or reduced) cost for attorneys who agree to undertake pro bono cases. It would also be permissible for a judge to write articles for publication in bar or general-circulation media, encouraging members of the bar to participate in pro bono work.

Acknowledging the pro bono activity of particular attorneys would be permissible if it were done in a manner that is public, such as in a newspaper advertisement or displaying a plaque in a court. However, letters of congratulation that were sent directly to the attorney could be interpreted as evidence that the attorneys are in a special position of influence or that the judge's ability to act impartially has been compromised. This same problem would be presented if a judge hosted a social event for the such lawyers. In any activity, the judge must avoid impropriety and the appearance of impropriety. See, Canon 2A.

The Chief Justice of the Alaska Supreme Court serves a unique role in the Alaska Court System and should be provided more latitude when soliciting funds for organizations integrally concerned with the justice system in the state. Article IV, § 16 of the Alaska Constitution designates the Chief Justice the administrative head of all courts. As part of this responsibility, the Chief Justice appoints an administrative director of the court system. The State Personnel Act, (in AS § 39.25.020) grants the Chief Justice the authority to appoint all administrative and clerical personnel in the judicial system. These administrative duties of the office are clearly separate from judicial functions. This administrative role, for example, the Chief Justice gives a "State of the Judiciary" address to the legislature and testifies with the Administrative Director on proposed legislation and budgetary needs of the court system.

Each of the other branches of state government has an identifiable

spokesperson. The Chief Justice fills this position in the judiciary. There would be a unique void if the person filling that position, were not allowed to publicly solicit for the needs of the unrepresented. The concerns that led to the prohibitions in Canon 4C(3)(b) while applying with equal validity to the Chief Justice in charitable interests that are unrelated to the court system, fade when balanced against the need for an institutional voice from the court system who can speak to fundamental financial needs of justice administration. For these reasons, the Commission believes that a limited exception exists for the Chief Justice in pleas for funding assistance to particular charitable organizations that provide access to justice for those who are otherwise unable to pay.

## Advisory Opinion # 2006-01

**(Adopted October 30, 2006)**

**Question:** *May a judge conduct settlement conferences in cases where the judge is also the assigned trial judge?*

**Opinion:** A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Canon 3(B)(7)(a)(iii)(e). Trial judges conducting settlement conferences in their own cases must, however, have a heightened awareness of the appearance that the parties might feel improper pressure to settle or that the judge will no longer be impartial if the case fails to settle.

Some guidelines for settlement conferences include:

(1) Before beginning the settlement conference, the parties' request for and consent to participation by the trial judge should be established either in writing or on record.

(2) Sensitivity to the appearance of impropriety must always be a consideration for the judge. In all cases, the judge should be aware that recusal may be required if the case fails to settle and the judge has learned information during the conference that might undermine objectivity or create the appearance of impropriety. In each instance, the judge should ask whether a reasonable person, with knowledge of all the circumstances of the conference, would question continued impartiality by the judge.

(3) The concerns about the appearance of impropriety mentioned above may be heightened in cases where the judge, not the jury, will decide the case. Courts are divided on the question of whether, if settlement efforts fail in such a case, the judge must recuse from further participation in the matter. One state supreme court has held that the judge must recuse if a party requests it.[1] Another state supreme court has held that recusal is automatic by virtue of participation in settlement negotiations.[2] Courts in four other states have not required automatic disqualification, leaving the decision to the individual judge to determine whether continued involvement would

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[1] *Schellin v. N. Chinook Irrigation Ass'n,* 848 P.2d 1043, 1045 (Mont. 1993) (holding that the judge should have recused himself after participating in settlement negotiations between the parties); *Shields v. Thunem,* 716 P.2d 217, 219 (Mont. 1986) ("[W]here a judge is to be the trier of fact, and he participates in pre-trial settlement negotiations which subsequently fail, he should, upon request, disqualify himself from sitting as the trial judge.").

[2] *Timm v. Timm,* 487 A.2d 191, 204 (Conn. 1985) ("When a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety and to avoid subtle suspicions of prejudice or bias.").

lead to an appearance of impropriety and bias.[3] The Alaska Supreme Court has not addressed this issue.

(4) Although the judge may explain the law to the parties, the judge should not state how he or she intends to rule on disputed legal issues.

(5) Particular care should be taken in cases involving unrepresented parties. The judge should consider the possibility of recording all discussion in order to resolve any later dispute about statements made during the course of negotiations.

(6) Many of the above concerns do not arise where judges share settlement conference work in a way that reduces or eliminates the need for assigned judges to conduct their own settlement conferences.

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[3] *Sinahopoulos v. Villa,* 224 A.2d 140, 142 (N.J.Super. 1966) ("[T]he mere fact that the judge participated in a pretrial conference with a view to possible settlement of the case does not and should not indicate prejudgment.").

*In re Estate of Sharpley,* 653 N.W.2d 124, 129 (Wisc. 2002) (disqualification required "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner…The determination of a basis for disqualification here is subjective.").

*Enterprise Leasing Company v. Jones,* 789 So.2d 964, 968 (Fla. 2001) ("A judge is presumed by law to be unbiased and unprejudiced. A mere allegation of bias without a specific factual showing in support is insufficient to require disqualification.").

*Home Depot, U.S.A., Inc. v. Saul Subsidiary I Ltd.,* 159 S.W.3d 339, 341 (Ky.App. 2004) (holding that a tiral judge is not required to recuse after conducting mediation).

## Advisory Opinion # 2007-01

**(Adopted January 22, 2007)**

**Question:** *May a judge serve as a National Guard judge advocate?*

**Opinion:** A judge may serve as a National Guard judge advocate if the judge's role is limited to performing only those duties that do not resemble services provided by civilian attorneys for members of the military[4]. Alaska state court judges must comply with the Alaska Code of Judicial Conduct. Canon 4G of the Alaska Code prohibits judges from practicing law except for limited activity for the judge's family. Canon 2A requires judges to "avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary." And Canon 4 requires a judge to conduct all of the judge's extra-judicial activities in a way that will "minimize the risk of conflict with judicial obligations."

These Code provisions must be read together to guide a judge in determining whether duties required by service as a National Guard judge advocate would be permitted. The purpose behind the prohibition of practicing law is to ensure that the judge is not viewed in any way as an advocate or a less than impartial arbiter of the law. Judges are prohibited from assuming any role that could lead to the appearance that the judge is an advocate. Consequently, judges may not take any actions while serving as a National Guard judge advocate that would give the impression that the judge is an advocate on matters that concern the civilian justice system. Examples of impermissible activities include rendering legal advice and opinions on: environmental law, fiscal law, tort claims, administrative law matters, and discipline. Other impermissible activities include: serving as a recorder, legal advisor or military defense counsel or assisting military personnel in drafting personal legal documents such as wills or powers of attorney or advising in civil law areas such as consumer affairs and domestic relations. All of these roles are similar in nature to what civilian attorneys perform and could lead to an appearance of improper advocacy on the part of the judge.[5]

However, there are duties of the judge advocate that do not impact the judge's impartiality or appearance of impartiality. Those activities include: conducting training in the law of armed conflict, operations law, and international law. Judges are permitted to teach and training in these areas is compatible with the role of the judge.

So too, there is no apparent conflict or appearance problem for a judge who renders legal advice in a military capacity on a purely military issue. These purely

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[4] This opinion is limited to the permissible activities of National Guard judge advocates performing duties while in state military status. The Alaska Commission on Judicial Conduct is not expressing an opinion on permissible activities of National Guard judge advocates who have been activated and are therefore subject to federal military orders.

[5] Our position is consistent with the views expressed by the Washington Ethics Advisory Committee in its opinion 04-8 and the Virginia Judicial Ethics Advisory Committee Opinion 03-4 that cautions "that certain types of legal assistance resemble the services provided by civilian attorneys. Performing those types of duties may give the impression that the judge is practicing law and could be a violation of Canon 2."

military issues are issues without a civil law counterpart such as the law of armed conflict or operations law. Once again, the role here is limited to one of legal advice and should not involve the judge in appearing before a tribunal.

## Advisory Opinion # 2009-01

**Judge's post-verdict communication with discharged jurors**

**Question:** *Do ethical considerations restrict a judge's communications with recently discharged jurors following the conclusion of a jury trial?*

**Opinion:** Yes.

*Introduction*

Once a civil or criminal jury trial is concluded, jurors commonly express a desire to speak with the judge. Frequently, discharged jurors will have natural curiosity and questions about the case in which they have just participated. Former jurors' questions and comments may range from uncontroversial, administrative matters (parking, jury accommodations, suggestions for improvement of the jury experience), to substantive matters such as trial procedure, evidentiary rulings, possible criminal sentence, and the possibility of an appeal.

Once discharged, the procedural and ethical restrictions, which previously barred contact with empanelled jurors, cease to apply.[6] Once discharged, a former juror reverts to the role of private citizen, with no further obligations to the judicial system.

A recently discharged juror is in no different role than any other citizen except for the fact that the recently discharged juror often will have an enhanced and natural curiosity about the case, courtroom procedure, subsequent legal activity, and the effect of the verdict the jury has just rendered.

The trial judge often will have a correspondingly understandable desire to be responsive and accessible to the discharged juror. To the extent that dialog contributes to the discharged juror's understanding and respect for the legal system, this communication can be positive.

However, the judge's communications are constrained by the Rules of Professional Conduct[7] and the Code of Judicial Conduct. The scope of those restrictions depends on whether the verdict and discharge of the jury represents the final litigation event (as in the case of a verdict of (not guilty) in a criminal case) or whether subsequent post-verdict proceedings (such as criminal sentencing or post-trial motions in a civil trial) remain before the judge.

*Ethical constraints governing all contacts with discharged jurors regardless of whether*

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[6] This opinion deals only with a judge's post-verdict contact with recently discharged jurors. The subject of mid-trial or mid-deliberation contact with empanelled jurors is beyond the scope of this opinion.

[7] Alaska R. Prof. Conduct Rule 3.5(c) (Impartiality and Decorum of Tribunal) provides that a lawyer may communicate with a former juror unless law or court order specifically prohibits the communication, the juror expresses unwillingness to communicate, the communication involves misrepresentation, duress, coercion or harassment, or the communication is calculated to improperly influence future jury service. Alaska R.Prof. Conduct 3.5(c), enacted by SCO 1680, effective April 15, 2009.

*matters remain pending before the judge.*

Two ethical provisions govern a judge's contact with all discharged jurors. Canon 2A requires all judges to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and avoids the appearance of impropriety. Canon 3B(10) prohibits judges from commending or complimenting jurors on their verdict, but permits an expression of appreciation for their service to the community.

Therefore, when communicating with a discharged juror in any case regardless of its procedural posture a judge may:

- express appreciation for the discharged jurors' service;

- inform the jurors that the attorneys may wish to speak with them, that there is nothing improper with this request, that the choice to speak (or decline to speak) with the attorneys is theirs, and that legal professional ethical rules prohibit attorneys from harassing or engaging in a non-consensual contact with a discharged juror; and may

- request that the jurors report any harassment or non-consensual communication stemming from the jurors' service in the case to the judge or staff.

A judge may not:

- volunteer information about inadmissible, suppressed, confidential or non-public information that could reasonably have the effect of bolstering or undermining the former juror's confidence in the "correctness" of the verdict, but may respond to a juror's question about any public matter including suppressed evidence where the answer is an explanation of the evidence rules and court process;

- offer excessively complimentary or derogatory critique regarding the performance or credibility of the attorneys or witnesses; or

- offer comment regarding the judge's view of the "correctness" of the verdict.

Judges must be mindful that a judge's communication is restricted to a greater degree than that of the attorneys, the trial participants or private citizens. Other trial participants may have a constitutionally protected right to communicate with the discharged juror about the case. Unlike some other jurisdictions, no Alaska statute or court rule presumptively bars post-verdict communication with a discharged juror.[8]

[8] Alaska R.Evid 606(b) provides that, where the validity of an indictment or verdict is at issue, a former juror may not testify about jury deliberations or deliberation processes. But, this is an evidence rule that

The attorneys' conduct is governed only by the professional conduct rules, not the Judicial Canons. A private citizens' communication with discharged jurors is unregulated by state statute or court rule. In contrast, the judge's comments are restricted by the Canons referred to above. This distinction serves an important policy goal: the maintenance of an impartial and independent judiciary in appearance and in fact. Therefore, the judge's communication is held to a higher standard than the attorneys' or other private citizens' communications.

*Ethical constraints governing contacts with discharged jurors where post-verdict matters are still pending before the judge, where post-trial motions may occur or there is the possibility of a retrial.*

Where there is no verdict, i.e. a jury is unable to come to a decision resulting in a mistrial, judges must exercise extreme caution. Juror deliberations should be afforded the highest protection. While individual jurors cannot be restrained in the scope of their speech once discharged, a judge's interaction with a hung jury as a group may cause extreme discomfort among the jurors in the minority view as to a verdict. Further, if the prosecution decides to retry the matter, the judge's impartiality could be questioned for similar reasons to those that do not allow judges to participate in criminal plea bargains. Consequently, judges should avoid direct communication that goes beyond appreciation for service with a discharged jury that has not reached a verdict.

Commonly, after a guilty verdict is received and the jury discharged, substantive matters still remain before the trial judge. In a criminal case, sentencing is often scheduled several weeks after the return of verdict. In a civil case, post-verdict motions such as motions for new trial are common. It is in this circumstance where a judge must be cautious. Where post-verdict matters are foreseeable or pending before the judge, the judge must take affirmative steps to avoid even the appearance of communications that give the impression of pre-judging upcoming issues or that jurors can influence those decisions.

Where matters are still before the judge, additional provisions of the Judicial Canons apply. With several exceptions not applicable here, Canon 3B(7) prohibits judges from initiating or permitting ex parte communications regarding a pending matter. Canon 3B(9) prohibits judges from making a public comment that may impair the fairness of a pending proceeding.

Where a judge initiates or participates in a dialog with recently discharged jurors, extra care must be taken to insure that the conversation does not stray toward the discharged jurors' favorable or unfavorable opinion regarding a trial participant, witness or the factual merits of the case. In a criminal case, where the jury has found the defendant guilty, but sentencing has not yet occurred, it is foreseeable that the jurors will ask the judge about the probable sentence, and express their opinion one way or the other. In a civil case, jurors may ask questions about the financial effect of their verdict upon

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governs admissibility of testimony. This rule does not categorically bar the discharged juror from speaking about the case, or bar any person from seeking to interview the discharged juror.

the litigants, the collateral effect of the verdict, or insurance consequences.

The judge must be particularly on guard because a discharged juror's opinion about the merits of the just-completed trial could convey the impression that the judge will resolve future issues in a certain way. So too, discussing the probative force of the evidence, the performance of the advocates, or the relative culpability of the criminal defendant, could leave an impression of the likely future decisions by the trial judge. If the judge has post-trial matters still pending, the litigants may legitimately view the communication as appearing to influence, however subtly, the judge's ultimate ruling on post-trial matters. Even worse, should the judge express agreement or disagreement with a juror's opinion, the appearance of pre-judgment of any still-pending issue is obvious. A judge in this position runs the risk of inviting a motion for disqualification based upon the communication. A judge may advise the jury of the date for sentencing and the pre-sentence/sentencing process and advise the jury that they are free to attend the sentencing if they choose to do so.

Where matters remain pending, a trial judge must manage any jury conversation with care. While the judge may explain events that occurred on the public record, the judge must not allow or participate in discussion of the merits of the case and must politely decline to answer questions about probable post-verdict rulings.

Before the judge initiates a conversation with the discharged jurors, the judge must inform the litigants of the judge's intent to speak with them.[9] The judge should not engage in a lengthy dialog, as the chances of a questioned communication increase with the length of time the discharged juror spends speaking with the judge. Finally, if the judge is inadvertently exposed to an opinion about the merits of the case, or receives a report of substantive juror misconduct, the judge should immediately inform the parties orally on the record or in writing.

As stated above, mere statements of appreciation for the jurors' service raise no concern. Judges may also distribute various court approve d surveys to jurors that assist in addressing court administration concerns, and may explain court procedures or answer questions concerning matters that occurred in open court.

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[9] A private, off-record, meeting between the judge and the discharged jurors, outside the parties' presence, may generate questions about what was said; judges. Judges should determine the best method to address any discomfort by the parties and lawyers, such as allowing litigants the opportunity to be present. or, perhaps most appropriately, having that conversation on the record.

# APPENDIX I

## Commission Rules of Procedure

# ALASKA COMMISSION ON JUDICIAL CONDUCT

# RULES OF PROCEDURE

Adopted December 1, 2000
(Last revised September 23, 2011)

# Alaska Commission on Judicial Conduct

# Rules of Procedure

(Adopted December 1, 2000 and subsequently revised. Latest revision September 23, 2011)

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**Rule 1. Organization of Commission**.

(a) Meetings. The commission holds the following meetings:

(1) Annual. The first regularly scheduled meeting of the calendar year is the annual meeting. At the annual meeting, the commission will approve the commission's annual report and will elect officers every two years.

(2) Regular. Other regular meetings at designated locations may be held as needed. Regular meetings may be held either in person or by teleconference.

(3) Special. Special meetings may be called by the chairperson or two members of the commission upon prior written or verbal notice to all members where there is a need to meet on short notice for a special purpose. If the special agenda includes any public matter, public notice shall be given at least 24 hours before the meeting. Special meetings may be held either in person or by teleconference.

(b) Notice of Meetings. Notice of meetings is required as follows:

(1) Public. At least 14 days before a regular commission meeting, the executive director shall give public notice to be placed in newspapers of general circulation most likely to give notice to the residents of the State of Alaska. The notice shall clearly specify the date, time, and place of the commission meeting and shall also state that anyone wishing to appear at the meeting must contact the executive director at the commission office at least five working days before the meeting. An agenda of public matters shall also be included in the meeting notice.

(2) Members. At least 14 days before a regular commission meeting, the executive director shall give notice of the meeting to each member of the commission. The notice must contain the date, time, and place of the meeting, and a tentative meeting agenda. The commission will, in its discretion, waive notice for any meeting.

(c) Officers. The commission has the following officers:

(1) Chair. The commission will elect a chair and a vice-chair by majority vote at the annual meeting. The term of office is two years. The chair shall conduct the meetings; certify commission recommendations; direct the preparation of meeting agendas, notices, reports, and minutes; and ensure accurate record-keeping. The vice-chair shall act in the absence of the chair.

(2) Executive Committee. The chair may appoint an executive committee to perform matters of administration as from time to time are designated by the commission.

(d) Commission Office. The commission shall establish a permanent office in a building open to the public. The office must be open and staffed at regular office hours.

(e) Quorum. No dispositive action may be taken by the commission unless a quorum of at least a majority of the members serving on the commission is present, in person or telephonically, at the meeting. A quorum of the commission must include at least one judge member, one attorney member, and one public member.

(f) Voting Requirements. The following rules apply to voting on commission action:

(1) Every action of the commission requires a majority vote of the members serving on the commission at the time the action is taken.

(2) The names of commission members voting on any question shall be recorded in the minutes.

(3) Once cast, votes may be changed only during the same meeting on a motion to reconsider unless otherwise provided by these rules.

(g) Order of Business. The chair shall determine the order of business in advance of each meeting.

(h) Public Participation. The meetings shall be ordered to encourage attendance by the public, where public matters are considered. To facilitate productive and effective meetings, any member of the public who wishes to testify at a public meeting of the commission shall make the request to the executive director at least 48 hours before the commencement of the meeting. Requests will be honored only if the general substance or subject area on which the individual wishes to testify concerns a public matter related to the commission's function under the Alaska Constitution and the statutes of the state. All requests are subject to approval by the commission chair. Written public testimony will be accepted at any time, concerning any matter relating to the commission's function.

(i) Electronic and Written Records. The executive director shall electronically record all commission meetings except for commission deliberations, prepare minutes of both public and closed sessions subject to approval of the commission, and maintain their permanent storage. The executive director shall preserve all documents, including tape recordings, staff notes and memoranda, transcripts of testimony before the commission, and correspondence.

(j) Commission Member Holdover. To ensure that the commission continuously fulfills its constitutional responsibilities, a commission member continues to serve as an active member after expiration of that member's term until the vacancy is filled by the appropriate appointing authority. [Adopted November 1, 1991; amended December 10, 1993; May 9, 1995; December 1, 2000.]

(k) Complaints Against Staff. Complaints against Commission staff will be handled in the same manner as complaints against Alaska Court System employees. Complaints against staff are confidential personnel matters and may not be addressed publicly under section (h) of this Rule. Any complaint against the Executive Director must be in writing

and addressed to the Chair. If the Chair determines the complaint merits investigation, the Executive Director will be given an opportunity to respond in writing. Thereafter, the Chair may: decide the matter, form a personnel committee, or present the matter to the full Commission for its consideration.

**Rule 2. Functioning of Commission.**

(a) Annual Report. Before the annual meeting, the executive director shall prepare an annual report of the commission's activities for presentation at that meeting. Upon approval by the commission, the executive director shall send a copy of the annual report to the governor, president of the senate, speaker of the house, chief justice, state publications distribution and data access center, and president of the Alaska Bar Association. The report shall also be kept available to the public.

(b) Executive Director. The commission will appoint an executive director to serve at its pleasure. While serving, the executive director may not be employed by the court system and may not be a judicial officer.

(c) Agents or Employees of Commission. The commission will employ individuals as appropriate to carry out its duties. Employees may include attorneys, accountants, paralegals, secretaries, and investigators. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 3. Financial Arrangements for Commission**.

(a) Compensation Proscribed. The commission members serve without compensation for their services.

(b) Expenses Allowed. Commissioners are reimbursed for expenses necessarily incurred in the performance of their duties as established by state law.

(c) Authorization for Payments. The commission will authorize payment for expenses that are within the commission's budget and comply with travel policies and procurement guidelines. Either the executive director or the chair may authorize payments of approved expenses.

(d) Extraordinary Expenses. If there is an unanticipated funding shortfall, the commission will not curtail the discharge of its constitutionally mandated operations, but will authorize the executive director to seek a supplemental appropriation. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 4. Duties of Executive Director.**

(a) Listed Duties. The commission will prescribe the duties of the executive director, which include:

(1) considering information regarding judicial misconduct from all sources and receiving allegations and complaints;

(2) making preliminary evaluations;

(3) screening complaints;

(4) conducting and supervising investigations;

(5) maintaining and preserving the commission's records, including all complaints, files, and written dispositions;

(6) maintaining statistics concerning the operation of the commission and making them available to the commission, the court, and the public;

(7) preparing the commission's budget for its approval and administering its funds;

(8) employing and supervising other members of the commission's staff;

(9) preparing an annual report of the commission's activities;

(10) employing, with the approval of the commission, office assistants, special counsel, private investigators, or other experts, as necessary to investigate and process matters before the commission and before the court;

(11) issuing subpoenas as directed by the commission;

(12) attending all meetings and hearings of the commission, except for commission deliberations; and

(13) providing and publishing notice as required by these rules.

(b) Other Duties. The executive director may perform other law-related duties, such as the following:

(1) interpreting statutes and case law and providing legal opinions to the commission related to its duties;

(2) preparing and filing court documents, as needed, on behalf of the commission;

(3) negotiating appropriate discipline and fact stipulations subject to final approval of and direction by the commission. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 5. Confidentiality.**

(a) Confidentiality. All investigative records, files, and reports of the commission are confidential and no disclosure may be made except as permitted by AS 22.30.060. All confidential documents acquired in the course of a commission investigation shall be accorded the same confidentiality as commission-generated documents.

(b) Disclosure -- Generally. To preserve public confidence in the administration of justice, the commission will, in its discretion, issue statements clarifying procedural aspects or explaining the right of a judge to a fair hearing when the subject matter of a complaint is generally known to the public. Unless otherwise provided by these rules, a person filing an accusation may have access only to those materials that the person has provided to the commission.

(c) Disclosure -- Dismissal. When an accusation against a judge has been considered by the commission and it has been determined that there is no basis for filing a charge or for further proceedings, the commission will, in its discretion and at the judge's request or approval, issue an explanatory statement.

(d) Disclosure -- Determination. Upon completion of an investigation or proceeding, the commission will disclose to the complainant that the commission

(1) has found no basis for action against the judge;

(2) has taken an appropriate corrective action, the nature of which, under AS 22.30.011(b), cannot be disclosed; or

(3) has filed a formal charge against the judge. [Adopted November 1, 1991; amended December 1, 2000.]

(e) Waivers. A judge may partially waive confidentiality by signing a Commission Waiver of Confidentiality for future employment or retention purposes. This partial waiver will permit the Commission to provide factual summaries of all instances where the Commission has taken disciplinary action under Rule 11 (b)(2)-(4) of these rules, including Informal and Private Admonishment and Recommendations for counseling in all its forms. "Future employment or retention purposes" include applications for other judgeships, other government employment or public office, private employment and seeking retention in current judicial office. *(adopted June 29, 2009)*

**Commission Waiver of Confidentiality**

Pursuant to Commission Rule 5(e), I waive my rights to confidentiality concerning any actions taken by the Commission under Rule 11(b)(2)-(4). I am seeking a position of (or seeking to retain my judicial position as) _____, and authorize Commission staff to provide a factual summary of any and all actions taken by the Commission to _____, for purposes of determining my qualifications for the position. No other use is authorized by this waiver; however, I recognize that once released, further dissemination of this information may not necessarily be restricted by law.

Dated:

Judge:

_____
*print name*

_____
*signature*

**Rule 6. Public Information.**

(a) Public Statements -- General. The commission will, in its discretion, issue press releases and other public statements explaining the nature of its jurisdiction, procedures for institution of accusations, limitations upon its powers and authority, and reports on the activities of the commission. The releases and reports may not identify the judge or other person involved in any inquiry before the commission unless disclosure is otherwise provided for in AS 22.30.060.

(b) Formal Proceedings. After a formal charge is filed, only the formal charge, the answer, the formal evidentiary hearing, and the final recommendation by the commission, including any minority report, are public. Unless otherwise ordered, all discovery items introduced into evidence at the public formal hearing become public documents when introduced. All other discovery items remain confidential. Dispositive motions and related resulting orders become public documents when decided.

(c) Formal Ethics Opinions. In its discretion, the commission will issue public formal ethics opinions resulting from actual complaints. Formal ethics opinions are not to be confused with formal advisory opinions issued under Rule 19 of these rules. The purpose of issuing a formal ethics opinion is to guide judges and to inform the public. These

opinions may not identify the judge or otherwise violate the commission's obligation to maintain the confidentiality of its proceedings. A formal ethics opinion may not be issued until the disciplinary process involving the underlying facts has been concluded and all related appellate proceedings have been adjudicated.

(d) Inquiries by the Press. Inquiries by the press concerning commission activities may be responded to only by the executive director, unless otherwise directed by the commission.

(e) Comments by Commission Members. Commission members should refrain from publicly commenting on the judicial qualifications of any sitting or pro tem judge. [Adopted November 1, 1991; amended March 1, 1996; December 1, 2000.]

**Rule 7. Initiation and Screening of Complaint.**

(a) Filing of complaint. A written complaint about the conduct or physical or mental disability of a judge may be filed upon any reasonable basis. A complaint may be filed by any individual, including a commission member, or by the commission itself. If a commission member files a complaint as an individual and not under (c) of this rule, that member may not participate in the matter.

(b) Screening of complaint. Each written complaint shall be screened in accordance with the following procedures:

(1) The executive director shall review a written complaint and determine whether the information or statement is within the jurisdiction of the commission and is not frivolous.

(2) If the executive director determines that the matter is not within the jurisdiction of the commission or not supported by facts, the executive director shall, after providing notice to the complainant and an opportunity to amend the complaint, recommend dismissal. A judge will not be notified of a dismissal under this paragraph.

(3) If the executive director determines that the matter is not frivolous, the executive director shall make a preliminary investigation to determine what further action should be taken, if any. After the preliminary staff investigation, the commission will either dismiss the complaint or direct further investigation. If the commission directs further investigation, the executive director shall notify the judge of the investigation, as set out in Rule 8 of these rules.

(c) Commission-initiated complaint. When a commission member or staff person becomes aware of information concerning possible judicial misconduct, he or she may inform the executive director. The executive director shall preliminarily investigate the information, and, if supported, present the information to the commission with a recommendation as to whether the matter should be designated a commission-initiated complaint. Once a matter is designated a commission-initiated complaint it will be treated in the same manner as a complaint filed by an individual under (a) of this rule. [Formerly

(before December 1, 2000) Rule 8. Adopted November 1, 1991; amended December 1, 2000.]

**Rule 8. Notice.**

(a) Notice of Investigation. If, after conducting an initial investigation, the executive director anticipates recommending to the commission at its next meeting an outcome other than dismissal and the chair agrees that notice at this time is appropriate, or if the commission does not dismiss the matter at a meeting, the executive director shall send a written notice of investigation to the judge. The notice of investigation must identify the complainant, if the complainant has authorized use of his or her name, and must convey the basic substance of the investigation and the date of the next commission meeting when the investigation will be reviewed. In addition, the written notice must convey the possible outcomes: dismissal, informal and private admonishment, recommendation for counseling, or proceeding to a probable cause determination. The executive director may issue supplemental notices as appropriate. In instances where the initial investigation is thorough enough to also serve as the full investigation, the commission may authorize both the notice of investigation and notice of probable cause determination under (b) of this rule in the same document at the same time.

(b) Notice of Probable Cause Determination. After an investigation, if the commission has decided that a probable cause determination is necessary, the executive director shall send a written notice of probable cause determination to the judge. The notice must include the date of the determination meeting and a citation of Rule 12 of these rules, pre-hearing discovery. In addition, the written notice must state the possible outcomes as listed in (a) of this rule.

(c) Notice After Formal Charge. The executive director shall provide appropriate notice of commission action taken under Rules 14 - 18 of these rules.

(d) Notice of Recommended Dismissal and of Dismissal. The executive director shall inform the complainant in writing of the executive director's recommendation of dismissal and that the dismissal will be reviewed by the commission at its next meeting. If the judge has been given prior commission notice, the executive director shall also inform the judge in writing of the recommended dismissal. After the commission's dismissal of a complaint, at whatever stage of proceedings, the executive director shall so inform the complainant and, if the judge has been given prior commission notice, the judge.

(e) Method of Service. Unless otherwise specified, notice to the judge, when required by these rules, shall be given by personal service, or by prepaid certified or registered mail that is addressed to the judge. [Formerly (before December 1, 2000) Rule 7. Adopted November 1, 1991; amended December 1, 2000; June 30, 2003; February 1, 2004; May 19, 2008]

**Rule 9. Formal Investigation**.

[REPEALED DECEMBER 1, 2000.]

**Rule 10. Subpoenas.**

(a) When Issued. The commission will, in its discretion, compel by subpoena the attendance and testimony of witnesses, including the judge, and the production of papers, books, accounts, documents, and testimony relevant to the investigation or proceeding. Service may be by commission staff or official process server.

(b) Request for Commission Subpoena. A request for a commission subpoena, under AS 22.30.066, shall be made to the executive director and must include

(1) the name of the person or document to be subpoenaed;

(2) the purpose and relevance of the testimony or document; and

(3) a statement whether the person or document would be available without a subpoena.

(c) Non-compliance With Commission Subpoena. If a person does not attend, testify, or produce a document required by a commission subpoena, the commission will, in its discretion, petition the superior court for an order compelling the person to comply with the subpoena. A claim of privilege must be asserted formally before the commission no later than the date of compliance stated in the subpoena. Privileges are those recognized in Article V of the Alaska Rules of Evidence and claims of privilege will be decided by the commission. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 11. Investigation Results; Commission Action.**

(a) Initial Commission Determination. The commission will promptly consider the results of an investigation at a regularly scheduled meeting of the commission or a special meeting called for consideration of the matter. In extraordinary situations, as determined by the commission, the commission will designate a master to make findings of fact related to a charge. At the meeting, neither the judge, the judge's attorney, nor witnesses may appear unless requested by the commission. The commission will consider any brief written statement provided by the judge.

(b) Disposition. The commission will proceed in one of the following ways:

(1) Dismissal. If the commission does not find that misconduct has occurred, the commission will instruct the executive director to send notice of dismissal under Rules 5(d) and 8(d) of these rules.

(2) Informal and Private Admonishment by the Commission. If the commission finds that there has been misconduct for which informal and private admonishment is appropriate, the commission will, in its discretion, issue a written private admonishment to the judge. The admonishment will include findings of fact and conclusions of law. A private admonishment becomes a final disposition 16 days after service on the judge unless the judge requests reconsideration under (c) of this rule.

(3) Recommendation for counseling. If the commission finds that there has been misconduct for which counseling is appropriate, the commission will, in its discretion, recommend counseling. For purposes of this paragraph, "counseling" means personal or professional counseling, further training, and other remedial measures; it can take the form of a cautionary letter. The commission will, in its discretion, also enter into an agreement with the judge, set out in a memorandum, concerning the judge's future conduct or submission to counseling. The executive director shall notify the complainant, under Rules 5(d) and 8(d) of these rules, that the matter has been resolved by recommended counseling. The commission will monitor any prescribed counseling.

(4) Probable Cause Determination. If the matter has not been resolved under (b)(1), (2), or (3) of this rule, the commission will determine probable cause at a definite time and place with reasonable notice to the judge. The commission chair, or a member of the commission designated by the chair, shall preside. At the meeting, neither the judge, the judge's attorney, nor witnesses may appear unless requested by the commission. The commission will consider written or taped witness statements, staff investigative reports, and any written information provided by the judge. The commission will make one of the following findings:

(A) Lack of Probable Cause. If the commission fails to find probable cause that there has been misconduct that warrants action more serious than informal and private admonishment or counseling, it will dispose of the matter under (b)(1), (2), or (3) of this rule.

(B) Probable Cause. If the commission finds that there is probable cause to believe that there has been misconduct that warrants action more serious than an informal and private admonishment or counseling, the chair or executive director shall serve the judge with a statement of formal charge and all documents upon which the finding was based. Service upon the judge constitutes notice that a response must be filed within 20 days.

(c) Reconsideration. Within 15 days after service of an informal and private admonishment under (b)(2) of this rule, the judge may request reconsideration, by filing a written motion with the commission. Upon receipt of the motion, the commission will dismiss the complaint, deny the motion for reconsideration, make further investigation, or institute a formal charge under (b)(4)(B) of this rule and Rule 14 of these rules. Reconsideration is not available for recommendations of counseling under (b)(3) of this rule or determinations of probable cause under (b)(4)(B) of this rule. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 12. Pre-Hearing Discovery.**

(a) General Scope. To expedite the hearing and maintain fairness, discovery will be as full and free as possible. The judge and special counsel are entitled to discovery in accordance with the Alaska Rules of Civil Procedure, including the limitations set out in those rules, except as noted in this rule. Exceptions to discovery are: (1) commission deliberations, and (2) confidential staff memoranda and other communications that do not relate to the charge. In addition, the executive director may not be compelled to testify as to conversations with the chair or other individual commission members concerning nondispositive motions. The judge shall bear the costs of duplication and transcription of all discovery items that require extraordinary staff resources.

(b) Discovery Before Formal Charge. Before a formal charge is issued, the commission will provide witness names, factual allegations, and a statement of legal issues to the judge at the conclusion of the investigation if the information does not warrant dismissal. Additional discovery will be, in the commission's discretion, as implemented by the chair under Rule 14(d) of these rules, allowed before the probable cause proceeding.

(c) Discovery After Formal Charge. After a formal charge is issued, the chair shall handle discovery requests. All discovery tools are available after a formal charge is issued. With the approval of the commission, the commission chair or the chair's designee (including a special master) may preside over depositions. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 13. Special Counsel.**

(a) Appointment. The commission will appoint a special counsel when a formal charge is issued or earlier when the commission determines that the appointment is necessary to preserve its adjudicative independence. The special counsel serves at the pleasure of the commission.

(b) Role and Duties. The special counsel is hired by the commission to formally prepare and present the case against the judge. The special counsel represents the public interest and may not represent any individual commission member or staff person but may represent the commission, as an entity, in related proceedings.

(c) Powers. The special counsel may request commission subpoenas, conduct discovery, and file motions. The special counsel may not dismiss or amend a charge, delay proceedings, or take other dispositive action. The special counsel may incur only those expenses authorized by the commission. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 14. Formal Disciplinary Hearing**.

(a) Pre-hearing Conference. Upon receipt of the judge's response to the complaint, the commission will set a pre-hearing conference to be held not later than the next regularly scheduled commission meeting. The commission chair or the chair's designee shall preside at the pre-hearing conference. At the conference, a discovery and briefing schedule will be established and the hearing date set. The discovery and briefing schedule will include

(1) a preliminary witness list;

(2) a preliminary exhibit list;

(3) a schedule for substantive motions.

(b) Discovery. Discovery for a formal hearing is governed by Rule 12(c) of these rules.

(c) Master. The formal hearing will be conducted before either the commission or a master designated by the commission. A master will be used only in compelling and extraordinary situations, as determined by the commission. When the hearing is before the full commission, either the chair or another member appointed by the chair will preside. A member of the commission may not serve as master. The master will have the same procedural authority as the commission chair when conducting the hearing.

(d) Role of the Chair. The chair is the presiding officer both at the hearing and during pre-hearing and post- hearing motions. The chair has the authority to decide all nondispositive motions on behalf of the full commission.

(e) Conduct of Hearing. The following rules apply to the conduct of hearings:

(1) At the time and place set for the hearing, the full commission will, or master shall, proceed with the hearing whether or not the judge has filed an answer or personally appears at the hearing.

(2) A hearing may rely in whole or in part on a statement of facts agreed to by both parties and placed in the public record.

(3) The proceedings at the hearing will be reported by electronic recording device in the same manner as proceedings are reported in a state court. The judge may, at the judge's expense, provide a court reporter of the judge's choosing.

(4) Commission members may question witnesses and hold brief conferences during the course of the hearing, to facilitate their fact-finding function.

(f) Evidence. The rules of evidence apply and all testimony will be under oath. The chair, presiding member, or master will administer the oath, rule on the admissibility of

evidence, and otherwise direct the manner and order of proceedings in the same manner as a judge of a state court. The standard of proof is clear and convincing evidence.

(g) Amendment of Complaint. By leave of the commission, a formal charge may be amended after the hearing begins, to conform to proof or to present additional facts, if the judge and the judge's counsel are given adequate time to prepare a response.

(h) Determination. Upon determination of a matter, the following rules apply:

(1) When the factfinder is a master, that master shall, within 60 days after the hearing, submit findings and recommendations, together with the record and transcript of proceedings, to the commission for review, and contemporaneously serve them upon the judge. The commission will pay all costs associated with the master's findings and recommendations.

(2) The judge, and commission counsel, may submit written objections to the findings and recommendations of the master within 15 days after receipt.

(3) The findings, conclusions, and accompanying materials, together with the objections, if any, will be promptly reviewed by the commission not later than its next regularly scheduled meeting. The commission may make independent findings of fact from the record. If the entire commission served as factfinder, the chair will draft findings and recommendations as directed by the commission.

(4) If no statement of objection is filed within the time provided, the commission will, in its discretion, adopt, in whole or in part, the findings of the master without a hearing. If a statement of objection proposes to modify or reject the findings of the master, the commission will give the judge and special counsel an opportunity to be heard orally before the commission not later than its next regularly scheduled meeting. The executive director shall serve written notice of the time and place of the hearing on the judge at least 10 days before the hearing.

(i) Extension of Time. The chair of the commission or the master may grant reasonable time extensions for good cause shown.

(j) Hearing Additional Evidence. The commission will, in its discretion, order the taking of additional evidence at any time while the matter is pending before it. The order will set the time and place of the hearing and indicate the matters on which the evidence is to be taken. The executive director shall serve a copy of the order on the judge at least 10 days before the date of the hearing. The hearing of additional evidence may be before the master or the commission, at the commission's discretion.

(k) Role of Executive Director After Formal Charge. After a formal charge is issued, the executive director may serve as a liaison between the commission and all counsel of record, and may provide research and administrative assistance as requested by the commission. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 15. Commission Decision.**

(a) Decision. A formal decision consists of the commission determination of dismissal or recommendation for discipline. The recommendation for discipline may include any one or more of the sanctions provided for in AS 22.30.011(d). Formal decisions are public documents.

(b) Minority Report and Distribution. If a member of the commission dissents from the decision of the majority of the commission, the dissenting member may submit a minority report, which must accompany the majority report. The minority report may be submitted to the chief justice of the supreme court, the attorney general, and the chairs of the senate and house judiciary committees, as provided in AS 22.30.068.

(c) Voting. Only a member who participated in the matter, and who is present at the meeting or teleconference at which commission action is taken on the matter, may vote on the matter. Before the final decision is issued, votes may be changed only during a meeting or teleconference with all members who participated in the matter being present.

(d) Execution. The determination and recommendation of the commission will be signed by the chair, or the chair's designee, and may be signed by other members, either concurring or dissenting in the determination or recommendation.

(e) Witness Fees. All witnesses will receive fees and expenses in the statutorily allowable amount. Expenses of witnesses will be paid by the party calling them, unless the physical or mental disability of the judge is in issue, when the commission will reimburse the judge for the reasonable expenses of witness testimony related to the disability. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 16. Supreme Court Review.**

The commission recommendation for discipline under Rule 15 of these rules will be filed in accordance with Appellate Rule 406 of the Alaska Rules of Court. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 17. Cases Involving Mental or Physical Disability.**

(a) Procedure. When considering an allegation of mental or physical disability, the commission will, except as provided in this rule, follow procedures established by Rules 1 - 16, 18, and 20 of these rules.

(b) Special Provisions. The following additional provisions apply in disability cases:

(1) If the commission finds probable cause to believe that a judge suffers from a mental or physical disability and the judge is not represented by counsel, the commission will, in its discretion, appoint an attorney to represent the judge at commission expense.

(2) If a judge is charged with a disability or raises a disability as an affirmative defense to misconduct, the commission will, in its discretion, under AS 22.30.066(b), request the judge to submit to a physical or mental examination by an independent medical expert. The medical expert shall report the results of the examination to both the commission and the judge. If the judge refuses to submit to the examination, the commission will decide the issue requiring the examination adversely to the judge.

(3) The commission will bear the costs of disability proceedings. [Adopted November 1, 1991; amended December 1, 2000.]

**Rule 18. Commission Member Disqualification; Proceeding Against Commission Member.**

(a) Conflict of Interest. A commission member may not participate in the consideration of a complaint against a judge if

(1) the member is the subject of the complaint;

(2) the member is a material witness to the alleged misconduct;

(3) the member is related to the judge or the complainant within the third degree of consanguinity;

(4) the judge has retained the member as the judge's attorney or the member provided legal representation or counseling in any matter within two years before the filing of the complaint with the commission; or

(5) the member believes that, for any reason, that member cannot give a fair and impartial decision.

(b) Disclosure. Each commission member shall disclose all facts that may lead to an inference of bias relating to a matter before the commission. After disclosure, the commission will determine whether the facts warrant disqualification. Commission members may also recuse themselves with a statement on the record as to the basis of the recusal.

(c) Motion for Disqualification. The judge or special counsel may request the disqualification of a commission member by filing a motion. The motion must be accompanied by an affidavit that states with particularity the grounds upon which it is claimed that the member should be disqualified. A motion for disqualification will be decided by that member. If the motion is denied by that member, the motion will be

decided by the commission chair or, if the motion concerns the chair, by the longest-serving commission member.

(d) Proceeding Against Commission Members. A proceeding against a member of the commission will be conducted in the same manner as a proceeding against any other judge.

(e) Prohibition Against Representing Judge Before the Commission. No commission member may provide legal representation or counseling to a judge in a matter before the commission during the member's term on the commission or within two years after the member's term has expired. [Adopted November 1, 1991; amended May 23, 1994; December 1, 2000.]

**Rule 19. Commission-Issued Advisory Opinions.**

(a) Issuance of Formal Advisory Opinions. On written request of a state judicial officer subject to the Code of Judicial Conduct, the commission will, in its discretion, issue a written formal advisory opinion concerning the application of the code to a specific fact situation involving that judicial officer. The request for an opinion should specify all facts relevant to the ethical situation. Both the request for an opinion and the opinion itself are confidential unless the requesting judge asks that it be public.

(b) Advisory Opinion Drafting. Written formal advisory opinions will be drafted by a committee of the commission, appointed by the chair for the purpose of drafting the opinion, with staff assistance. The drafting committee will be composed of not less than one public member, one attorney member, and one judge member of the commission. The full commission will vote on adoption of the draft opinion.

(c) Use of Formal Advisory Opinions. Reliance on the formal advisory opinion by the requesting judge is an absolute defense to subsequent disciplinary proceedings by the commission concerning the identical facts addressed by the opinion. If there are distinguishing facts, reliance on the formal advisory opinion will be viewed as merely a good faith defense.

(d) Informal Verbal Advisory Opinions. Informal verbal guidance concerning judicial ethics issues is available from commission members and staff. Informal verbal advisory opinions have no legal effect and, if in error, provide no recognized defense to a later disciplinary charge. [Adopted March 1, 1996; amended December 1, 2000.]

**Rule 20. Settlement Procedures.**

(a) Settlement After Investigation. After an investigation, the executive director may initiate settlement discussions with the judge that may result in one of the following: an informal and private admonishment, or a recommendation for counseling. The executive

director shall present any agreed disposition to the commission for approval or rejection. If rejected, the commission will, in its discretion, give reasons for the rejection but will not comment on the strength or weakness of the factual investigation. If the settlement is approved, the executive director shall prepare a written statement of facts and a decision in support of the agreed action. The statement of facts and decision may be revised by the commission but, once adopted, will either constitute the private admonishment or state the need for counseling.

(b) Settlement After Probable Cause Finding. After the commission has found probable cause and has issued a formal charge, the commission will hold a formal hearing on the allegation, as required by AS 22.30.011(b) and as provided in Rule 14 of these rules. A settlement after the commission has found probable cause must include a public hearing during which any stipulation between the parties, and the disposition of each charge, are publicly presented and made a part of the public record. If the commission does not dismiss the charges against the judge, a settlement after the hearing must be in the form of a recommendation to the Supreme Court, and does not take effect until approved by the court. [Adopted December 1, 2000.]

# APPENDIX J

## List of Published Alaska Supreme Court Opinions

## Addressing Judicial Conduct in Alaska

# LIST OF
# PUBLISHED ALASKA
# JUDICIAL DISCIPLINE COURT OPINIONS
# BY ALASKA SUPREME COURT

**In re Robson,**
500 P.2d 657 (Alaska 1972)

**In re Hanson,**
532 P.2d 303 (Alaska 1975)

**In re Inquiry Concerning a Judge,**
762 P.2d 1292 (Alaska 1988)

**In re Inquiry Concerning a Judge,**
788 P.2d 716 (Alaska 1990)

**In re Inquiry Concerning a Judge,**
822 P.2d 1333 (Alaska 1991)

**In re Johnstone,**
2 P.3d 1226 (Alaska 2000)

**In re Curda,**
49 P.3d 255 (Alaska 2002)

**In re Landry,**
157 P.3d 1049 (Alaska 2007)

**In re Cummings,**
211 P.3d 1136 (Alaska 2009)