

STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held at the Wakefield Valley Golf and Conference Center, Westminster, Maryland, on October 20, 2000.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson

Hon. Joseph H. H. Kaplan
Joyce H. Knox, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Cathy D. Cox, Administrative Assistant
Michele Nethercott, Esq., Office of the Public Defender
Delegate Samuel Rosenberg
Hon. Sally Denison Adkins
Hon. James T. Smith, Jr.
Claire Smearman, Esq.
Steven P. Lemmey, Esq., Commission on Judicial Disabilities
Hon. Charlotte M. Cooksey
Elizabeth B. Veronis, Esq.

The Chair convened the meeting. He announced that the Assistant Reporter was absent because her mother had passed away. He said that the proposed revision of the Attorney Disciplinary Rules, drafted by two judges of the Court of

Appeals and reviewed by the Rules Committee at the September meeting, will be considered by the Court on Monday, November 6, 2000 at 2:00 p.m.

at the Robert C. Murphy Courts of Appeal Building in Annapolis. He also announced that the 148th Report of the Rules Committee was transmitted to the Court of Appeals, and a hearing will be scheduled at a later date.

The Chair told the Committee that Mr. Klein had sent in an e-mail in which he proposed amendments to the September minutes. The e-mail was distributed to the Committee members. The Reporter suggested that the third paragraph of Mr. Klein's e-mail communication be changed into the third party voice and inserted on page 75 of the minutes. The minutes were approved as amended.

Agenda Item 2. Consideration of proposed amendments to certain rules in Title 4, Criminal Causes: Rule 4-331 (Motions for New Trial) and Rule 4-341 (Sentencing – Presentence Investigation)

The Chair stated that Delegate Samuel Rosenberg and Michele Nethercott, Esq. were present to discuss Rule 4-331. Judge Johnson presented Rule 4-331 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE
TITLE 4 - CRIMINAL CAUSES
CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-331 to add to subsection (c)(2) an exception for DNA identification testing and certain other scientific evidence and to clarify that under section (e) a hearing must be held under certain circumstances, as follows:

Rule 4-331. MOTIONS FOR NEW TRIAL

(a) Within Ten Days of Verdict

On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

Cross reference: For the effect of a motion under this section on the time for appeal see Rules 7-104 (b) and 8-202 (b).

(b) Revisory Power

The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:

(1) in the District Court, on motion filed within 90 days after its imposition of sentence if an appeal has not been perfected;

(2) in the circuit courts, on motion filed within 90 days after its imposition of sentence.

Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

(c) Newly Discovered Evidence

The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not

have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:

(1) in the District Court, on motion filed within one year after its imposition of sentence if an appeal has not been perfected;

(2) in a circuit court, on motion filed within one year after its imposition of sentence or the date it receives a mandate issued by the Court of Appeals or the Courts of Special Appeals, whichever is later, except that (A) if a sentence of death was imposed, the motion may be filed at any time if the newly discovered evidence, if proven, would show that the defendant is innocent of the capital crime of which the defendant was convicted or of an aggravating circumstance or other condition of eligibility for the death penalty actually found by the court or jury in imposing the death sentence and (B) a motion for a new trial of a felony crime may be filed at any time if the motion is based upon DNA identification testing or other generally accepted scientific techniques the results of which, if proven, could show that the defendant is innocent of the crime for which the defendant was convicted.

Committee note: Newly discovered evidence of mitigating circumstances does not entitle a defendant to claim actual innocence. See Sawyer v. Whitley, 112 S. Ct. 2514 (1992).

(d) Form of Motion

A motion filed under this Rule shall be in writing and shall state in detail the grounds upon which it is based. If the defendant was sentenced to death and the motion is filed more than one year after the circuit court receives the mandate issued by the Court of Appeals, the motion

shall be under oath and shall state in detail the newly discovered evidence required by subsection (c)(2) of this Rule.

(e) Disposition

If there is no waiver by the parties, ~~The the~~ court shall ~~afford the defendant or counsel and the State's Attorney an opportunity for~~ hold a hearing on a motion filed under this Rule, except that if the motion is filed more than one year after the circuit court receives the mandate issued by the Court of Appeals, a hearing need not be held unless the motion satisfies the requirements of section (d) of this Rule. The court may revise a judgment or set aside a verdict prior to entry of a judgment only on the record in open court. The court shall state its reasons for setting aside a judgment or verdict and granting a new trial.
Cross reference: Code, Article 27, §§594 and 770.

Source: This Rule is derived from former Rule 770 and M.D.R. 770.

Rule 4-331 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 4-331 are twofold.

Based on a request by Delegate Samuel Rosenberg, the Criminal Subcommittee is recommending a change to Rule 4-331 (c)(2) to add another exception to the rule that a court may not grant a new trial or other appropriate relief on the ground of newly discovered evidence if the motion for a new trial was not filed within a year after the imposition of sentence. The exception is for newly discovered evidence based upon DNA identification testing or other generally accepted scientific techniques the results of which, if proven, could show that the defendant is innocent of the crime for which the defendant was convicted. This change is prompted by ongoing advances in DNA technology which may have occurred or may occur more than a year after criminal trials.

The case of Jackson v. State, 358 Md. 612 (2000), filed May 10, 2000) pointed out some ambiguity as to whether section (e) of Rule 4-331 provides an automatic hearing when a motion for a new trial is filed. The Court of Appeals held that in the absence of a waiver by the parties, the court must conduct a hearing. The Criminal Subcommittee is recommending a change to the language of section (e) to clarify this holding.

Judge Johnson explained that the Criminal Subcommittee is proposing to add a new provision to subsection (c)(2) which would allow a motion for a new trial beyond one year after the imposition of sentence if the motion is based upon DNA

identification testing or other accepted scientific techniques the results of which, if proven, could show that the defendant is innocent of the crime for which the defendant was convicted. Delegate Rosenberg noted that he had introduced House Bill 1080 which was similar to the proposed change to Rule 4-331. Robert Dean, Esq., a member of the Rules Committee, had referred Delegate Rosenberg to Rule 4-331, so he presented the proposed change to the Criminal Subcommittee. The Rule reflects the language of the proposed statutory change, except that the Rule change is more specific, pertaining directly to DNA evidence or generally accepted scientific evidence. Delegate Rosenberg said that he is in agreement with the proposed language to be added to Rule 4-331. If the change were made, there would be no need for legislative action.

Mr. Brault asked why there was an unfavorable report of House Bill 1080. Delegate Rosenberg answered that this can happen with first-time legislation. He noted that Delegate Vallario was in agreement with the Subcommittee's proposed Rule change. Judge Johnson remarked that the basis of the discussion at the Subcommittee was that a defendant should be able to bring in newly discovered exculpatory DNA evidence. The Vice Chair commented that this would be appropriate when the defendant is not guilty of the crime. Judge Johnson

responded that the Subcommittee proposes to use the word "innocent." The Chair pointed out that in the Kirk Bloodsworth case, the DNA evidence excluded Bloodsworth as the perpetrator of the crime. The Reporter stated that Bob Dean had called her to suggest that the word "could" should be changed to the word "should." She observed that this change would conform the language of subsection (c)(2)(B) to the language of subsection (c)(2)(A). The Committee agreed by consensus to this change. The Chair commented that some people are given long prison sentences even if convicted of a misdemeanor, and he asked if it would be harmful if the language "of a felony crime" were deleted. An example of this would be a long sentence for an assault conviction. Judge Heller expressed her agreement with the Chair's suggestion. The Committee agreed by consensus to the deletion of the language "of a felony crime" from subsection (c)(2)(B) of Rule 4-331.

The Chair pointed out that under the holding of a recent case, Skok v. Maryland, ___ Md. ___ (No. 22, September Term, 1999, filed October 10, 2000), a defendant can use the writ of coram nobis to reopen a misdemeanor drug case because there was allegedly something procedurally wrong with the way the defendant's guilty plea was accepted. The writ of coram nobis may be applicable to reopening cases because of newly

discovered DNA evidence.

Mr. Bowen remarked that Delegate Rosenberg pointed out that the change to subsection (c)(2) is limited to scientific evidence and to any crime of the which the alleged perpetrator is innocent. Ms. Nethercott said that at the moment two states, Illinois and New York, have enacted amendments to their criminal code which are similar to the change proposed to Rule 4-331. One aspect of this matter which the Rule does not address is what happens when the defendant finds out that the evidence exists and has been tested, but the law enforcement agency is not willing to release the evidence. She said that she is not aware of any cases like this, but it may be a problem down the road. The Illinois and New York statutes provide that the petitioner can obtain the assistance of the court in ordering that the evidence be released. The Chair said that the courts have that inherent power, and this is consistent with case law. Judge Smith remarked that he could not imagine denying such a motion. Judge Johnson commented that he had a case on post conviction where the police had been ordered to search for a weapon and had found it, but a party to the case claimed it never existed. The Chair reiterated that the court has the power to order that evidence be released, and it is not necessary to expressly provide this in the Rule.

Mr. Hochberg inquired as to why the motion does not have to be under oath. Mr. Brault asked how one would make a motion under oath. The Vice Chair pointed out that motions are made under oath in Rule 4-252. She suggested that the Subcommittee could consider Rule 4-252 in determining whether a motion should be filed under oath in Rule 4-331. The Chair asked if the Rule should be sent back to the Subcommittee, and the Committee was of the opinion that it should not be sent back. The Committee approved the changes to subsection (c)(2) as amended. The Vice Chair suggested that, without delaying this rule change, the Criminal Subcommittee could look at the issue of when an oath should be required in Rules 4-252, 4-331, and the other Rules in Title 4. The Committee agreed by consensus.

Turning to section (e), Judge Johnson explained that the Subcommittee is proposing to clarify that a hearing is required pursuant to the decision of Jackson v. State, 358 Md. 612 (2000), which had pointed out some ambiguity as to whether section (e) of Rule 4-331 provides an automatic hearing when a motion for a new trial is filed. The Vice Chair questioned as to how the hearing is waived, and Judge Johnson replied that it is waived if no one asks for a hearing. Judge Heller noted that waiver in criminal proceedings can be different. Counsel or the defendant can expressly so state, or it may be

necessary to come to the courtroom to waive the hearing.

Another way to accomplish the concept of a waiver is to delete the introductory language of section (e) which reads: "[i]f there is no waiver by the parties" and substitute in its place the language "[i]f a hearing is requested by a party." The Vice Chair pointed out that one of the ambiguities in the existing language of the Rule is the meaning of the phrase "[t]he court shall afford the defendant or counsel and the State's Attorney an opportunity for a hearing" when there is no other place in the Rule providing how the hearing happens. Mr. Bowen commented that if the introductory language of section (e) is changed as Judge Heller suggested, the second part of section (e) will have to be changed to be consistent. Sections (d) and (e) will have to be worked on together. The Vice Chair stated that the Style Subcommittee can take care of this. The Chair stated that Rule 4-331 was approved as amended. He thanked Delegate Rosenberg and Ms. Nethercott for attending the meeting.

Judge Johnson presented Rule 4-341, Sentencing - Presentence Investigation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-341 to add an exception to the confidentiality requirement, as follows:

Rule 4-341. SENTENCING -- PRESENTENCE INVESTIGATION

Before imposing a sentence, if required by law the court shall, and in other cases may, order a presentence investigation and report. A copy of the report, including any recommendation to the court, shall be mailed or otherwise delivered to the defendant or counsel and to the State's Attorney in sufficient time before sentencing to afford a reasonable opportunity for the parties to investigate the information in the report. The presentence report, including any recommendation to the court, is not a public record and shall be kept confidential as provided in Code, Correctional Services Article, §6-112, unless admitted into evidence.

Cross reference: See, e.g., Sucik v. State, 344 Md. 611 (1997). As to the handling of a presentence report, see Ware v. State, 348 Md. 19 (1997) and Haynes v. State, 19 Md. App. 428 (1973).

Source: This Rule is derived from former Rule 771 and M.D.R. 771.

Rule 4-341 was accompanied by the following Reporter's Note.

Mary R. Craig, Esq., who represents the Sunpapers, requested a change to the confidentiality provision of Rule 4-341. She pointed out that the decision of Baltimore Sun v. Thanos, 92 Md. App. 227 (1992) held that a presentence report is required to be admitted into evidence in the sentencing phase of a capital case. She contends that once the presentence report is admitted into evidence, the public has a First Amendment right to review it. The Criminal Subcommittee pointed out that §6-112 of the Correctional Services Article allows a court to order that the report is not confidential. The Subcommittee felt that the judge can decide if the report is admissible pursuant to the statute and case law. The Subcommittee recommends making the change suggested by Ms. Craig, which is to add the language "unless admitted into evidence" at the end of Rule 4-341.

Judge Johnson explained that counsel for The Baltimore Sun, Mary R. Craig, Esq., had asked that Rule 4-341 be changed to provide that if the pre-sentence investigation report (PSI) has been admitted into evidence, it would be available to the public. This would be an exception to the rule that the pre-sentence report is confidential. The Chair said that a lawyer for the newspaper brought this up in the context of a capital case. The perception of The Sunpapers was that a conflict was created if the PSI report is admitted in a capital case, but it is not available to the public. The Vice Chair noted that the PSI report is not a public record under the Public Information Act. Judge Johnson observed that there is no

conflict within the Rule. The Rule provides that if admitted into evidence, the PSI report is available to the public and is given to the jury. The Vice Chair commented that the view of Ms. Craig is not that the PSI should be a public record, but that it should be available to the press. Judge Johnson said that this is dealing with a capital case. The jury is given the evidence that it will be considering, and this is given to the public. Judge Smith suggested that the language "in a capital case" be added at the end of the last sentence of Rule 4-341. Judge Heller remarked that up until now, the PSI report has not been public record, but it can be introduced into evidence. The Chair suggested that the language could be "unless received into evidence during the sentencing proceeding." Judge Johnson reiterated that only capital cases are being discussed.

The Chair asked if the Rule is acceptable to the Committee with the addition of the language "in a capital case" at the end of the last sentence. By consensus, the Committee approved the rule as amended.

Agenda Item 1. Consideration of proposed amendments to Rule 16-813, Maryland Code of Judicial Conduct. (See Appendix 1)

The Chair explained that when the revised Judicial

Disabilities Commission Rules were considered by the Court of Appeals, the Court asked that the Committee reconsider the Code of Judicial Conduct. The revised Code will be presented to the Court by the Judicial Ethics Committee, and not by the Rules Committee. The Rules Committee will look over the Code of Judicial Conduct and present recommendations to the Judicial Ethics Committee, who will make their suggested changes with the benefit of the Rules Committee's recommendations.

The Chair presented the Code of Judicial Conduct for the Committee's consideration. (See Appendix 1). He said that text of the Preamble is fairly consistent with the ABA Preamble. The changes in the Preamble involve reorganizing some of the sentences to try to make it clearer that every violation of the Code does not result in disciplinary sanctions. There are requirements in the Code that a single violation of a rule may be serious enough to result in a disciplinary sanction, but not all violations automatically result in disciplinary sanctions. Judge Adkins suggested that in the second paragraph of the Preamble, the language which reads: "broad statements called Canons" could be changed to "specific statements of conduct." The Reporter pointed out that M. Peter Moser, Esq., a consultant to the General Court Administration Subcommittee, had sent in two letters on

October 16, 2000, copies of which had been distributed at today's meeting. (See Appendix 2.) In one of the letters Mr. Moser had made the suggestion to delete the language from the Preamble which reads "broad statements called" and substitute in its place the language "specific rules set forth in." He also suggested that the remainder of the sentence read as follows: "Canons, a terminology section, and Comments." Mr. Bowen suggested that the language should be "a terminology section, Canons, and Comments." The Committee agreed by consensus to these changes, substituting Mr. Bowen's suggestion for Mr. Moser's second suggestion.

The Vice Chair asked if the language in the third paragraph of the Preamble which reads "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..." is consistent with the language of Rule 16-803 (g), the definition of "sanctionable conduct." Judge Smith answered that he felt that the definition of "sanctionable conduct" is consistent with the language in the Preamble, and the Chair agreed.

Directing the Committee's attention to page A-4 of Appendix 1, Mr. Bowen pointed out that Mr. Moser asked for a change in the definition of the word "fiduciary" in section

(b) of the "Terminology" provisions. Mr. Moser proposed that the first sentence of section (b) would read as follows:

"'Fiduciary' includes such relationships as trustee, attorney-in-fact by power of attorney, personal representative, and guardian." The Committee agreed by consensus to this change.

Mr. Bowen suggested that in section (c) on page A-4, quotation marks should be placed around the words "Knowingly, knowledge, known, or knows." The Committee agreed by consensus with this suggestion.

The Vice Chair asked if the Code of Judicial Conduct will go to the Style Subcommittee. The Chair answered in the affirmative.

The Chair pointed out that Mr. Moser had suggested a change to the Reporter's note to the Terminology provisions on page A-5. The Committee agreed by consensus to this change.

The Vice Chair remarked that she remembered the concern of the Court of Appeals about the use of the words "should" and "shall" in the Code of Judicial Conduct. When the Judicial Disabilities Commission Rules were transmitted to the Court of Appeals, the Committee transmitted with them a new Preamble which was proposed to be added to the Code of Judicial Conduct to clarify the issue of the word "should" vs. the word "shall." The Reporter commented that the Court did not want to consider the proposed clarification in the

Preamble without having looked at the entire Code of Judicial Conduct, so the Court remanded the Preamble to the Committee. The revision of the Code of Judicial Conduct is based on the ABA Model Code of Judicial Ethics. Judge Smith added that Mr. Moser was the driving force behind the suggested changes.

The Chair noted that Mr. Moser had pointed out that in section (B) of Canon 2 on page A-7, in the second sentence the word "should" is to be changed to the word "shall." The Committee agreed by consensus to this change.

Turning to section (C) of Canon 2 on page A-9, Mr. Hochberg questioned as to whether the word "invidious" describing racial discrimination is a term of art. The Chair responded that the use of this word prevents situations such as African-American judges being accused of violating Canon 2C because they belong to the Monumental Bar Association. Judge Kaplan remarked that there is legal discrimination and there is illegal discrimination. The Chair stated that "invidious discrimination" is an important term with a specific meaning, and it should not be taken out. Judge Smith noted that this term has not been changed from the current Rules. Referring to the language of the Comment at the top of page A-10, Mr. Brault observed that the language "it is hardly unlikely" means that it is likely. The Chair suggested that the word "hardly" be deleted. Mr. Bowen said that it could read "it is

highly unlikely." The Committee agreed by consensus to delete the word "hardly."

The Vice Chair expressed the view that in place of the language "particular congregation" the language "certain organization" should be substituted. The Reporter noted that the word "congregation" ties into the religious aspect of the organization. The Vice Chair suggested that the examples in the Comment should be taken out altogether. The Chair suggested that the language could read: "Certain congregational brotherhoods and sisterhoods may well be restricted to persons belonging to a particular congregation."

Mr. Brault proposed that the term "bowling leagues" should be taken out. Judge Cooksey said that the point was that religious congregations and certain types of organizations affiliated with religious congregations could be viewed as discriminatory. That was the historical point of giving that type of example which is inclusive rather than exclusive. The Vice Chair commented that the point is not that a religious organization is per se discriminatory, but that the second sentence of the new material in the Comment to Canon 2C may be construed that way. The Chair suggested deleting the language which reads "belonging to the particular congregation," but Mr. Bowen expressed the view that this would broaden the category too much. The Vice Chair suggested that the examples

could be deleted. The Reporter pointed out that this language is in the current Rule now, but it is being moved to another place.

Judge Cooksey said that the language of the Comment to Canon 2C had been enacted with great difficulty. It had to be presented to the entire Judicial Conference on two occasions over a period of years by the Ethics Committee. It has been studied at great length, and is recommended by the ABA. The current language is what the ABA recommends and continues to recommend. Judge Adkins suggested that the language should be retained, except the word "hardly" should be deleted from the second sentence. The Chair stated that the shaded language will not be changed, except for the deletion of the word "hardly." Mr. Bowen suggested that in the third line, the word "the" should be changed to the word "a," so that the language would read "belonging to a particular congregation." The Committee agreed by consensus to this change.

The Vice Chair inquired as to why some of the language is in bold type. Judge Cooksey answered that these are defined terms. The Reporter added that this is similar to the products liability form interrogatories. The ABA uses an asterisk, but it is clearer to bold the language to indicate that where a phrase that is a defined term begins and ends.

Turning to Canon 3 on page A-12, Mr. Lemmey pointed out

that in Canon 3A (5), the current language includes the word "full" before the language "right to be heard." He said that he was not sure whether the Subcommittee intended to delete the word "full" from the revised draft. Without the word "full," the language is weakened. The Chair responded that every pro se litigant whose redundant or irrelevant presentation is shortened by a judge will say that he or she did not receive a full right to be heard.

The Vice Chair suggested that in section (a) of Canon 3A (5), the word "where" should be changed to the word "if." The Committee agreed by consensus with this change. The Vice Chair asked what the word "promptly" in subsection (a)(ii) modifies -- making the provision or notifying the parties. The Committee did not suggest a change to this provision.

Judge Heller questioned as to why subsection (b) of Canon 3A (5) is limited to disinterested experts on the law and does not pertain to other experts. The Reporter replied that this applies to ex parte matters concerning the law. The Chair said that a judge can discuss the law ex parte but cannot get into the facts.

The Vice Chair suggested that in section (d), the word "may" should be moved so that it is before the word "confer." The beginning language of section (d) would read as follows: "A judge, with the consent of the parties, may confer....".

The Committee agreed by consensus to this change. The Chair pointed out that in the second paragraph of the Comment after section (f), the word "shall" should be changed to the word "must," because Mr. Moser had recommended that the comments use the word "must" instead of "shall." The Committee agreed by consensus to this change.

Judge Vaughan noted that in the third paragraph of the Comment after section (f), the words "the party" which appear the second time should be moved, so that the language would read as follows: "... or the party if the party is unrepresented, who is to be present...". The Chair clarified that this provision means that if the party is represented, notice is given to the attorney. The Committee agreed by consensus to this change.

Mr. Brault pointed out that, on page A-15, the seventh paragraph of the Comment after section (f) appears to say that whenever a court asks for proposed findings of fact and conclusions of law, the findings can be submitted without a response from the other side. The Vice Chair suggested that the language could be "A judge may request both parties to submit...". Mr. Brault suggested that the language could read as follows: "A judge may request one party to submit...". The Committee agreed by consensus to this change.

Mr. Bowen commented that currently there is a free-

standing rule pertaining to nepotism and favoritism. He asked why, on page A-19, the Subcommittee is breaking this up into two sentences. The Vice Chair expressed the opinion that the sentence about nepotism and favoritism makes more sense as the first sentence. Mr. Bowen suggested that the original language be retained. The Vice Chair noted that the last sentence of Canon 3B (4) pertains only to appointees. The Chair suggested that the second sentence be moved to Canon 3B (1) so that it would read as follows: "A judge shall diligently discharge the judge's administrative responsibilities without bias, prejudice, nepotism, or favoritism and shall cooperate with other judges and court officials in the administration of court business." The Committee agreed by consensus to this change.

Mr. Bowen suggested that in Canon 3B (3), on page A-19, the word "assure" should be changed to the word "ensure." The Committee agreed by consensus to this change.

Turning to Canon 3E, beginning on page A-26, the Chair explained that the Subcommittee had discussed this very thoroughly. The question is if this provision is adequate. There are situations in which notification of the Judicial Disabilities Commission is required. The Canon provides a chance for one judge to take appropriate corrective measures short of notifying the Judicial Disabilities Commission when

that judge notices a problem with another judge. The Comment explains the kinds of measures available. Judge Adkins pointed out that the provisions concerning judges and attorneys are not parallel. Mr. Brault noted that some of the language in Canon 3E (2) is taken directly from Rule 8.3 of the Lawyers' Rules of Professional Conduct. Judge Adkins said that the language in Canon 3E (1) which reads "facts known to that judge that raise a substantial question as to another judge's fitness for office where corrective measures are not appropriate, or if attempted, were not successful" was added by the Subcommittee. When a judge knows of another judge's misconduct, the first judge is not required to report the misconduct, but may attempt corrective measures first. If a judge knows of an attorney's misconduct, the judge should go to the Attorney Grievance Commission.

Mr. Lemmey remarked that there may be a problem with the concept. A judge in Maryland is by definition an attorney, and a colleague judge could report the other judge to the Attorney Grievance Commission. Mr. Brault responded that there is a difference between a lawyer's honesty, trustworthiness, or fitness as a lawyer and being fit for judicial office. The distinction should remain. Mr. Hochberg asked why the word "should" is used in the first sentence of Canon E(1) instead of the word "shall." The Chair answered

that the word of choice is "should," because the judge who observes the unprofessional conduct of another judge can decide his or her course of action, while a judge who knows of facts that raise a question as to another judge's fitness for office shall inform the Judicial Disabilities Commission.

The Chair drew the Committee's attention to Canon 4, beginning on page A-29. Judge Adkins noted that the Comment to Canon 4B on page A-30 is inconsistent with the text which provides that the judge may participate in non-legal matters. The third sentence of the Comment is a holdover from an old provision stating that a judge could not participate, except in certain circumstances. The Chair said that expressing opposition to the persecution of lawyers and judges in other countries is a legal or political matter. Judge Adkins pointed out that if, under Canon 4B, a judge can participate in a non-legal matter, the third sentence of the Comment is not needed. The Comment seems limiting. The Chair remarked that the Comment is illustrative. It is from the ABA. Judge Adkins observed that the ABA particularized one thing. Judge Smith suggested that the third sentence of the first paragraph of the Comment to Canon 4B be deleted. The Committee agreed by consensus to this suggestion.

Turning to Canon 4C on page A-31, Mr. Bowen asked why the word "judiciary" was taken out. His view was that it was the

most important item listed, and it should not have been deleted. Mr. Brault suggested that the word "judiciary" be put back in Canon 4C, and the Committee agreed by consensus to this change.

The Reporter said that in his second memorandum, Mr. Moser had addressed how the proposed language of Canon 4C 3 (a) differs from the parallel ABA provision. Judge Heller noted that the Subcommittee had discussed whether it is appropriate for judges to sit on hospital boards. She had reflected on this issue, and her view was that the Canon should not prohibit judges from sitting on hospital boards. Judge Johnson commented that some hospitals are "for profit" and need to be distinguished from the "not for profit" hospitals. Mr. Brault remarked that he did not know of many "for profit" hospitals. The Chair pointed out that the issue is the public's perception. Someone may sue Johns Hopkins Hospital, and it is difficult if prominent members of the judiciary are on the board of directors of the hospital. Judge Heller inquired as to why hospitals are being singled out of all the possible lists of organizations. The Chair answered that hospitals are the organizations most often being sued. Judge Cooksey observed that judges should not put themselves in the position of having to recuse themselves frequently. A judge who frequently hears medical malpractice

cases probably should not sit on the board of a hospital.

The Chair noted that the language of subsection (a)(i) of Canon 4C 3 which reads "will be regularly engaged in adversary proceedings in any court" does not mean that the organization is regularly being sued. Mr. Bowen pointed out that the added language which provides that a judge shall not participate "as a member" of a civic or charitable organization is broader than the current language. The Vice Chair said that under the ABA provision, a judge could sit on the board of Johns Hopkins Hospital if the judge does not frequently hear cases involving the hospital. The Chair suggested that the language of subsection (a)(i) could read: "will regularly initiate adversary proceedings in any court." It is not the fault of the judge who is on the board of an organization if other people sue the organization. This issue was discussed when the Attorney Disciplinary Rules were being considered.

Judge Kaplan commented that so many judges sit on boards that there would be no one to hear the cases if the judges have to constantly recuse themselves. The Chair stated that the Subcommittee recommended the language because of the history. The Ethics Committee had been concerned about this and wanted to have the same kind of language. Judge Adkins noted that the ABA language of subsection (a)(ii) is "deals with people who are referred to the organization by the court

on which the judge serves or who otherwise may likely come before that court." Judge Cooksey expressed the opinion that the ABA language is clearer. Judge Adkins suggested that the word "frequently" could be substituted for the word "regularly." Mr. Brault added that the word "frequently" has a legislative history in the ABA. The word was chosen with the express purpose of narrowing it down. Ms. Smearman observed that the ABA does not prohibit a judge from participating as a member. Mr. Brault remarked that service by judges as trustees of non-profit hospitals is a recurring problem. The ABA's view is that this is not prohibited, but it requires caution.

The Chair said that organizations such as the Women's Law Center would not be affected by Canon 4C (3)(a), but it may affect the House of Ruth. Judge Cooksey commented that it is a tremendous risk for a judge to be on the board of a hospital. Mr. Brault questioned whether there have been any rulings from the Ethics Committee as to judges serving on hospital boards. Judge Cooksey responded that there have not been any rulings on this.

Judge Kaplan moved to adopt the language recommended by the Subcommittee. The motion was seconded, and it carried with seven in favor, three opposed, and one abstention.

Mr. Bowen pointed out that on page A-35 in Canon 4C

(3)(c), at the end of subsection (iii), the word "and" should be added, and at the beginning of subsection (iv), the word "shall" should be added. The Committee agreed by consensus to these changes.

Turning to Canon 4D that begins on page A-37, the Vice Chair commented that she does not like the Comments being placed in the middle of the Rules. The Reporter said that the clean copy of the Rules is easier to read. Mr. Bowen suggested that on page A-41 in subsection (3)(b) of Canon 4D, the language which reads "family member of a judge residing in the judge's household" and in the Comment after subsection (3)(d), the language which reads "member of the judge's family living in the judge's household" should be bolded to indicate the language is defined in the Terminology section. The Committee agreed by consensus to this suggestion.

The Reporter pointed out that Mr. Moser had suggested the deletion of the following language in Canon 4E (1) on page A-44: "executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other" which would leave only the word "fiduciary" in the Rule. The language can be deleted because "fiduciary" is a defined term. The Committee agreed by consensus to make this change.

Judge Adkins remarked that the Committee note to Canon 4E has some confusing language. She suggested that in the third

sentence of the note the language "in any other proceeding" should be added after the word "impartiality." The Reporter said that this sentence had been added by the Subcommittee. The Chair suggested that language could be added explaining that there is a recusal requirement. The Reporter suggested that the sentence is not necessary and could be deleted. The Committee agreed by consensus to this suggestion.

The Chair drew the Committee's attention to Canon 4F on page A-46. Judge Vaughan asked how this relates to retired judges. Mr. Brault answered that Canon 6C provides that Canon 4F does not apply to retired judges.

There was no discussion of Canon 4G. Turning to Canon 4H that begins on page A-48, the Chair commented that when the Court of Appeals was considering the Judicial Disabilities Commission Rules, the judges had expressed some concern about honoraria. Judge Cooksey noted that the language of the Comment to Canon 4H seems to conflict with State law which provides that a judge can accept certain limited honoraria but no other compensation. The Vice Chair inquired as to why the Comment is being proposed. The Chair said that the legislature passes many laws pertaining to judges, but it did not consider whether there is a judicial right to reasonable reimbursement.

The Chair asked how Canon 4H violates the State law.

Judge Cooksey answered that the definition of "honoraria" is in conflict. The Chair suggested that the Comment could be moved. The Rule does not refer to the term "honoraria;" only the Comment refers to it. Mr. Lemmey pointed out that the State Ethics Law requirement that judges have to report payments puts the judges in a bad position. If they report the payments, they could get in trouble for violating the Ethics Law. Mr. Brault observed that a judge is subject to the State Ethics Law.

The Vice Chair suggested that the tagline to Canon 4H should be changed to: "Compensation and Reimbursement." The Committee agreed by consensus to this change. Judge Smith asked about judges teaching bar review courses, traveling around the country as part of the faculty. Judge Vaughan noted that this is different than making a speech. Judge Heller suggested that Canon 4H be left as it is, but subject to the provisions of the State Ethics Law. The Vice Chair expressed the view that it would be helpful to know more about the State Ethics Law. Mr. Bowen remarked that the Rule provides that extra-judicial activities are permitted by this Code. He suggested that the Rule could list which activities are permitted. The Chair stated that the Comment will tie into the relevant portion of the Ethics Law.

After the lunch break, the Chair said that he wanted to

thank the consultants who had helped with the Judicial Ethics Rules. They included: Judges Cooksey and Adkins, Claire Smearman, Esq., and M. Peter Moser, Esq. The Vice Chair commented that the Ethics Committee can change the Rules before they are sent to the Court. The Chair said that if members of the Rules Committee are not in agreement with the changes made by the Ethics Committee, the Rules Committee members will have the opportunity to speak to the changes. The proposal for revision that is sent to the Court of Appeals will come from the Ethics Committee. Judge Johnson expressed the concern that if the Rules Committee is recommending that the State Ethics Law be trumped, that decision should not be made at a meeting with neither of the legislators present. The Chair noted that the reference to "honoraria" in the Comment has been deleted.

The Chair drew the Committee's attention to Canon 5, beginning on page A-52. Mr. Bowen observed that the language in Canon 5C on page A-54 which reads "when a newly appointed judge to that court becomes a 'candidate' in the same general election" is not clear. The Vice Chair said that this means that everyone becomes a candidate at that time. The Chair suggested that the second sentence could end after the word "retention." Mr. Lemmey pointed out that if the phrase at the end of the second sentence is eliminated, the newly appointed

judge can begin campaigning the day he or she is appointed, but his or her colleague will have to wait until two years before the election. Judge Heller asked if a newly appointed judge becomes a candidate more than two years after the judge's appointment. Mr. Brault said that he was not sure the wording was correct. An incumbent judge may have 14 years left on his or her term. Mr. Lemmey explained that this pertains to the same general election. The Reporter inquired as to whether the last phrase of the second sentence is to be deleted. There was no motion to change Canon 5C.

The Chair drew the Committee's attention to Canon 5D on page A-55. Judge Vaughan asked if a lawyer who files for a judicial position but is unsuccessful is precluded from judicial discipline. The Chair answered that he thought that that was the case. The Chair pointed out that on page A-56, Mr. Moser suggested a change to the Reporter's Note.

The Chair drew the Committee's attention to Canon 6 that begins on page A-57. He noted that Mr. Moser, in his letter of October 16, had suggested a change to Canon 6D, so that it would read as follows: "A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Canons 2C, 4D (2) and 4E, shall comply with these sections as soon as reasonably possible, and shall do so in any event as to Canon 2C within two years and as to Canons

4D(2) and 4E within one year." The Committee agreed by consensus to this change.

The Vice Chair pointed out the use of the word "shall" in Canon 6D. She asked if it is possible that there is a violation of a rule worded as mandatory by using the word "shall," but the violation is not the subject of a proceeding by the Judicial Disabilities Commission. The Chair answered that under the definition of "sanctionable conduct" in Rule 16-803, a violation of a "shall" rule does not automatically result in proceedings.

The Chair drew the Committee's attention to Canon 7 beginning on page A-59. There was no discussion of Canon 7.

The Chair said that with respect to Canon 4H, the Committee had decided to leave the text as it appears in the package of Rules, but add a reference to the State Ethics Law to the Comment. Mr. Bowen asked when Canon 4H would be styled. The Chair replied that the Court of Appeals has asked that the Judicial Ethics Rules be styled before they go to the Ethics Committee. Ms. Veronis remarked that the next meeting of the Judicial Ethics Committee will be on December 7th, and the Rules are on the agenda of that meeting. The Chair commented that the current language of the Comment may cause a problem. Mr. Lemmey noted that it is preferable to rewrite the Comment while looking at the State Ethics Law. The Chair

questioned whether the entire Rule should be redrafted. Judge Kaplan observed that compensation of judges, including teaching in law schools and being compensated and reimbursed, has never been a problem. If the reference to "honoraria" is removed from the Comment, it would read more clearly and correctly. Mr. Bowen added that the Rule is correctly written, since there are no references to "honoraria." The problem is with the Comment, and it can be cured by taking out the reference to "honoraria." Mr. Bowen moved to keep the Rule as it appears and change the Comment by referring to the relevant section of the State Ethics Law. The motion was seconded, and it carried with one opposed. The Chair stated that the Style Subcommittee will rewrite the Comment.

The Chair adjourned the meeting.

MARYLAND RULES OF PROCEDURE
TITLE 16 - COURTS, JUDGES, AND ATTORNEYS
CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-813, as follows:

Rule 16-813. MARYLAND 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 consists of broad statements called Canons, and Comments. The text of the Canons is authoritative. The Comments, by explanation and example, provide guidance with respect to the purpose and meaning of the Canons. The Comments are not intended as a statement of additional rules.

It is not intended that every transgression of the Code 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.

The Canons are rules of reason. They should be applied in the context of all relevant circumstances and in a manner that is consistent with constitutional requirements, statutes, other court rules, and decisional law. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

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. The purpose of the Code would be subverted if the Code were invoked for mere tactical advantage in a proceeding.

The Code is intended to state basic standards for the conduct of all judges and to provide guidance in establishing and maintaining high standards of judicial and personal

conduct.

Terminology

Terms explained below are noted in boldface type in the Canons and Comments where they appear. In addition, the Canons where terms appear are referred to after the explanation of each term below.

(a) Significant Financial Interest

"Significant financial interest" means (1) ownership of an interest as the result of which the owner has received within the past three years, is currently receiving, or in the future is entitled to receive, more than \$1,000 per year; or (2)(i) ownership of more than 3% of a business entity; or (ii) ownership of securities of any kind that represent, or are convertible into, ownership of more than 3% of a business entity. However, the following exceptions apply:

(1) 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;

(2) 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;

(3) 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 propriety 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; or

(4) 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 Canons 3C (1)(c), 3C (1)(d)(iii), and 3C (2).

(b) Fiduciary

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Canon 3C (2).

(c) Knowingly, Knowledge, Known, or Knows

"Knowingly, knowledge, known, or knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Canons 3D, 3E, and 5A (3).

(d) Law

"Law" means court rules as well as statutes, constitutional provisions, and decisional law. See Canons 2A, 3A(1), 3A (5), 3B (6), 4B, 4C, 4D (5), 4F, 4G, 5B, and 5C.

(e) Member of the Judge's Family Residing in the Judge's Household

"Member of the Judge's Family Residing in the Judge's Household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Canon 4D (3).

(f) Political Organization

"Political organization" means a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Canons 5B (1) and 5B (2).

(g) Require

The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's discretion and control. See Canons 3A (3), 3A (4), 3A (6), 3A (10) and 3B (2).

(h) Third Degree of Relationship

"Third degree of relationship" means the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. See Canon 3C (1)(d).

REPORTER'S NOTE

The definitions in the Terminology section are new and are substantially the same as the definitions in the ABA Terminology section.

CANON 1

Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge ~~should~~ **shall** observe high standards of conduct so that the integrity and independence of the judiciary ~~may~~ **will** be preserved. The provisions of this Code ~~should~~ **are to** be construed and applied to further that objective.

COMMENT

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 depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Committee note.-- The American Bar Association Model Code of Judicial Conduct ("ABA Code") states that a judge should "participate in establishing, maintaining, and enforcing, and should himself" observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The Committee believes that even though desirable, a judge should not be obligated to participate in "establishing" standards of conduct. "Maintaining" and "enforcing" high standards of conduct are dealt with in Canon ~~3B~~ **3A** (3).

REPORTER'S NOTE

The language of Canon 1 is substantially the same as the current Rule, except that the language has been reworded to be mandatory rather than permissive. This is derived from Canon 1 of the ABA Code. The Comment is new and is substantially

the same as the parallel ABA Commentary.

CANON 2

Avoidance of Impropriety and the Appearance of Impropriety

A. A judge ~~should~~ shall behave with propriety and ~~should~~ shall avoid even the appearance of impropriety. A judge ~~should~~ shall respect and comply with the **law** and ~~should~~ shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. ~~The personal behavior of a judge in both the performance of judicial duties, and in everyday life, should be beyond reproach.~~

COMMENT

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her 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 or 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 the Comment to Canon 2C.

B. A judge ~~should~~ shall not allow judicial conduct to be

improperly influenced by family, social, political, or other relationships. A judge should not use the prestige of judicial office to advance the private interests of the judge or others; nor should shall a judge convey or permit others to convey the impression that they are in a special position to influence judicial conduct. A judge should shall not testify voluntarily as a character witness.

COMMENT

~~Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.~~

~~The testimony of a judge as a character witness injects the prestige of judicial office into the proceeding in which a judge testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford a judge the privilege against testifying in response to an official summons.~~

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 all 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 deferential 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 the 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 Canon 4D 3(b) and Comment.

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, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration.

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. A judge may, however, testify when properly summoned.

Committee note.- The first and third sentences of ~~See~~ Canon 2A are derived from ~~current~~ former Md. Canon IV. ABA Canon 2 relegates the first sentence of ~~Section~~ Canon 2A to ~~Commentary~~ the Comment; but the Committee believes that it is sufficiently important to retain its status as part of the Canon. The second sentence of ~~See~~ Canon 2A is derived from ABA Canon 2A.

The first sentence and the second clause of the second sentence of ~~Section~~ Canon 2B are derived from ABA Canon 2B and ~~current~~ former Md. Canon XXXII. The first clause of the second sentence of ~~See~~ Canon 2B is derived from ABA Canon 2B and prohibits a judge from advancing the "private interests" of others, while ~~current~~ former Md. Ethics Rule 9 ~~applies~~ applied the prohibition only to "private business interests" of others, which is somewhat narrower in scope. The broader prohibitory language in the ABA Canon is not meant to preclude a judge from writing a letter of recommendation or the like under appropriate circumstances, as discussed in Md. Judicial Ethics Opinion No. 98 (issued 7/16/82).

The last sentence of ~~See~~ Canon 2B is derived from ABA Canon 2B and ~~current~~ former Md. Canon XIII.

The first paragraph of the ~~Commentary~~ ~~Comment~~ is derived from a ~~the~~ ~~Commentary~~ to ABA ~~Section~~ ~~Canon~~ 2A of ~~Canon~~ 2.

The last paragraph of the ~~Commentary~~ ~~Comment~~ is derived from a ~~Commentary~~ to ABA Canon 2 and is consistent with Md. Judicial Ethics Opinion No. 31 (issued 5/7/75).

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENT

Membership of a judge in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin may give rise to perceptions that the judge's impartiality is impaired. It is therefore inappropriate for a judge to continue to hold membership in an organization that the judge knows or reasonably should know, practices and will continue to practice such invidious discrimination so as to give rise to the perception that the judge's impartiality is impaired. Membership in an organization would not be prohibited unless that membership would reasonably give rise to a perception of partiality. Certain organizations - such as congregational brotherhoods, sisterhoods, bowling leagues, etc. - may well be restricted to persons belonging to the particular congregation and therefore to those sharing a particular religious belief, but it is hardly unlikely that membership in such an organization would cause people reasonably to believe that the judge is partial.

Whether an organization practices and will continue to practice that kind of invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined merely from an examination of an organization's current membership rolls but may depend on (1) the nature and purpose of the organization, (2) any restrictions on membership, (3) the history of the organization's selection of members, and (4) other relevant factors such as that the organization is dedicated to the preservation of religious, ethnic, or cultural values of

legitimate common interests to its members, or that it is in fact, 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. Inc. v. City of New York, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940 (1987), 95 L. Ed. 2d 474; Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).~~

Although ~~Section~~ Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion, or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates ~~Canon 2 and Section 2A~~ and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 ~~and Section 2A~~ for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of ~~Section~~ Canon 2A.

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~~ Canon 2C or under ~~Canon 2 and Section~~ Canon 2A, 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 two years of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

Committee note.- ~~After careful consideration, the Committee~~

~~decided to make membership in organizations that practice invidious discrimination a violation of the Code. New Section 2C moves to black-letter text a principle that had been in the Commentary to Canon 2 of the 1989 Code. It was determined that it was neither appropriate nor workable to leave to each individual judge's conscience the determination whether an organization practices invidious discrimination, and this discretionary standard was removed from the Commentary.~~

The ~~Commentary~~ **Comment** incorporates most of the ~~Commentary to ABA Section~~ **Canon 2C of Canon 2**. The second sentence of the first paragraph is derived from the ~~Commentary~~ **Comment** to ~~current~~ **former** Md. Canon 2B and has been retained to make clear that membership in an organization would not be prohibitive unless that membership would reasonably give rise to a perception of partiality. ~~Certain organizations—such as congregational brotherhoods, sisterhoods, bowling leagues, etc.—may well be restricted to persons belonging to the particular congregation and therefore to those sharing a particular religious belief, but it is hardly likely that membership in such an organization would cause people reasonably to believe that the judge is partial.~~

REPORTER'S NOTE

Section A has been modified so that it is couched in mandatory terms which is the way Canon 2A of the ABA Code is written. The last sentence has been eliminated to be consistent with the ABA Rule. The Comment is new and was added for consistency with the ABA version of the Rule.

Section B has been reworded to be mandatory as Canon 2B of the ABA Code is. The word "political" has been added to the list of relationships which shall not influence judicial conduct. The first paragraph of the Comment is now in the Comment to Canon 1. The second paragraph is deleted because it is restated in the new Comment which is derived from the ABA Commentary. The Committee note has been updated.

Section C has not been changed, except that language has been added to the Comment which was originally in the Committee note to Canon 2C. The Subcommittee has deleted some citations to cases which are not recent.

CANON 3

~~Impartial and Diligent~~ Performance of Judicial Duties

In the performance of judicial duties, the following standards apply:

A. ADJUDICATIVE RESPONSIBILITIES.-

(1) A judge ~~should~~ **shall** be faithful to the **law** and maintain professional competence in it.

(2) A judge ~~should~~ **shall not** be ~~unswayed~~ **swayed** by partisan interests, public clamor, or fear of criticism.

(3) A judge ~~should maintain~~ **shall require** order and decorum in proceedings before the judge.

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

COMMENT

The duty to hear all proceedings fairly and with patience 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) A judge should accord to every person who is legally interested in proceedings, or the person's lawyer, full right~~

~~to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the name of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.~~ A judge shall accord to every person who has a legal interest in the proceeding pending before the judge, or that person's lawyer, the right to be heard according to **law**. While presiding over the proceeding, a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances **require**, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

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

(ii) the judge makes provision promptly to notify

all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the **law** applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges and with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) 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.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by **law** to do so.

(f) This section does not prohibit a judge from discussing cases in which the judge is not involved and is not likely to be involved.

COMMENT

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. ~~It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities.~~

To the extent reasonably possible, all parties or their

lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Canon 3A (5), 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.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Canon 3A (5) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Canon 3A (5) are clearly met. A judge must disclose to all parties all *ex parte* communication described in Canons 3A (5)(a) and 3A (5)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented except matters of which the court can properly take judicial notice.

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.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Canon 3A (5) is not violated through law clerks or other personnel on the judge's staff.

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.

(6) A judge ~~should~~ shall dispose promptly of the business of the court.

COMMENT

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 to that end.

(7) A judge ~~should~~ shall abstain from public comment about a pending or impending proceeding in any court that might reasonably be expected to affect the outcome of that proceeding or to impair the fairness of that proceeding, and ~~should~~ shall **require** similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court.

COMMENT

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers in this regard is governed by Rule 3.6 of the Maryland [Lawyers'] Rules of Professional Conduct.

(8) At the conclusion of a jury trial, the judge ~~should~~ neither praise nor criticize the verdict shall not communicate to the jury the judge's praise or criticism of the verdict but may thank the jurors for their public service.

COMMENT

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.

(9) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

COMMENT

A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of 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 to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(10) A judge shall **require** lawyers in proceedings before

the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This ~~Section~~ Canon 3B (10) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.

(11) A judge shall hear and decide matters assigned to the judge except those in which recusal is appropriate.

Committee note.- ~~See.~~ Canons 3A (1) and (2) are derived from ABA Canon ~~3A (1)~~ 3B (2) and ~~current former~~ Md. Canon XIV.

~~See.~~ Canon 3A (3) is derived from ABA Canon ~~3A (2)~~ 3B (3) and ~~current former~~ Md. Canon XV.

~~See.~~ Canon 3A (4) is derived from ABA Canon ~~3A (3)~~ 3B (4) and ~~current former~~ Md. Canons IX and X.

~~See.~~ Canon 3A (5) is derived from ABA Canon ~~3A (4)~~ 3B (7) and ~~current former~~ Md. Canon XVI.

The ~~Commentary Comment~~ to ~~see.~~ Canon 3A (5) is derived from the Commentary to ABA Canon ~~3A (4)~~ 3B (7) and the Committee note to ~~current former~~ Md. Canon XVI.

~~See.~~ Canon 3A (6) is derived from ABA Canon ~~3A (5)~~ 3B (8) and ~~current former~~ Md. Canon VII.

The ~~Commentary Comment~~ to ~~see.~~ Canon 3A (6) is derived from the Commentary to ABA Canon ~~3A (5)~~ 3B (8) and from ~~current former~~ Md. Canon VII.

~~See.~~ Canon 3A (7) is derived from ABA Canon 3 A B (6) and ~~current former~~ Md. Ethics Rule 12.

The ~~Commentary Comment~~ to ~~see.~~ Canon 3A (7) is derived from the Commentary to ABA Canon ~~3A (6)~~ 3B (9).

~~Sec. 3A (8) is derived from current Md. Ethics Rule 13. There is no ABA provision on this subject ABA Canon 3B (10).~~

~~ABA Canon 3A (7), current Md. Canon XXXIV, and current Md. Ethics Rule 11 contain provisions governing broadcasting, televising, recording or photographing in courtrooms and adjacent areas. Several states have deleted that provision on the ground that it addresses a question of court administration rather than ethics. The Committee agrees, especially since Rule 1209 of the Md. Rules of Procedure governs media coverage of civil actions, and Md. Code, Art. 27, sec. 467B prohibits (with limited exceptions) media coverage of criminal trials.~~

~~See Canon 3A (9) and the Commentary Comment to See Canon 3A (9) are derived from ABA Canon 3B (5) and the Commentary to the Canon of the 1990-2000 ABA Code of Judicial Conduct.~~

~~Section Canon 3A (10) is derived from ABA Canon 3B (6) of the 1990-2000 Code.~~

~~Sections Canons 3A (9) and 3A (10) were added to emphasize the requirements of impartial decision-making and the appearance of fairness in the courtroom.~~

~~Canon 3A (11) is derived from ABA Canon 3B (1).~~

B. ADMINISTRATIVE RESPONSIBILITIES.-

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

~~COMMENT~~

~~Former Section 3B (1) was revised to prohibit a judge from manifesting bias or prejudice in the performance of~~

~~administrative duties and to encourage, rather than to require, the more practicable duty of cooperation rather than facilitation.~~

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

COMMENT

~~Former Section 3B (2) was revised to add the requirement that a judge exercise reasonable direction and control over judicial personnel to assure that they do not manifest bias or prejudice in the performance of their official duties.~~

~~(3) A judge should take or initiate appropriate corrective measures against a judge or lawyer for unprofessional conduct of which the judge may be aware. A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.~~

COMMENT

~~Corrective measures may include a private admonition or reporting misconduct to the appropriate disciplinary body or a bar association counseling program.~~

~~(4) In exercising a power of appointment, a judge should appoint only qualified persons and should avoid nepotism and~~

~~favoritism. No~~ A judge shall not make unnecessary appointments ~~should be made.~~ A judge shall avoid nepotism and favoritism. A judge ~~should~~ shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT

Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this section.

Committee note.-- ~~See.~~ Canon 3B (1) is derived from ABA Canon [3B (1)] C(1) of the ~~1990~~ 2000 Code of Judicial Conduct and ~~current~~ former Md. Canon VIII.

~~See.~~ Canon 3B (2) is derived from ABA Canon [3B(2)] 3C (2) of the ~~1990~~ 2000 Code of Judicial Conduct and ~~current~~ former Md. Canon VIII.

~~The Commentary to Sections 3B (1) and (2) is derived from the Commentary to ABA Canons 3C (1) and (2) of the 1990 Code of Judicial Conduct.~~

~~See.~~ Canon 3B (3) is derived from ABA Canon 3B C (3) and ~~current~~ former Md. Canon XI, ~~except that those provisions require the judge to take appropriate "disciplinary" measures. The Committee believes that there may be instances of professional misconduct which would warrant a private admonition or referral to a bar association counseling service, actions which are less drastic than "disciplinary" measures. Requiring a judge to take "corrective" measures, therefore, gives the judge a wider range of options to deal with unprofessional conduct.~~

~~The Commentary to sec. 3B (3) is derived from the Commentary to ABA Canon 3B (3), but is modified in accordance with the Committee's changes to ABA Canon 3B (3).~~

~~See.~~ Canon 3B (4) is derived from ABA Canon 3B C (4) and ~~current~~ former Md. Canon XII.

~~The Commentary to sec. 3B (4) is derived from the Commentary to ABA Canon 3B (4) and from current Md. Canon XII.~~

C. RECUSAL.-

(1) A judge ~~should not participate~~ shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

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

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

COMMENT

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should not participate 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 or minor child of the judge residing in the judge's household, has a **significant**

financial interest in the subject matter in controversy or in a party to the proceeding, ~~or any other interest that could be substantially affected by the outcome of the proceeding;~~

COMMENT

~~As a minimum standard for determining what constitutes a "significant financial interest," the judge should apply the definition of "financial interest" provided in the Maryland Public Ethics Law, Md. Code, State Government Article, §15-102 (n) (1995 Replacement Volume and 1998 Supplement): "(1) Ownership of an interest as the result of which the owner has received within the past 3 years, is currently receiving, or in the future is entitled to receive, more than \$1,000 per year; or (2)(i) ownership of more than 3% of a business entity; or (ii) ownership of securities of any kind that represent, or are convertible into, ownership of more than 3% of a business entity."~~

Moreover, There may be situations involving a lesser financial interest which also require recusal because of the judge's own sense of propriety. Conversely, there are situations where participation may be appropriate even though the "financial interest" threshold is present. In the latter case, the judge must first obtain an opinion from the Judicial Ethics Committee to obtain an exemption, except as provided in Canon 3D (Non-recusal by Agreement).

(d) the judge, the **judge's** spouse ~~of the judge~~, **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;

COMMENT

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself require recusal of the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Canon 3C (1), or that the lawyer-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 Canon 3C (1)(d)(iii) may require the judge's recusal.

(iii) is **known** by the judge to have ~~an~~ a **significant financial interest** that could be substantially affected by ~~the outcome of~~ the proceeding;

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

(2) A judge ~~should~~ **shall** keep informed about ~~his or her~~ ~~the judge's~~ personal and **fiduciary** financial interests, and **shall** make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and ~~minor~~ children residing in the judge's household.

~~(3) For the purposes of this section:~~

~~(a) the degree of relationship is calculated according to the civil law system;~~

COMMENT

~~The following persons are within three degrees of relationship according to the civil law system: parent, grandparent, sibling, child, grandchild, uncle, aunt, niece, and nephew.~~

~~(b) "fiduciary" includes such relationships as~~

~~personal representative, executor, administrator, trustee, custodian, attorney in fact by power of attorney, and guardian;~~

~~(c) "financial interest" means ownership of a legal or equitable interest, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:— (i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;~~

~~(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;~~

~~(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the interest;~~

~~(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.~~

Comment

Under this Rule, a judge should recuse himself or herself whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Canon 3C (1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be recused from any matters in which that law firm appeared, unless the recusal 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 recusal, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of recusal. 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 recusal and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Committee note.-- See. Canon 3C (1)(a) is derived from ABA Canon ~~3C~~ **3E** (1)(a).

See. Canon 3C (1)(b) is derived from ABA Canon ~~3C~~ **3E** (1)(b). Former Md. Ethics Rule 2 requires recusal in any matter in which the judge previously acted as a lawyer. Sec. 3C (1) (b) extends the recusal requirement to any matter in which the judge's former partner or associate acted while the judge was in practice.

The ~~Commentary~~ **Comment** to see. Canon 3C (1)(b) is derived from the Commentary to ABA Canon ~~3C~~ **3E** (1)(b) and is consistent with Md. Judicial Ethics Opinion No. 1 (issued 9/13/71).

Sec. 3C (1)(c) is derived from ABA Canon ~~3C~~ **3E** (1)(c) and ~~current~~ **former** Md. Ethics Rule 2. That ABA Canon requires recusal if any ~~financial~~ **economic** interest, "~~however small,~~" is present; ~~current~~ **former** Md. Ethics Rule 2 mandates recusal if a judge has a "significant" financial interest in the matter, which means a value in excess of \$1,000. See Md. Judicial Ethics Opinion No. 78 (issued 10/29/80). The

Committee believes that de minimis financial interests should not automatically require recusal. As a result, the Committee favors the use of the definition of "financial interest" provided in the Maryland Public Ethics Law. Accordingly, this standard is set forth in the ~~Commentary to sec. 3C (1)(e)~~ definition of "Significant financial interest" in the Terminology section.

The first sentence of the last paragraph of the ~~Commentary Comment~~ to ~~sec. Canon~~ 3C (1)(c) is derived from the Committee note to ~~current former~~ Md. Ethics Rule 2. The last two sentences of this ~~Commentary Comment~~ are new and allow some flexibility to mandatory recusal even where the financial interest threshold exists. Such exemptions can be determined by the Committee on an ad hoc basis.

~~The first clause of sec. Canon~~ 3C (1)(d)(i) is derived from ABA Canon 3E 3E (1)(d)(i), ~~current former~~ Md. Canon XIII, and ~~current former~~ Md. Ethics Rule 2. ~~The second clause is derived from the same ABA Canon, which does not, however, require knowledge by the judge of the relative's position. The Committee believes that such knowledge should be actual, not imputed.~~

~~Sec. Canon~~ 3C (1)(d)(ii) is derived from ABA Canon 3E 3E (1)(d)(ii).

The ~~Commentary Comment~~ to ~~sec. Canon~~ 3C (1)(d)(ii) is derived from ~~the Commentary to~~ ABA Canon 3E 3E (1)(d)(ii) and is consistent with Md. Judicial Ethics Opinion No. 53 (issued 6/16/77) and No. 25 (issued 12/26/74).

~~Sec. Canon~~ 3C (1)(d)(iii) is derived from ABA Canon 3E 3E (1)(d) (iii).

~~Sec. Canon~~ 3C (1)(d)(iv) is derived from ABA Canon 3C (1)(d)(iv).

~~Sec. Canon~~ 3C (2) is derived from ABA Canon 3E 3E (2) and ~~current former~~ Md. Canon XXV.

~~Sec. 3C (3)(a) is derived from ABA Canon 3C (3)(a). Current Md. Ethics Rule 2 uses the common law system, which counts down from the common ancestor, a method which would extend the disqualification where the judge's first cousins are involved. Thirty seven states have adopted the ABA Code provision, as does Md. Code, sec. 1-203 of the Estates and~~

~~Trusts Article for purposes of estate distribution and administration.~~

~~The Commentary to sec. 3C (3)(a) is derived from the Commentary to ABA Canon 3C (3)(a).~~

~~Sec. 3C (3)(b) is derived from ABA Canon 3C (3)(b).~~

~~Sec. 3C (3)(c) is derived from ABA Canon 3C (3)(c), but is modified as explained in the Committee note to sec. 3C (1)(c).~~

~~Sec. 3C (3)(c)(i) is derived from ABA Canon 3C (1)(c)(i). This provision would, superficially at least, negate Md. Judicial Ethics Opinion No. 81 (issued 11/20/80). That opinion required recusal because the judge had invested in an unusual type of mutual fund, where the investments were unchanging and the judge knew of each company in which the fund had invested. Under those particular facts, however, the judge's recusal would still be required under Canon 3C (1)(c) ("an interest that could be substantially affected by the outcome of the proceeding") or under the broad test of Canon 3C (1) (where the judge's "impartiality might reasonably be questioned").~~

~~Secs. 3C (3)(c)(ii), (iii) and (iv) are derived from ABA Canon 3C (3)(ii), (iii), and (iv), respectively.~~

D. NON-RECUSAL BY AGREEMENT.-

Where recusal would be required by Canon 3C, ~~(1)(c) or Canon 3C (1)(d)~~, the judge may disclose on the record the basis of **reason for** the recusal. If the lawyers, after consultation with their clients and ~~independently of the judge's participation~~, **out of the presence of the judge** all agree ~~on the record~~ that the judge ought to participate notwithstanding the basis for recusal, the judge may participate in the proceeding. **If following disclosure of any**

basis for recusal other than what is required by Canon 3C (1)(a), the parties and lawyers, without participation by the judge, all agree that the judge should not have to recuse himself or herself, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement of the parties shall be incorporated in the record of the proceeding.

COMMENT

~~This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. A pro se party may agree to allow participation by the judge. This~~ procedure provides the parties an opportunity to proceed without delay if they wish to waive the recusal. To assure that consideration of the question of waiver of the recusal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible waiver of the recusal unless the lawyers jointly propose waiver after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the waiver agreement.

~~Committee note. Sec. 3D and the Commentary there to are derived from ABA Canon 3D and the commentary thereto; however, those provisions require written approval of the parties. Because a party may not be readily available to sign, the Committee believes that the lawyer's agreement, after consultation with the client, should suffice. Non-recusal by agreement is not permitted under current Md. Ethics Rule 2, as interpreted by Md. Judicial Ethics Opinion No. 78 (issued 10/29/80) and No. 50 (issued 1/17/77).~~

E. Disciplinary Responsibilities.

(1) A judge should take or initiate appropriate

corrective measures with respect to the unprofessional conduct of another judge. A judge shall inform the Commission on Judicial Disabilities of facts **known** to that judge that raise a substantial question as to another judge's fitness for office where corrective measures are not appropriate, or if attempted, were not successful.

(2) A judge should take or initiate appropriate corrective measures with respect to the unprofessional conduct of a lawyer. A judge shall inform the Attorney Grievance Commission of facts **known** to that judge that raise a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(3) Acts of a judge, required or permitted by Canons 3E (1) and 3E (2) shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

COMMENT

Appropriate corrective measures may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

The Committee believes that there may be instances of professional misconduct which would warrant a private admonition or referral to a bar association counseling service, actions which are less drastic than "disciplinary" measures. Requiring a judge to take "corrective" measures, therefore, gives the judge a wider range of options to deal with unprofessional conduct.

REPORTER'S NOTE

Section A (1) through (4) have been changed to be stated as mandatory as the parallel ABA Canon is. The Comment is new and is identical to the ABA Commentary to Canon 3B. Canon 3A (5) is substantially the same as Canon 3B (7) of the ABA Code, except for section (f) which is new. The Subcommittee was of the opinion that a judge who is not involved or likely to become involved in a pending or impending proceeding need not be prohibited from ex parte communications about the case. Most of the Comments to Canon 3A (5) have been added and are substantially the same as the parallel ABA Commentary. Canon 3A (6) has been modified to use the word "shall" instead of the word "should" which is the way the ABA Canon 3B (8) is written. Canon 3A (7) was changed at the request of the Judicial Ethics Committee. The Committee was concerned that the language of the Rule might interfere with a judge's ability to discuss a pending or impending case while the judge was teaching a class. Some of the new language was taken from Canon 3B (8) of the ABA Code. Maryland Canon 3A (8) has been modified by the Subcommittee to more clearly state that the judge is not to praise nor criticize the verdict to the jury. Canon 3A (11) is new and was added for clarity. The Committee note to Canon 3A has been updated.

Canon 3B (1) was modified by the Subcommittee taking out unnecessary language and formulating the Rule as completely mandatory. The Comment was deleted because it is obsolete as was the Comment to Canon 3B (2). The Subcommittee recommends the adoption of the ABA version of Canon 3B (3) which is numbered 3C (3). The Comment to Canon 3B (3) was deleted as it does not appear in the ABA Rule. Canon 3B (4) was changed to be the same as ABA Canon 3C (4). The Committee note was updated.

Canon 3C (1) has been changed slightly to the ABA version of the Canon, but the Subcommittee prefers the word "recusal" to the word "disqualification" and uses the word "recusal" throughout the Rules. The Subcommittee put the first paragraph of the Comment to Canon 3C (1)(c) into the Terminology Section as a definition of the term "significant financial interest." The language in Canon 3C (1)(d) has been changed to the language in ABA Canon 3E (1)(d). The Subcommittee took out the language which read "the outcome of" from the Comment to Canon 3C (1)(d)(ii) as well as from Canon 3C (1)(d)(iii) to broaden the effect of the Comment and Rule.

In Canon 3C (d)(2) the Subcommittee is using the term "significant financial interest" in place of the former term "interest" or the ABA term "more than de minimus interest." The Subcommittee deleted Canon 3C (3) and the Maryland Comment as unnecessary, substituting the Commentary to ABA Canon 3E (1). The Committee note to Canon 3C has been updated.

The Subcommittee has modified Canon 3D to adopt the substance of ABA Canon F, the parallel provision and to adopt the Commentary to ABA Canon F as the Comment to Maryland Canon 3D.

Canon 3E is new and is based on Canon D of the ABA Code. The Subcommittee has substituted the name of the appropriate authority in sections (1) and (2) and has modified the language of section (1) to clarify when a judge has to notify the Commission on Judicial Disabilities. The first paragraph of the Comment is taken from the Commentary to ABA Canon D. The second paragraph was added by the Subcommittee to clarify that steps other than reporting to the commission on Judicial Disabilities or the Attorney Grievance Commission may be appropriate.

CANON 4

Extra-Judicial Activities

A. EXTRA-JUDICIAL ACTIVITIES IN GENERAL.-

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cause a substantial question as to the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or ~~Except as otherwise prohibited or limited by law or these canons, a judge may engage in the following activities, if doing so does not interfere with the proper performance of judicial duties, does not reflect adversely upon the judge's impartiality, and does not detract from the dignity of the office.~~

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

COMMENT

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.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes, or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual

orientation, or socioeconomic status. See Canon 2C and accompanying Comment.

~~Committee note. This Canon combines ABA Canons 4 (Quasi-judicial Activities) and 5 (Extra-judicial Activities) and 6 A and B (Compensation and Expense Reimbursement) and is consistent with the ABA Code, unless specifically noted otherwise.~~

~~A. B. AVOCATIONAL ACTIVITIES.-~~

~~A judge may speak, write, lecture, and teach on both legal and non-legal subjects. A judge may and participate in other extra-judicial activities concerning the law, the legal system, and the administration of justice. A judge may engage in social and recreational activities, and non-legal matters, subject to the requirements of this Code.~~

COMMENT

~~Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the society in which he or she may live.~~

~~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 and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.~~

In this and other sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic, or charitable activities. This phrase is included to remind judges that the use of permissive language in various sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

~~Committee note. — Sec. 4A is derived from ABA Canons 4A and 5A and current Md. Canon XXX.~~

~~The Commentary to sec. 4A is derived from the Commentary to ABA Canon 5A and from current Md. Canon XXXII.~~

~~B.~~ C. GOVERNMENT, CIVIC OR CHARITABLE ACTIVITIES. -

(1) A judge ~~may~~ shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except ~~and confer with public bodies or officials~~ on matters concerning the judiciary 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.

COMMENT

As suggested in the Reporter's Notes to the ABA Code of Judicial Conduct, the "administration of justice" is not limited to "matters of judicial administration" but is broad enough to include other matters relating to the judiciary.

(2) Except as otherwise provided by law and subject to Canon 4A, A a judge may ~~serve on~~ accept appointment to a governmental advisory bodies devoted to committee or commission or other governmental position the improvement of the law, the legal system or the administration of justice. and may A judge may, represent his or her a country, state, or locality on ceremonial occasions or in connection with historical, educational, and or cultural activities.

COMMENT

~~Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial time created by~~

~~today's crowded dockets and the need to protect the courts from involvement in extra judicial matters that may prove to be controversial. Judges should~~ **must** ~~not be expected or permitted to~~ accept governmental appointments that could interfere with the effectiveness and independence of the judiciary. Nor ~~can~~ **may** a judge assume or discharge the legislative or executive powers of government (Article 8 of the Md. Declaration of Rights) or hold

an "office" under the constitution or laws of the United States or State of Maryland (Article 33 of the Md. Declaration of Rights).

~~(3) As a private citizen, a judge may appear before or confer with public bodies or officials on matters that directly relate to a judge's person, immediate family or property so long as the judge does not use, and avoids the appearance of using, the prestige of the judge's office to influence decision-making. Committee note.— Sec. 4B (1) is derived from ABA Canon 4B, which provides as follows:~~

~~[A judge] may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.~~

~~The Committee believes that the phrase "matters concerning the law" is overly broad, and that a judge's participation, as a judge, before public bodies or officials should be limited to matters involving the judiciary or administration of justice. Current Md. Canon XXII allows a judge's participation in executive and legislative matters to "improve the administration of justice."~~

~~The Commentary to sec. 4B (1) is from the stated source.— Sec. 4B (2) is derived from ABA Canon 5 G. Current Md. Ethics Rule 3 and Article 33 of the Md. Declaration of Rights prohibit a judge from holding any "office," civil, military or political, under the constitution or laws of the United States or State of Maryland. An "office" is one which calls for the exercise of some portion of the sovereign power of government. See, e.g., Howard County Comm. v. Westphal, 232 Md. 334, 340 (1963) and Judicial Ethics Opinion No. 77 (issued 9/14/79) and No. 97 (issued 4/21/82). Service on a government "advisory" commission would not be prohibited. See Judicial Ethics Opinion No. 75 (issued 9/13/79) and No. 90 (11/28/80) and Unreported Opinion No. 82-16 (issued 9/7/82), No. 81-3 (issued 4/1/81) and No. 80-1 (issued 6/13/80).~~

~~The Commentary to sec. 4B (2) is derived from the Commentary to ABA Canon 5 G, except that the last sentence thereof is added to reflect the provisions of Articles 8 and 33 of the Md. Declaration of Rights.~~

~~Sec. 4B (3) appears to be prohibited by ABA Canon 4 B. However, within proper bounds and with appropriate restraint, such conduct has been permitted by Maryland judges in their personal affairs. See Judicial Ethics Opinion No. 99 (issued 7/12/82) and In Re Foster, 271 Md. 449 (1974).~~

~~C. CIVIC AND CHARITABLE ACTIVITIES. (3) Subject to the following limitations and the other requirements of this Code, A a judge may participate and serve as a member, or serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, law-related, or civic organization not conducted for the economic or political advantage of its members or profit, subject to the following provisions:~~

~~COMMENT~~

~~See Comment to Canon 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Canon 4C (3) to serve on the board of a fraternal institution may be prohibited from such service by Canons 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.~~

~~Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Canon 4C. For example, a judge is prohibited by Canon 4G from serving as a legal advisor to a civic or charitable organization.~~

~~(1)~~ (a) A judge ~~should~~ shall not participate ~~and~~ as a member or serve as an officer, director, trustee, or non-legal advisor of such organization if it is likely that the organization:

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

~~(b) (i) will be regularly engaged in adversary proceedings in any court; or~~

~~(c) (ii) deals with people who are referred to the organization by the any court on which the judge serves or who otherwise may likely come before that court.~~

COMMENT

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 a judge is affiliated to determine if it is proper to continue a relationship with it. For example, in many jurisdictions charitable organizations are now more frequently in court than in the past or make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

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 the 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.

~~(2) (b) A judge should not solicit funds for any such~~

~~organization, or use or permit the use of the prestige of the judge's office for that purpose, but a judge may be listed as an officer, director, or trustee of the organization. A judge may make recommendations to public and private fund granting agencies on projects and programs of which the judge has personal knowledge and which concern the law, the legal system, or the administration of justice. A judge should~~ shall not ~~be~~ participate as a speaker or as the guest of honor at an organization's a fund raising events, but may attend such events of a civic or charitable organization unless the organization is one that is devoted to the improvement of the law, the legal system, or the administration of justice and is not conducted for the political advantage or profit of its members.

(c) A judge as an officer, director, trustee, or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and 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 or, except as permitted in Canon 4C (3)(c)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) take reasonable measures to assure that the organization shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

~~Committee note. The first paragraph of sec. C is derived from ABA Canons 4 C and 5 B, current Md. Ethics Rule 9 and the Committee note to current Md. Ethics Rule 9.~~

~~Secs. 4 C (1) (a) and (b) are derived from ABA Canon 5 B (1).~~

~~Sec. 4 C (1) (c) is derived from a series of rulings by the Md. Judicial Ethics Committee. See Opinion No. 6 (issued 3/1/72), No. 35 (issued 10/3/75), and No. 75 (issued 9/13/79) and Unreported Opinion No. 81-15 (issued 2/16/82) and No. 82-7 (issued 4/26/82).~~

~~The first paragraph of the Commentary to sec. 4 C (1) is derived from the Commentary to ABA Canon 5 B.~~

~~The second paragraph of the Commentary to sec. 4 C (1) is derived from the Commentary to ABA Canon 4 C.~~

~~Sec. 4 C (2) is derived from ABA Canon 5 B (2), ABA Canon 4 C, current Md. Canon XXIV, current Md. Ethics Rule 9 and is consistent with numerous opinions issued by the Judicial~~

~~Ethics Committee, with one exception: Judicial Ethics Opinion No. 6 (issued 3/1/72) and No. 59 (issued 11/30/77) require that the name of the judge be omitted as an officer or director in any campaign literature for that organization. ABA Canon 4 C permits a judge to assist in fund raising for a law related organization, provided the judge does not personally participate in "public" fund raising activities. The Committee believes that the dangers inherent in a judge's participation in civic and charitable fund raising are equally applicable to fund raising, public or private, for law related organizations. Notwithstanding these prohibitions, the judge may still participate in "purely internal discussions and decisions within the confines of the governing board" relating to fund raising activities. Judicial Ethics Opinion No. 89 (issued 11/25/80).~~

~~ABA Canon 5 B (3) provides that a judge should not give investment advice to a non profit organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions. The ABA rationale for this prohibition is to avoid attributing to the judge a fiduciary's interest in the organization's investment portfolio, which could result in the judge's recusal in a case involving such investments. This provision is unnecessary, since proposed Maryland Canon 3 C (3)(c)(ii) provides that a judge's office in a non profit organization is not a "financial interest" in securities held by the organization. Moreover, there are many other types of decisions that a judge would make as a board member which would require recusal in a particular matter, but which are not specifically dealt with in these canons.~~

COMMENT

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 is not essentially a fund-raising 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 for funds or memberships 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 such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Canon 4C (3)(c) 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.

Although a judge is not permitted to be a speaker or guest of honor at a fund-raising event, this Canon does not prohibit the judge from attending the event.

D. FINANCIAL ACTIVITIES.-

(1) A judge ~~should refrain from~~ shall not engage in financial and business dealings that:

(a) use may reasonably be perceived to exploit the judge's judicial position, or

(b) 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.

COMMENT

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 recusal. With respect to affiliation of relatives of the judge with law firms appearing before the judge, see Comment to Canon 3C (1) relating to recusal.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Canon 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Canon 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. See Comment to Canon 4B regarding use of the phrase "subject to the requirements of this Code."

(2) Subject to the requirements of this Code, A a judge may hold and manage investments, including real estate, and engage in other remunerative activity except that a full-time judge shall not hold any office or directorship in any public utility, bank, savings and loan association, lending institution, insurance company, or any other business corporation or enterprise or venture which is affected with a public interest.

~~(3) A judge should manage investments and other~~

~~financial interests to minimize the number of cases in which
recusal would be required. As soon as practicable without
serious financial detriment, the judge should dispose of
investments and other financial interests that might require
frequent recusal.~~

~~(4) Information acquired by a judge in his or her
judicial capacity should not be used or disclosed by the judge
in financial dealings or for any other purpose not related to
the judge's judicial duties.~~

~~Committee note: Sec. 4 D (1) is derived from ABA Canon 5 C
(1) and current Md. Canon XXV.~~

~~Sec. 4 D (2) is derived from ABA Canon 5 C (2) and
current Md. Ethics Rule 6. However, ABA Canon 5 C (2)
prohibits a judge from serving as an officer, director,
manager, advisor, or employee of any business. Only 8 states
have adopted that version without any change, and 7 states
have adopted a slightly modified version. Sec. 4 D (2)
continues the present practice provided in current Md. Ethics
Rule 6 and has been substantially adopted in at least 15
states. At least 2 other states are more permissive. Seven
states only allow a judge to participate in a "family"
business or "closely held business."~~

~~Sec. 4 D (3) is derived from ABA Canon 5 C (3) and
current Md. Canon XXV.~~

~~Sec. 4 D (4) is derived from ABA Canon 5 C (7) and
current Md. Canon XXV.~~

~~E. COMPENSATION AND EXPENSE REIMBURSEMENT.~~

~~A judge may receive compensation and reimbursement of
expenses for activities permitted by this Code, subject to~~

~~the following restrictions:~~

~~(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.~~

~~(2) Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of such an amount is compensation.~~

~~Committee Note: This is found in ABA Canon 6 A and 6 B but is placed here because it is related to the financial activities of a judge.~~

~~F. GIFTS.—~~

~~(1) (3) A judge must be especially careful in accepting gifts, favors, and loans from persons not in the judge's immediate family. However innocently intended, gifts and favors from such persons, especially gifts and favors having substantial monetary value, may create an appearance that the judge could be improperly beholden to the donor. Subject to this caveat, and except as otherwise prohibited or limited by law or these canons, a judge may accept 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:~~

COMMENT

Canon 4D (3) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.

A judge should be especially careful in accepting gifts, favors, and loans from persons not in the judge's immediate family. However innocently intended, gifts and favors from such persons, especially gifts and favors having substantial monetary value, may create an appearance that the judge could be improperly beholden to the donor.

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;

COMMENT

Acceptance of an invitation to a law-related function is governed by Canon 4D (3)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Canon 4D (3)(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 Canons 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 of a judge 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 the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

~~(b)~~ (c) ordinary social hospitality;

~~(e)~~ (d) a gift from a ~~friend or~~ relative or friend, ~~by reason of some~~ for a special occasion, such as a wedding, anniversary, or birthday, ~~and the like,~~ if the gift is fairly commensurate with the ~~nature of the occasion and the~~ friendship or occasion and the relationship;

COMMENT

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require recusal of the judge where recusal would not otherwise be required. See, however, Canon 4D (3)(e).

~~(d)~~ (e) a gift, bequest, favor, or loan from a relative

or close personal friend whose appearance ~~before the judge or~~
~~whose interest in a case would require a recusal under Canon 3~~
€ or interest in a case would in any event **require** a recusal
under Canon 3C;

~~(e) a scholarship or fellowship awarded on the same terms~~
~~applied to other applicants;~~

(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

~~(2) (h) The standards set forth in subsection (1) of~~
~~this section also apply to gifts, favors, and loans offered to~~
~~members of the judge's family who reside in the judge's~~
~~household. For purposes of this Canon and absent extraordinary~~
~~circumstances, gifts, favors and loans accepted by such family~~
~~members shall be considered to be accepted by the judge any~~
other gift, bequest, favor, or loan, only if: the donor is
not a party or other person who has come or is likely to come
or whose interests have come or are likely to come before the
judge; and, if its value exceeds \$150.00, the judge reports it
on the judge's financial disclosure statement in accordance
with Rule 16-815.

COMMENT

~~This section relating to gifts does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.~~

~~Judges are often invited by lawyers or other persons to attend social, educational, or recreational functions. In most cases, such invitations would fall within the realm of ordinary social hospitality and may be accepted by the judge. If there is more than a token fee for admission to the function, however, unless the fee is waived by the organization, the judge should pay the fee and not permit a lawyer or other person to pay it on the judge's behalf.~~

~~Canon 4D (3)(h) prohibits judges from accepting gifts, favor, 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.~~

~~Committee note: Sec. 4F (1) is new language not found in either the ABA Code or the current Md. Canons.~~

~~Sec. 4 F (1) (a) is derived from ABA Canon 5C (4) (a).~~

~~Sec. 4 F (1) (b) is derived from ABA Canon 5C (4) (b).~~

~~Sec. 4 F (1) (c) is derived from ABA Canon 5C (4) (b); but that provision allows a judge to receive a wedding or engagement gift from anyone, which the Committee believes is overly broad.~~

~~Sec. 4F (1) (d) is derived from ABA Canon 5C (4) (c), current Md. Canon XXXI, and current Md. Ethics Rule 7. Those ABA and Md. provisions allow a judge to receive any gift from any donor who is not a party or other person whose interests have come or are likely to come before the judge. The Committee believes these provisions are too permissive, since it is difficult to know if a person's interests will be submitted to the judge in the future, and since it is unseemly and perhaps suspicious for a judge to accept gifts for no apparent reason from persons with whom the judge has little or no connection or relationship. This provision allows a judge to receive any type of gift from relatives and close personal friends who could not appear before the judge.~~

~~Sec. 4F (1)(e) is derived from ABA Canon 5C (4)(b).~~

~~Sec. 4F (1)(f) is derived from ABA Canon 5C (4)(b).~~

~~Sec. 4F (2) is derived from ABA Canon 5C (4)(b), except that the phrase "absent extraordinary circumstances" has been added.~~

~~The first sentence of the Commentary following sec. 4F (2) is derived from the Commentary to ABA Canon 5C (4) and from current Md. Ethics Rule 7. The remainder of that Commentary is new and provides guidance as to the scope of "ordinary social hospitality" as used in sec. 4 F (1) (b). It is consistent with Md. Judicial Ethics Opinion No. 91 (issued 3/2/81), which permits a judge to accept an invitation by a bar association to a bar association function which otherwise requires a paid ticket of admission; and Md. Judicial Ethics Opinion No. 102 (issued 3/21/84), which allows a judge to accept an invitation of an attorney to a bar association or other social function where an admission fee is not charged provided that "there is no reason to suspect that the attorney will attempt to use the judge's presence for any inappropriate purpose." ABA Canon 5 C (4) (a) allows a judge to accept an invitation from anyone to a bar related function or activity even if the inviter pays the admission fee for the judges.~~

~~G. **E. FIDUCIARY ACTIVITIES.**~~

~~(1) A judge should not serve as a fiduciary except in the following instances. A judge may serve as a personal representative (executor or administrator) or special administrator of the estate of a decedent, as a trustee of a trust, as a custodian, as a guardian, or as an attorney in fact but only where the judge is spouse, the surviving spouse or is related within the third degree (according to the civil law system) to the decedent, grantor, minor or disabled person. A judge actually serving as a trustee of a trust on~~

~~December 31, 1969, may continue to serve even if not within the required degree of relationship. In extraordinary cases, a judge may serve as guardian or attorney in fact for any other person with whom the judge maintains a close familial relationship, but only if there is no other person ready, willing and able to serve in that capacity. While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge personally. A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other **fiduciary**, except for the estate, trust, or person of a member of the judge's family subject to the requirements of this Code.~~

(2) A judge shall not agree to serve as a **fiduciary** if it is likely that the judge as a **fiduciary** 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 one 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.

COMMENT

~~A judge's obligation under this canon and as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 4 D (3).~~

The Time for Compliance provision of this Code (Canon 6D) postpones the time for compliance with certain provisions of this Canon in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Canon 4D (5).

Committee note.- See. Canon 4G 4E is derived from ABA Canon 5D, with substantial modifications 4E. Secs. 5-105 (b) (5) and 14-104 of Md. Code Ann., Estates and Trusts Article, prohibit a judge from serving as a personal representative or trustee for someone who is not a spouse or related within the third degree (although a judge serving as trustee as of 12/31/69 is allowed to continue in that capacity). Maryland law and the existing Maryland canons do not prohibit a judge from serving as any other type of fiduciary for anyone. (Judicial Ethics Opinion No. 60 erroneously assumes that Maryland statutory law prohibits a judge from serving as a guardian of the property of a disabled person. But see Unreported Opinion Docket No. 82-10). If a judge serving as a fiduciary is involved in litigation, the judge shall not participate in a proceeding in which the judge's impartiality might reasonably be questioned. See Canon 3C. ~~ABA Canon 5 D allows a judge to serve as a fiduciary only for a "spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship." As can be seen, the ABA canon is more permissive than Maryland law as to personal representatives and trustees, but is more restrictive than Maryland law or existing Maryland canons as to other types of fiduciaries. The Committee believes that a judge's eligibility as a fiduciary should be very limited, because of the necessity or likelihood of the judge having to appear in court or be under court supervision as a representative of a party. The limitations imposed by the legislature as to personal representatives and trustees appeared to the Committee to be appropriate for guardians and custodians. The Committee recognizes the exceptional situation where the judge should be allowed to act as a guardian or attorney in fact for~~

~~a disabled person who is not a near relative but with whom the judge has a close relationship, and no one else is willing to undertake that personal responsibility.~~

~~ABA Canon 5D (1) provides that a judge "should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction." The Committee agrees that ordinarily a judge should not undertake a fiduciary position if adversary proceedings in the judge's court are likely to occur; however, the Committee believes that this ABA provision, which would require resignation whenever the estate or trust became involved in adversary proceedings, is too inflexible.~~

The ~~Commentary~~ **Comment** to ~~sec.~~ **Canon 4G 4E** is derived from the ~~Commentary~~ to ABA Canon 5D **4E**.

H. F. ARBITRATION SERVICE AS ARBITRATOR OR MEDIATOR.-

A judge ~~should~~ **shall** not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by **law**.

COMMENT

This does not preclude a judge from participating in settlement conferences. If by reason of disclosure made during or as a result of the conference, the judge's impartiality might reasonably be questioned, the judge should not further participate in the matter. See Canon 3 C (1).

~~See. H~~ **Canon 4F** is derived from ABA Canon 5E **4F**. ~~Current~~ **Former** Md. Canon XXX allows a judge to act as an arbitrator or mediator pursuant to a contract in force on January 1, 1975. The Committee assumes that no such contract is still operative. If otherwise, the judge should make this known to the Committee.

~~Committee note. The Commentary to sec. H is new.~~

~~I.~~ G. PRACTICE OF LAW.-

~~(1) (a) Except as provided in subsection (b), a~~ A judge ~~should~~ 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.~~

~~(b) A part-time judge of the Orphans' Court may practice law to the extent permitted by law, except that the judge shall avoid conduct whereby such judicial position is used or seems to be used to further success in the practice of law; and in no event should the judge practice in the court in which the judge sits, even when presided over by another judge, nor appear therein pro se in any controversy.~~

~~(2) Prior to qualification for judicial office, a judge who intends to enter into an agreement under §1-203 (b) of the Md. Code Ann., Courts and Judicial Proceedings Article, for payments relating to the judge's former law practice should submit the agreement to the Judicial Ethics Committee so that the Committee may review it as to the reasonableness of the time provided for payments to be made under the agreement. A payment period limited to a maximum of five years or less is presumptively reasonable. A longer payment period is permitted only with the Committee's prior approval as to its reasonableness.~~

~~(3) An agreement entered into under §1-203 (b) of Md. Code Ann., Courts and Judicial Proceedings Article, may not be amended without the prior approval of the Judicial Ethics Committee.~~

~~(4) These subsections are applicable to any agreement entered into under §1-203 (b) of Md. Code Ann., Courts and Judicial Proceedings Article, on and after July 1, 1981.~~

COMMENT

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 Canon 2B.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as 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.

Committee note.--Sec. 4I (a) Canon 4G is derived from ABA Canon 5F 4G and ~~current~~ former Md. Canon XXX.

~~Sec. 4 I (b) is derived from paragraph A of the Compliance Section of the ABA Code and current Md. Canon XXX.~~

~~Secs. 4 I (2), (3), and (4) are derived from current Md. Ethics Rule 5A. a., b., and c., respectively.~~

E. H. COMPENSATION AND ~~EXPENSE~~ REIMBURSEMENT.-

A judge may receive compensation and reimbursement of expenses for **extra-judicial** activities permitted by this Code, ~~subject to the following restrictions~~ **if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety:**

~~(1)~~ **(a)** Compensation ~~should~~ **shall** not exceed a reasonable amount nor ~~should~~ **shall** it exceed what a person who is not a judge would receive for the same activity.

~~(2)~~ **(b)** Expense reimbursement ~~should~~ **shall** be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse **or guest**. Any payment in excess of such an amount is compensation.

COMMENT

The 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 trade on the 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.

Disclosure of a judge's income, debts, investments, or other assets is required only to the extent provided in this Canon and in Canons 3C and 3D, or as otherwise required by law. See Code, State Government Article, §15-610.

REPORTER'S NOTE

Canon 4A has been changed to read the same as Canon 4A of the ABA Code including the ABA Commentary. The Committee note of the current Rule has been deleted.

Canon 4B has been modified to use the same language as the parallel ABA Rule, Canon 4B. The language of the current Comment has been deleted, and the language of the Commentary to Canon 4B of the ABA has been added in its place. The two Committee notes have been deleted.

Canon 4C (1) has been changed so that it is the same as ABA Canon 4C (1). Canon 4C (2) has been modified so that it is broader than the current language. The change allows a judge to sit on any governmental commission instead of only on those devoted to improvement of the law, the legal system, or the administration of justice as long as it is permissible by law and subject to Canon 4D. The Subcommittee deleted part of the current Comment as unnecessary.

The Subcommittee deleted current Canon 4C (3) as unnecessary. New Canon 4C (3) is derived from current Canon 4C and ABA Canon 4C (3). The Comment is based on the Commentary to the ABA Canon. Canon 4C (3)(a) was formerly numbered Canon 4C 1. It is similar to ABA Canon 4C (3)(a), but the Subcommittee has made some changes to it, including deletion of the language "will be engaged in proceedings that would ordinarily come before the court." The deletion of this language broadens the limitation on the judge's service as an officer, director, or advisor of an educational, religious, charitable, or fraternal organization.

Canon 4C (3)(b) has been changed. The language referring to soliciting funds and making recommendations to fund granting agencies has been deleted. The Subcommittee limited the prohibition against a judge participating as a speaker or guest of honor at fund-raising events by allowing this when the organization is one that is devoted to the improvement of the law, the legal system, or the administration of justice.

Canon 4C (3)(c) is derived from ABA Canon 4C (3)(b). The Committee note has been deleted as obsolete. The Comment is substantially the same as the ABA Commentary to Canon 4C (2)(c).

Canon 4D (1) has been changed so that it is the same as

the parallel ABA rule, Canon 4D. The Comment is the last two paragraphs of the ABA Commentary. Canon 4D (2) is the current Maryland Canon except that the Subcommittee added the phrase "subject to the requirements of this Code" which is in Canon 4D (2) of the ABA Code. This language alerts judges that other restrictions may apply.

The Subcommittee deleted current Canon 4D (3) and (4) because of their restrictiveness. The Subcommittee deleted the Committee note after Canon 4D (4) because the note was unnecessary.

The Subcommittee moved Canon 4E to Canon 4H. Canon 4D (3) was previously Canon 4F. It has been changed so that it is identical to Canon 4D (5) of the ABA Code, including the Comment.

Canon 4D (3)(a) which had been Canon 4F (a) has been changed so that it is the same as Canon 4D (5)(a) of the ABA Code. The Subcommittee also adopted the language of the ABA Commentary as a Comment to Canon 4D (3)(a).

Canon 4D (3)(b) is new and is identical to ABA Canon 4D (5)(b). Canon 4D (5)(d) has been changed so that it is the same as ABA Canon 4D (5)(d). The Commentary to the ABA provision is now the Comment to Canon 4D (5)(d).

Canon 4D (5)(e) has been changed so that it is similar to Canon 4D (5)(e) of the ABA Code, except that the Subcommittee has retained the word "recusal" instead of the word "disqualification." Canon 4D (5)(g) has been slightly modified to use the language of Canon 4D (5)(g) of the ABA Code.

Canon 4D (5)(h) has been modified so that it is similar to Canon 4D (5)(h) of the ABA Code. The Subcommittee changed the Comment so that it is the same as the language in the ABA Commentary to Canon 4D (5)(h). The Committee note has been deleted as obsolete.

Canon 4E (1) has been modified so that it is similar to Canons 4E (1), (2) and (3) of the ABA Code. The Subcommittee deleted the Comment and substituted in its place the language of the Commentary to ABA Canon 4E. The Subcommittee deleted part of the Committee note referring to ABA Canons which the Subcommittee felt was unnecessary. The Subcommittee added language covering the situation where a judge serving as a

fiduciary is involved in litigation.

Canon 4F was previously Canon 4H. The Subcommittee changed Canon 4F so that it is identical to ABA Canon 4F. The Committee note has been deleted as unnecessary.

Canon 4G was formerly Canon 4I. The Subcommittee deleted all sections of Canon 4G in favor of the briefer language of ABA Canon 4G. The Subcommittee added a new Comment to Canon 4G, using the language of the ABA Commentary.

Canon 4H was formerly Canon 4E. The Subcommittee changed the Canon slightly so that it is identical to the language of ABA Canon 4H. A new Comment was added which was taken from the language of the ABA Commentary to Canon 4H.

CANON 5

Political Activity

A. POLITICAL CONDUCT OF A JUDGE WHO IS NOT A CANDIDATE.-

A judge who is not a candidate for election, ~~or~~ re-election ~~to~~, or retention ~~to~~ in a judicial office ~~should~~ ~~shall~~ not engage in any partisan political activity and ~~should~~ ~~shall~~ resign judicial office when becoming a candidate for a non-judicial office, except that the judge may continue to hold judicial office while a candidate for election to or serving as a delegate in a state constitutional convention.

Committee note.- ABA Canon ~~7A~~ 5A (1), ~~current~~ former Md. Canon XXVII, and ~~current~~ former Md. Ethics Rule 3 generally prohibit partisan political activity by a judge who is not a candidate for judicial office. The resignation requirement is found in ABA Canon ~~7-A-(3)~~ 5A (2), ~~current~~ former Md. Canon XXIX, and ~~current~~ former Md. Ethics Rule 4. ABA Canon ~~7-A-(3)~~ 5A (2) allows a judge to serve as a state constitutional convention delegate if allowed by law. Such a delegate is not an "office" which Article 33 of the Md. Declaration of Rights prohibits a judge from holding. Board v. Attorney General, 246 Md. 417 (1967).

B. POLITICAL CONDUCT OF A JUDGE WHO IS CANDIDATE.-

A judge who is a candidate for election, re-election, or retention to judicial office may engage in partisan political activity allowed by **law** with respect to such candidacy, except that the judge

(1) ~~should~~ ~~shall~~ not act as a leader or hold any office

in a **political organization**;

(2) ~~should~~ **shall** not make speeches for a **political organization** or candidate or publicly endorse a candidate for non-judicial office;

COMMENT

A judge does not publicly endorse a candidate for public office by having the judge's name on the same ticket.

(3) ~~should~~ **shall** maintain the dignity appropriate to judicial office;

(4) ~~should~~ **shall** not allow any other person to do for the judge what the judge is prohibited from doing;

(5) ~~should~~ **shall** not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, announce the judge's views on disputed legal or political issues, or misrepresent the judge's identity, qualifications, or other fact.

Committee note.- ~~See.~~ **Canon 5B** (1) is derived from ABA Canon ~~7A~~ **5A** (1) (a), ~~current~~ **former** Md. Canon XXVII, and ~~current~~ **former** Md. Ethics Rule 3.

~~See.~~ **Canon 5B** (2) is derived from ABA Canon ~~7-A (1) (b)~~ **5A** (1)(c) and ~~current~~ **former** Md. Canon XXVII, although the ABA language probably is broad enough even to prohibit a judge from endorsing another judge who is also a candidate. However, public endorsement by one judicial candidate of another judicial candidate has long been permitted in Maryland. See Md. Judicial Ethics Opinion No. 20 (issued 4/25/74).

The Commentary to ~~see~~ Canon 5B (2) is derived from the Commentary to ABA Canon ~~7A (1)(b)~~ 5A (1)(c) and is consistent with Md. Judicial Ethics Opinion No. 109 (issued 2/14/86).

~~See~~ Canon 5B (3) is derived from ABA Canon ~~7B (1)(a)~~ 5A (3). That canon also provides that a judge should encourage family members to adhere to the same standards of political conduct that apply to the judge. The Committee disagrees with this proposition; it believes that family members should be free to engage in political activity in their own right which is not related to the judge's office.

~~See~~ Canon 5B (4) is derived from ABA Canon ~~7B (1)(b)~~ 5A (3)(c) and is generally implied in ~~current~~ former Md. Canon XXIX and ~~current~~ former Md. Ethics Rule 10. ABA Canon ~~7B (1)(b)~~ 5A (3)(c) ~~also~~ provides that a judge should prohibit public officials or employees subject to the judge's direction and control for doing for the judge what the judge is prohibited from doing. The Committee believes that this is redundant to the remainder of the subsection and may even imply that a judge must terminate the employment of a person who does not follow the judge's admonitions - a result which may be unreasonable under the circumstances.

~~See~~ Canon 5B (5) is derived from ABA Canon ~~7B (1)(e)~~ 5A (3)(d) and ~~current~~ former Md. Canon XXIX.

ABA Canon ~~7B~~ 5C (2) prohibits a judge from personally soliciting or accepting campaign funds or soliciting publicly stated support; however, the judge may establish "committees of responsible persons" to do these things for the judge. The Committee believes that this is too restrictive and politically unrealistic, since it puts the judge at a distinct disadvantage to active opposition. Maryland law does require all campaign funds to be publicly reported by the campaign treasurer.

~~ABA Canon 7 permits partisan political activity by a judge who is a candidate for retention without a competing candidate only if the judge's candidacy has drawn "active opposition." However, Md. Judicial Ethics Opinion No. 88 (issued 8/29/80) stated that such a view "would not be realistic, since . . . even in the absence of an active campaign against the judge, negative votes might be cast against the judge's continuance in office, as was the case in the 1978 general election." The opinion concluded that the exception in the canons which permitted political activity by~~

~~judges seeking election is "equally applicable" to appellate judges standing for retention under non competitive election procedures. The Committee supports this conclusion.~~

C. STATUS OF A JUDGE OR LAWYER AS A CANDIDATE.-

A newly appointed judge is a "candidate" for judicial office from the date of taking office until the general election pertaining to that judge's election or initial retention. Any other incumbent judge is a "candidate" for a period commencing two years prior to the general election pertaining to that judge's re-election or subsequent retention, or when a newly appointed judge to that court becomes a "candidate" in the same general election, whichever first occurs. A lawyer who is seeking judicial office or a judge who is seeking election to another judicial office is a "candidate" for that office when the lawyer or judge files a certificate of candidacy in accordance with the state election laws, but no earlier than two years prior to the general election for that office, or, in the case of a judge, when a newly appointed judge to that court becomes a "candidate" in the same general election, whichever first occurs.

Committee note.- Md. Judicial Ethics Opinion No. 14 (issued 5/23/74) allows a judge to begin campaigning as a candidate immediately upon assumption of office. The longest possible campaign period would be one day less than three years. See Article IV, sec. 5 of the Constitution of Maryland. Md. Judicial Ethics Opinion No. 34 (issued 7/7/75) allowed an incumbent judge to begin campaigning for re-election only from January 1 of the year of the election. This was found to be

too restrictive, so the campaign period was changed to "times which are reasonable under the particular circumstances of each case." Md. Judicial Ethics Opinion No. 57 (issued 11/28/77). The Committee believes that the latter standard is too vague, and that an incumbent judge should be permitted to campaign as soon as the preceding general election has ended, which is a two-year period, or earlier if a newly appointed judge, who will be a running mate of the incumbent judge, has already become a candidate. ~~ABA Canon 7 A (2) considers an incumbent judge whose office is filled by election between competing candidates as always a candidate for re-election. While this may be a political necessity for judges in some states who must stand for re-election frequently, the Committee believes this is inappropriate in Maryland, where circuit court judges are elected for 15-year terms and appellate judges are retained for 10-year terms.~~

A judge should be permitted to engage in political activity regarding the judge's candidacy for judicial office only if the judge's intention to pursue that candidacy is clear. An incumbent judge's candidacy for election or re-election is fairly obvious, but a judge's intention to seek another judicial office is not as clear; therefore, the filing of a certificate of candidacy is required in the latter situation.

D. APPLICABILITY.-

Canon 5 generally 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 Maryland Rules of Professional Conduct.

REPORTER'S NOTE

Canon 5A has been changed so that it is stated as mandatory using the word "shall" instead of the word "should." The Committee note has been updated.

Canon 5B has been changed so that is couched as mandatory, using the word "shall" instead of the word "should." The Committee note has been updated.

Canon 5C has been modified to include the status of lawyers as candidates. The Subcommittee deleted the last two sentence of the Committee note as unnecessary.

Canon 5D is new and is identical to the language of ABA Canon 5E.

CANON 6

Compliance

A. This Code of Judicial Conduct applies to each judge of the Court of Appeals, the Court of Special Appeals, the Circuit Courts, the District Court, and the Orphans' Courts.

Committee note.- ~~See.~~ Canon 6A is derived from ~~current~~ former Md. Ethics Rule 14 a.

B. Violation of any of the ~~provisions of this Code of Judicial Conduct~~ Canons by a judge may be regarded as conduct prejudicial to the proper administration of justice within the meaning of Maryland Rule 16-803 (g) of the Rules concerning the Commission on Judicial Disabilities.

Committee note.- ~~See.~~ Canon 6B is derived from ~~current~~ former Md. Ethics Rule 15, which provides that a violation of an Ethics Rule is conduct prejudicial to the proper administration of justice. Whether the violation actually is or is not prejudicial conduct is to be determined by the Court of Appeals of Maryland. Article IV, Sec. 4B of the Md. Constitution gives that Court the authority to discipline any judge upon recommendation of the Commission on Judicial Disabilities. This disciplinary power is alternative to and cumulative with the impeachment authority of the General Assembly.

C. This Code of Judicial Conduct applies to each judge of one of those courts who has resigned or retired, if the judge is subject to and approved for recall for temporary service under Article IV, Section 3A of the Constitution, except that Canon 4C (~~Civil and~~ Government, Civic, or Charitable Activities);

Canon 4D (Financial Activities) - paragraphs (1), ~~and (2), and~~
(3); Canon 4G ~~4E~~ (**Fiduciary** Activities); and Canon 4H
(~~Arbitration~~) ~~4F~~ (Service as Arbitrator or Mediator) do not
apply to any such former judge.

Committee note.- See. Canon 6C is derived from ~~current~~ former Md. Ethics Rule 14 b. (1).

~~Paragraph C of the Compliance Section of the ABA Code exempts a retired judge subject to recall from only one provision of the ABA Code: The provision which prohibits a judge from serving on a governmental commission concerned with matters other than improvement of the law, legal system, or the administration of justice.~~

D. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Canons 2C, 4D (2), and 4E and shall comply with these sections as soon as reasonably possible and shall do so in any event within the period of one year.

REPORTER'S NOTE

Canon 6B has been changed by substituting the word "Canons" for the language "provisions of this Code of Judicial Conduct" to clarify that a judge can only be charged with violating the provisions of the Canons themselves, and not the Comments or the Committee notes.

Canon 6C has been updated, and part of the Committee note has been deleted because it is no longer applicable.

Canon 6D is new and is derived from ABA Canon 6F.

CANON 7

Judicial Ethics Committee

A. The Chief Judge of the Court of Appeals shall appoint annually an Ethics Committee consisting of not less than seven and not more than nine members. One member shall be appointed from each of the Court of Special Appeals, the Circuit Courts, and the District Court. Three members may not be judges and of these one may not be a lawyer or an employee or officer within the judicial branch of government. The remaining members shall be judges appointed from any of the above courts, but not from the Court of Appeals. The Chief Judge shall designate one of the members as chairperson.

In addition to its other duties, the Committee

(1) is designated as the body to give advice with respect to the application of the provisions of Subtitles 5 and 6 of Title 15 of the State Government Article, Annotated Code of Maryland, to State officials of the Judicial Branch as defined in Title 15 of the State Government Article; and

(2) shall from time to time submit to the Court of Appeals recommendations for necessary or desirable changes in the Code of Judicial Conduct, and the Code of Conduct for Judicial Appointees.

B. Any judge may in writing request the opinion of the Committee on the proper interpretation of the Code of Judicial Conduct as contained in Rule 16-813, or as to the provisions of Subtitle 5 or 6 of Title 15 of the State Government Article, Annotated Code of Maryland. A judge who has requested an opinion and who is in compliance with that opinion is protected from a charge of violation of Code or statute construed in that opinion.

C. A judge or any person who is subject to the Code of Conduct for Judicial Appointees as contained in Rule 16-814 may in writing request the opinion of the Committee on the proper interpretation of the rules of conduct. A person who has requested an opinion and who is in compliance with it is protected from a charge of violation of the Code construed in that opinion.

D. Any person, other than a judge, who is a State official of the Judicial Branch within the meaning of that term as used in §15-104 (2) of the State Government Article, Annotated Code of Maryland, may in writing request the opinion of the Committee on the proper interpretation of Subtitle 5 or 6 of Title 15 of the State Government Article. The person who requests an opinion and who is in compliance with it is protected from a charge of violation of the statute construed in that opinion.

E. Every opinion issued pursuant to this rule shall be filed

with the Secretary of the Maryland Judicial Conference. The filed opinion is confidential and not public information unless the Court of Appeals otherwise directs. However, the Secretary shall prepare an edited version of each opinion, in which the identity of the person who has requested the opinion, the specific court or geographical location of that person, and the identity of other individuals, organizations or groups mentioned in the opinion, may not be disclosed. Edited opinions shall be published in the manner the Secretary deems proper.

Committee note.- Canon 7 is derived from ~~current~~ former Md. Ethics Rule 16.

Cross reference: See Rule 16-802 (The Maryland Judicial Conference).

Source: This Rule is former Rule 1231.