

**TEXAS SUPREME COURT ADVISORY COMMITTEE  
ON THE CODE OF JUDICIAL CONDUCT**

**FINAL REPORT OF CANON 3 SUBCOMMITTEE**

**DECEMBER 15, 2004**

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**INTRODUCTION**

The subcommittee identified and discussed a number of possible revisions to Canon 3 of the Texas Code of Judicial Conduct. To begin the process, individual members of the subcommittee reviewed all provisions of Canon 3, giving particular attention to Canon 3B(10) and any need for revision in light of the United States Supreme Court's opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002). To identify points for discussion, the subcommittee reviewed the most recent version of Canon 3 of the American Bar Association's Model Code of Judicial Conduct and also surveyed other states' Codes of Judicial Conduct. Additionally, the subcommittee reviewed the language of the current provisions of Texas Canon 3 to identify any parts that presented possible incongruities or ambiguities, failed to accurately reflect current practices and/or procedures, and/or which otherwise required or would benefit from clarification or substantive change.

The Canon 3 subcommittee made specific recommendations for possible changes to the committee. Additionally, the Cannon 3 subcommittee identified particular issues for further discussion among all members of the committee. After the meeting of the entire committee on April 16, 2004, the Canon 3 subcommittee reconvened to discuss a number of follow-up matters necessitated by the committee discussion. Matters discussed but not resolved at the April 16, 2004 meeting, were addressed at the committee meeting on June 11, 2004,<sup>1</sup> and, again the discussion produced a number of follow-up matters for the Canon 3 subcommittee.<sup>2</sup> These

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<sup>1</sup> The subcommittee issued a supplemental report following the April 2004 meeting.

<sup>2</sup> The subcommittee issued a Second Supplemental Report prior to the October 2004 meeting.

matters were mentioned but not resolved at the September 10, 2004 meeting. All remaining items were ultimately resolved at the meeting on October 29, 2004.<sup>3</sup>

The committee adopted some but not all of the subcommittee's recommendations. The committee's general comments and recommendations are summarized below. The attached appendix shows all proposed amendments to Texas Canons 3 and 8.

### **CANON 3A JUDICIAL DUTIES IN GENERAL**

No recommended changes.

### **CANON 3B ADJUDICATIVE RESPONSIBILITIES**

#### **Canon 3B(6) – Addition of “Savings Clause”**

Canon 3B(6) contains a prohibition against judges manifesting bias or prejudice “by words or conduct.” Canon 3B(7) requires judges to require lawyers to refrain from such manifestation of bias or prejudice. There is a “savings clause” of sorts in Canon 3B(7) that would seem equally applicable to Canon 3B(6), but there is no comparable provision in 3B(6).

The last sentence in Canon 3B(7) exempts “legitimate advocacy” from the requirement that a judge require lawyers to refrain from manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status when any of these factors is an issue in the proceeding.

Currently, Canon 3B(6) states:

#### **B. Adjudicative Responsibilities.**

...

(6) 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 knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

According to official comments in some Judicial Conduct Codes, the purpose of this rule is to ensure that a judge refrains from speech, gestures, or other conduct that manifests bias or prejudice and that the judge requires the same standard of behavior of court staff subject to the judge's control. A judge, quite legitimately, could make an inquiry or comment relating to socioeconomic status, race, religion, national origin, etc. in a case in which those matters were in

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<sup>3</sup> The subcommittee chair (Kem Frost) could not attend the final meeting. The subcommittee's findings and recommendations on the remaining issues were presented by Sharon Callaway.

issue<sup>4</sup> and that inquiry or comment could be misconstrued or mischaracterized as some manifestation of bias or prejudice, particularly when there is no counterpart to the “saving language” in Canon 3B(7).

Canon 3B(7) contains an exception for “legitimate advocacy” when any of these factors are at issue in a proceeding. If a lawyer can offer “legitimate advocacy” on a point, then a judge should be allowed legitimate consideration and inquiry of the same matter, even if the lawyer’s argument in the proceeding is ultimately rejected. Therefore, it seems logical to extend the “legitimate advocacy” exception in Canon 3B(7) to “legitimate inquiry or analysis” in Canon 3B(6). A few other states already have done so. *See e.g.*, VA. CANONS OF JUDICIAL CONDUCT, Canon 3B(6); FLA. CODE OF JUDICIAL CONDUCT, Canon 3B(5).

**By unanimous vote (6/11/04 RR 5), the committee recommends adding the bolded language to Canon 3B(6) so that it would read:**

(6) 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 knowingly permit staff, court officials and others subject to the judge’s direction and control to do so. **This requirement does not preclude proper judicial inquiry or consideration when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or similar factors, are issues in the proceeding.**

The purpose of this proposed addition is to clarify that in cases in which these factors are in issue, Canon 3B(6) does not preclude a judge from legitimately considering or making inquiry about such matters.<sup>5</sup>

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<sup>4</sup> *See, e.g., In re E.A.S. and B.M.S.*, 123 S.W.3d 565 (Tex. App.—El Paso 2003, pet. filed) (reviewing whether father was intentionally underemployed in appeal from modification of child support payments); *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877 (Tex. App.—Dallas 2000, pet. denied) (reviewing individuals’ claims concerning the church’s training and conducting of its missionary program under the Establishment Clause and the Free Exercise Clause).

<sup>5</sup> The following language from Virginia’s Canons of Judicial Conduct is similar to the proposed language, with the recommendation that “judicial consideration” also include “inquiry”:

This Section 3B(5) does not preclude proper judicial consideration when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or similar factors, are issues in the proceeding.

VA. CANONS OF JUDICIAL CONDUCT, Canon 3B(6), available at [www.courts.state.va.us/jirc/canons\\_112398.html](http://www.courts.state.va.us/jirc/canons_112398.html).

Florida’s Code of Judicial Conduct contains similar language:

This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

FLA. CODE OF JUDICIAL CONDUCT, Canon 3B(5), available at [www.flcourts.org/sct/sctdocs/ethics/canon3.html](http://www.flcourts.org/sct/sctdocs/ethics/canon3.html).

Another possibility the committee discussed was changing the wording to say, “A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that reasonably could be perceived as bias or prejudice . . . .” *See CAL.*

### **Canon 3B(10)**

In August of 2003, in response to the *White* decision, the ABA<sup>6</sup> left unchanged its analogue of Texas Canon 3B(10) — ABA Model Code 3B(9) — and added the following new provision:

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

The counterpart to this “pledges and promises” rule is contained in Texas Canon 5 and was a primary subject of discussion in the Canon 5 subcommittee.

The ABA also added the following definition of “impartiality”:

“Impartiality” or “impartial” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

### **Prohibition Against Public Comments About Pending or Impending Cases in Canon 3B(10)<sup>7</sup>**

Texas Canon 3B(10) currently reads:

A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge’s court in a manner which suggests to a reasonable person the judge’s probable decision on any particular case. This

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CODE OF JUDICIAL ETHICS, Canon 3B(5) (West 2004); MISS. CODE OF JUDICIAL CONDUCT, Canon 3B(5) (West 2003) (“A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . .”).

Alternatively, the provision could be amended to simply state, “A judge shall not discriminate because of race, color, religion, age, etc.” See, e.g., NEW JERSEY CODE OF JUDICIAL CONDUCT, Canon 3A(4) (West 2004).

<sup>6</sup> The ABA also has appointed a “Joint Commission to Evaluate the Model Code of Judicial Conduct” to review the ABA’s model ethics code for judges and to recommend revisions for possible adoption in February 2005. The commission held public hearings across the country during 2004 and issued preliminary reports for comment in the fall of 2004.

<sup>7</sup> Any changes made to Canon 5 will impact the provisions of Canon 3B(10), as the former expressly refers to the latter. Therefore, any changes made to Canon 5 should be incorporated, where applicable, in Canon 3. The committee discussed but ultimately rejected a proposed recommendation to combine these provisions into a single canon to reduce confusion and simplify the statute.

prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

TEX. CODE OF JUDICIAL CONDUCT, Canon 3B(10) (West 2004).

In the *Second Report of the Judicial Speech Advisory Committee from Chairperson Charles Babcock*, dated August 20, 2002, that committee suggested the following definition of "impending":

A proceeding is "impending" if:

- (i) it is pending in a court or administrative agency whose decisions are subject to review by de novo review, original proceeding, or appeal, in the judge's court; or
- (ii) the judge has actual knowledge, through press reports or otherwise, that a litigant has specific plans to file a proceeding in the judge's court or in a court or agency described in subparagraph (i); or
- (iii) the judge has actual knowledge, through press reports or otherwise, that a specific event has occurred that is highly likely to lead to litigation in the judge's court or in a court or agency described in subparagraph (i).

In its *Approval of Amendments to the Texas Code of Judicial Conduct*, the Texas Supreme Court did not incorporate this proposed definition of "impending." However, at the April 16, 2004 meeting, Chief Justice Wallace Jefferson indicated that the Texas Supreme Court's decision not to adopt this definition of "impending" in 2002 should not be interpreted as a rejection of that provision. Following additional discussion, the consensus of the committee at the April 2004 meeting was that the "impending" provision could be more narrowly defined to address concerns about perceived gaps.<sup>8</sup>

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<sup>8</sup> Other states have defined the boundaries of prohibited public comment about "pending and impending proceedings" in a variety of ways.

**New York** takes a very broad view, restricting comment to a pending or impending proceeding in **any court within the United States or its territories**. See N.Y. CODE OF JUDICIAL CONDUCT, Canon 3B(8) (West 2004) (emphasis added).

In **Alabama, Iowa, and Maryland** a judge "should" (rather than "shall") abstain from public comment about a pending or impending proceeding **in any court**. See ALA. CANONS OF JUDICIAL ETHICS, 3A(6) (West 2004); IOWA CODE OF

A definition of “impending” emerged from a series of discussions between subcommittee members and Doug Laycock (Chair of the Canon 4 subcommittee). **By a vote of 11 to 1 (6/11/04 RR 72), the committee adopted the following definition of “impending” to be included in Canon 8:**

A proceeding is “impending” if: (i) [no change]; (ii) the judge has actual knowledge, through press reports or otherwise, that **an identifiable party** [delete “a”] has specific plans to file a proceeding, in the judge’s court or in a court or agency described in subparagraph (i); or (iii) the judge has actual knowledge, through press reports or otherwise, that a specific event has occurred that is highly likely to lead to litigation **between identifiable parties** in the judge’s court or in a court or agency described in subparagraph (i).

### **Clarification Regarding Duration of Prohibition Against Public Comment in Canon 3B(10)**

At the April 2004 meeting (4/16/04 RR 215), the committee discussed and approved a recommendation proposing an amendment adding the following language to Canon 3B(10):

**“The requirement to abstain from public comment about a pending proceeding continues during any appellate process and until final disposition.”**

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JUDICIAL CONDUCT, Canon 3A(6) (West 2004); MD.CODE OF JUDICIAL CONDUCT, Canon 3A(7) (Lexis 2004) (emphasis added).

In **North Carolina**, the restriction does not apply to “impending proceedings” at all; a judge “should” (rather than “shall”) abstain from public comment **about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law.** See N.C. CODE OF JUDICIAL CONDUCT, Canon 3A(6) (West 2004) (emphasis added).

In **Oregon**, the restriction is limited to a proceeding **pending** in any court **within the judge’s jurisdiction.** See OR. CODE OF JUDICIAL CONDUCT, JR 2-103 (West 2004) (emphasis added).

Some states have provisions that expressly state a judge is permitted to make public statements “to explain general legal principles, or what may be learned from the public record in a case.” See, e.g., MASS. CODE OF JUDICIAL CONDUCT, Rule 3:09, Canon 3B(9)(a) (West 2004).

### **Addition of Educational/Scholarly Study Provision in Canon 3B(10)**

Texas, unlike many other states,<sup>9</sup> does not currently have an express educational/scholarly study provision in Canon 3B(10). At the April 2004 meeting, the committee discussed the possible inclusion of a new provision that would expressly sanction a judge's participation in **educational programs** and **scholarly studies**. The committee recognized that, as a matter of policy, it would seem appropriate to encourage judges to take part in these activities and for the Code of Judicial Conduct to expressly recognize and acknowledge that, in doing so, judges do not tread on any ethical rules. This change is intended merely to reflect current practice, provide assurance and comfort to judges, and clarify that judges may take part in educational programs and scholarly studies and, in that context, discuss issues that might come before them, as long as their comments do not indicate how the judge might rule in a given case. This provision, however, needs to be narrowly tailored to ensure that it is only a recognition of a judge's ability to participate in these activities within the boundaries of Canon 3B(10).

Following the April 2004 meeting, the subcommittee considered provisions from other states which address this educational/scholarly study activity by judges.<sup>10</sup> **The subcommittee proposed the addition of new language to Canon 3B(10); and at the June 2004 meeting, by a vote of 10-2 (6/11/04 RR 96), the committee elected to propose the following language to be added to Canon 3B(10):**

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<sup>9</sup> See, e.g., CAL. CODE OF JUDICIAL ETHICS, Canon 3B(9) (West 2004); DEL. JUDGES' CODE OF JUDICIAL CONDUCT, Canon 3A(6) (West 2004); MASS. CODE OF JUDICIAL CONDUCT, Rule 3:09, Canon 3B(9)(b) (West 2004); N.H. CODE OF JUDICIAL CONDUCT, Commentary to Canon 3B(9) (WEST 2004); N.C. CODE OF JUDICIAL CONDUCT, Canon 3A(6) (West 2004).

<sup>10</sup> Several of these provisions are listed in this subcommittee's original report.

“ . . . This section does not prohibit judges or judicial candidates from participating in the following activities, providing such participation does not interfere with a fair hearing in a case:

[i] making public statements in the course of their official duties or explaining for public information the procedures of the court; or

[ii] publicly discussing, acknowledging, and/or explaining, orally or in writing, the administration of justice, legal systems, recognized legal principles and theories, and/or issues and holdings contained in case law; or

[iii] identifying or discussing previously decided cases or issues pending in appellate courts in legal education programs and materials, scholarly articles, or other similar writings; or

[iv] participating in scholarly studies, such as those conducted by the American Law Institute, or serving on an advisory committee, such as Texas Supreme Court Advisory Committees, where the purpose of any such study or service is to analyze current law or procedure and make recommendations for changes or developments in the law.

Subsections [i] - [iv] each address a different category of activities.

**Subsection [i]** reflects the current provision in Canon 3B(10).

**Subsection [ii]** is primarily aimed at public comments by a judge to non-lawyer audiences (*e.g.*, the example cited by Judge Woodward at the April 2004 meeting).

**Subsection [iii]** is aimed primarily at comments by judges in professional settings, such as during continuing legal education programs and in law review articles.

**Subsection [iv]** addresses a judge's participation in studies and service projects aimed at improving the law or the legal system.

All four subsections are qualified by the prefatory statement that makes participation contingent on the activity not interfering with a fair hearing in any pending case. This contingency is reflected in the language utilized by some states in similar educational/scholarly

analysis provisions.<sup>11</sup> The subcommittee discussed, as an alternative, repeating the language “providing such comment does not suggest to a reasonable person the judge’s probable decision on any particular case” found in Canon 3B(10), and made the following observations:

(1) The “probable decision” standard leaves the door open for an argument that a judge who merely identifies a particular legal principle as “well-settled law” might be suggesting a probable decision on a particular case involving that legal principle, *i.e.*, the judge would probably rule in accordance with the well-settled law identified. To some, this standard seems too broad given the concern the provision is intended to address. The “interfere with a fair hearing” language used by other states seems to address the issue more effectively. Because of this concern, the subcommittee favored inclusion of the language “providing such participation does not interfere with a fair hearing in a case.”

(2) The “probable decision” language is contained in the first sentence of Canon 3B(10) and, if repeated in the educational/scholarly study provision, would seem superfluous. If the “fair hearing” language is intended to apply to the educational/scholarly study provision, then the placement of the “probable decision” language in Canon 3B(10) should be re-visited.

### **Clarification of Canon 3B(11) – Inclusion of Court Orders and Other Official Rulings and Notifications**

In the original report, the Canon 3 subcommittee recommended the committee propose amending Canon 3B(11) to clarify that votes of appellate judges may be revealed not just through opinions but also through written orders and other official rulings and notifications. The intent is to amend the rule to reflect the practices in many appellate courts that routinely reveal “votes” and “positions taken” in orders, as well as opinions and judgments. **The committee agreed and, at the April 16, 2004 meeting, approved a proposal recommending that Canon 3B(11) be amended to add the words “order or other official ruling or notification” to more accurately reflect the courts’ practices and procedures. (4/16/04 RR 235)** With the proposed amendment, the provision would read (proposed new language bolded):

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<sup>11</sup> *See, e.g.*, CAL. CODE OF JUDICIAL ETHICS, Canon 3B(9) (West 2004); MASS. CODE OF JUDICIAL CONDUCT, Rule 3:09, Canon 3B(9)(b) (West 2004). Some states, while recognizing an educational exemption in the commentary, express within the rule itself that:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

*See, e.g.*, N.H. CODE OF JUDICIAL CONDUCT, Canon 3B(9) (West 2004); OHIO CODE OF JUDICIAL CONDUCT, Canon 3B(9) (West 2004); VT. CODE OF JUDICIAL CONDUCT, Canon 3B(9) (West 2004).

“(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court’s judgment, **a court’s order**, a written opinion, **or other official ruling or notification**, or in accordance with Supreme Court guidelines for a court approved history project.”

### **Possible Inclusion of Trial Judges and Multi-District Litigation Panel in Non-Disclosure Provisions of Canon 3B(11)**

Though not raised by the Canon 3 subcommittee, at the April 2004 meeting, some committee members expressed concerns that the **non-disclosure provision** in the second sentence of Canon 3B(11) should apply not only to appellate judges, as currently drafted, but also to trial judges and multi-district litigation panels. The subcommittee agreed to examine counterpart provisions in other states to see whether any other jurisdictions include non-appellate judges in this provision. (4/16/04 RR 260-62). The survey revealed that this provision in Texas Canon 3B(11) appears to be unique to Texas.

The subcommittee considered (1) whether any amendment should relate to trial judges as well as appellate judges and (2) whether the rule should prohibit disclosures of a judge’s own documents as well as those of other judges. The subcommittee created two versions of a possible proposed amendment to Canon 3(B)(11). The first version addressed these concerns largely through a definition of “nonpublic”; it made no distinction between trial judges and appellate judges/multi-member panels. The second version maintained the distinction between trial court judges and judges on multi-member courts or panels, but added language to address items (1) and (2). Ultimately, the committee opted for the first version and incorporated the multi-district panel concept into the definition of “nonpublic.” *See proposed language on page 11.*

### **Definition of “Nonpublic” as Used in Canon 3B(11)**

At the April 2004 meeting, the committee also voiced concerns about the meaning of the term “nonpublic” as used in Canon 3B(11) and questioned whether this term should be defined in the Code of Judicial Conduct. The subcommittee agreed to examine counterpart provisions in other states to see whether and how the term is defined in other jurisdictions.

Several states include definitions of “nonpublic information” in their Codes of Judicial Conduct. States defining this term generally construe it to mean information that, by law, is not available to the public. Under this definition, nonpublic information may include but is not limited to: information that is sealed by statute or court order, information impounded or communicated in camera, and information offered in grand jury proceedings, presentencing

reports, dependency cases, or psychiatric reports.<sup>12</sup> One state, Utah, has taken a different approach. The Utah Code does not appear to define “nonpublic information,” but states only that a judge shall not disclose or use, for purposes unrelated to judicial duties, information acquired in a judicial capacity that is not available to the public. UTAH CODE OF JUDICIAL CONDUCT, Canon 3B(11) (West 2003).

### **Specific Concerns Identified in Connection with Defining “Nonpublic”**

1. Committee on Public Access to Court Records. The subcommittee noted that the disclosure of court records and information was currently being evaluated by the Committee on Public Access to Court Records. This 17-member body, appointed by the Texas Judicial Council (chaired by then Chief Justice Tom Phillips) was in the process of examining the policy considerations relating to the public’s access to court case records. A report was expected sometime in the fall of 2004. Any suggestions by the Canon 3 subcommittee relating to an appropriate definition of “nonpublic information” would almost certainly be impacted by any changes recommended by the Committee on Public Access to Court Records. Rather than make specific proposals, the subcommittee suggested that any changes made in that committee be reflected or acknowledged in the Code of Judicial Conduct.

2. “Discussions in Judges’ Chambers.” At the April 2004 committee meeting, Seana Willing (Judicial Conduct Commission) noted that many grievances filed against judges are based on events alleged to have occurred in chambers. She voiced concerns that if “nonpublic” were defined to include discussions in judges’ chambers, the rule might give a “safe haven” to a judge not to talk to the Judicial Conduct Commission in response to a complaint alleging misconduct in the judge’s chambers.

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<sup>12</sup> See, e.g., ALASKA CODE OF JUDICIAL CONDUCT, Terminology (West 2003); ARIZ. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); CAL. CODE OF JUDICIAL ETHICS, Terminology (West 2004); FLA. CODE OF JUDICIAL CONDUCT, Definitions (West 2004); HAWAII CODE OF JUDICIAL CONDUCT, Terminology (West 2004); IDAHO CODE OF JUDICIAL CONDUCT 2001, Terminology (West 2003) (adding information that, by law or rule, is not available to the public and including information that is sealed by court administrative rule); IND. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); KAN. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); MAINE CODE OF JUDICIAL CONDUCT, General Provisions, 3M (West 2004) (stating nonpublic information denotes information that is made confidential or is impounded by law or court order, without any further description of what is included in the definition); MINN. CODE OF JUDICIAL CONDUCT, Comments to Canon 3 (West 2004); MISS. CODE OF JUDICIAL CONDUCT, Terminology (West 2003); NEB. CODE OF JUDICIAL CONDUCT, Terminology (West 2004) (including “statutorily confidential information in other cases” rather than naming specifically “dependency cases or psychiatric reports”); NEV. CODE OF JUDICIAL CONDUCT, Preamble (West 2004); N.H. CODE OF JUDICIAL CONDUCT, Terminology (West 2003); N.M. CODE OF JUDICIAL CONDUCT, Definitions (West 2004) (stating only that nonpublic information means information that, by law or court order, is not available to the public); N.Y. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); N.D. Code of Judicial Conduct, Terminology (West 2004); R.I. CODE OF JUDICIAL CONDUCT, Terminology (West 2002); S.C. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); TENN. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); VT. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); W. VA. CODE OF JUDICIAL CONDUCT, Terminology (West 2004); WYO. CODE OF JUDICIAL CONDUCT, Terminology (West 2003).

Rule 12 of the Rules of Judicial Administration governs public access to judicial records, with “judicial records” being defined as the record not pertaining to its adjudicative function. However, Rule 12.5(a) and (f), outlining exemptions from public disclosure, gives some guidance for a definition of “nonpublic” information in the context of the adjudicative function. Rule 12.5 exemptions include “judicial work product and drafts” and “internal deliberations on matters of court or judicial administration.”

Combining Rule 12.5 and some of the ideas raised at the April 2004 meeting, the subcommittee proposed two versions of a suggested definition of “nonpublic.” **At the June 11, 2004 meeting (6/11/04 RR 106), the committee voted to recommend the following definition of “nonpublic,” which includes the new multi-district litigation panel:**

“Nonpublic” means:

- (i) **With respect to confidences of the court**, any written or oral communication with one or more judges or court personnel that relates to any confidences of the court or any individual judge’s or multi-member panel’s decision-making process in any case, including discussions, votes, positions taken, drafts of opinions, or other writings, except the court’s official decision.
- (ii) **With respect to other information or documents of the court**, any information or document that, by law, is not available to the public.

The committee agreed that, if adopted, this definition should be included in Canon 8. (6/11/04 RR 100-01)

**CHANGES TO CANON 3B RECOMMENDED BY THE SUBCOMMITTEE, BUT NOT ADOPTED BY THE FULL COMMITTEE**

The Canon 3 Subcommittee discussed and identified several possible revisions to Canon 3B that were not adopted by the committee, including the following:

**Abstention from Public Comment Extended to Certain Court Personnel:**

The subcommittee approved a proposed revision adding the following sentence from Canon 3B(10) to the end of 3B(11), but the committee did not adopt that recommendation. (6/11/04 RR 107-10):

“A judge shall require similar abstention on the part of court personnel subject to the judge’s direction and control.”

### “Use” versus “Disclose” in Canon 3B(11)

At least one state’s counterpart to Canon 3B(11) draws a distinction between “use” and disclose. See ALASKA CODE OF JUDICIAL CONDUCT, Canon 3B(11) & Commentary (West 2003). The Alaska counterpart provision states:

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

The commentary notes that the ABA’s version of this provision prohibits a judge from *disclosing or using* nonpublic information acquired in a judicial capacity for any purpose unrelated to judicial duties. According to the Alaska commentary, “[t]his rule does not adequately address the problem presented when a judge obtains confidential information that has relevance to the judge’s personal life outside of the financial sphere.” The commentary provides the following examples:

“A judge hearing a confidential proceeding might obtain information about a doctor that has potentially crucial relevance to the judge’s decision of which doctor to employ.”

“A judge who hears a search warrant application might obtain information that would affect the judge’s decision regarding what day-care center to use or what restaurant to patronize.”

The commentary notes that “[e]ven though the judge reveals this information to no one, it would not strain the English language to say that a judge who makes decisions based on this information has ‘used’ the nonpublic information for a purpose unrelated to the judge’s official duties.”

The Alaska version of Canon 3B(11) “recognizes that a judge cannot reasonably be expected to disregard nonpublic information when it comes to the health or safety of the judge’s immediate family.” Accordingly, “[t]he first clause of the Alaska rule forbids ‘disclosure’ of such information for any non-judicial purpose (thus allowing the judge to ‘use’ the information for personal purposes so long as the judge does not violate the second clause).”

The second clause in the Alaska counterpart to Canon 3B(11) “forbids the ‘use’ of nonpublic information for anyone’s financial gain.” The commentary points out that “[a] judge who wishes to misuse confidential information for financial gain will often not need to disclose the information to anyone else; indeed, the amount of the improper financial gain may be directly proportionate to the judge's success in concealing the information from all other persons.” See ALASKA CODE OF JUDICIAL CONDUCT, 3B(11) & Commentary (West 2003). **The committee did not make a proposal for change to Texas Canon 3B.**

## CANON 3C ADMINISTRATIVE RESPONSIBILITIES

### No Changes to “Fair Value of Services Rendered” Language in Canon 3C(4)

At the April 2004 meeting, the committee discussed at length the possibility of changing the language in Canon 3C(4) from “fair” to “reasonable” or “fair and reasonable” with regard to compensation of court appointees. The rationale for a possible change is that the proposed “reasonable” language might bring more consistency and congruity to the “fee issue” by applying a recognized and well-defined “reasonableness” standard. **After a thorough discussion, the committee decided against recommending any change to this language in Canon 3C(4). (4/16/04 RR 266-80).**

The subcommittee also discussed the possibility of including a provision that a judge should avoid appointments which tend to create the appearance of impropriety. *See, e.g.*, LA. CODE OF JUDICIAL CONDUCT, Canon 3B(4) (West 2004). It was decided that the current language in Canon 3C(4) containing the prohibition against favoritism was sufficient to serve the intended purpose and no change or additional language was necessary.

## CANON 3D DISCIPLINARY RESPONSIBILITIES

At the June 2004 meeting, the committee discussed whether it might be better if the “should” in the first sentence in Canon 3(D)(1) were instead a “shall.” As part of this discussion, the committee also considered whether the “appropriate action” language used in Canon 3D(1) and (2) should be defined. Some suggested that perhaps the words “one or more violations” or “repeated violations” should be substituted for the “a [single] violation in Canon 3D(1) and (2). Others emphasized that a single serious or egregious violation should warrant action.

### Commentary versus Text

A separate discussion evolved over whether these matters should be addressed in a comment to the Code provision rather than in the provision itself. This led to a discussion about whether it would be advisable to include comments to one provision of the Code when the existing Code does not have comments to any provisions, except for the newly amended Canon 5. (The Canon 5 subcommittee, however, subsequently recommended that the commentary be moved into the body of the provision.) Some committee members were opposed to adding comments and favored putting any additional material directly into the body of the rule. Ultimately, the committee decided that the language in the body of Canon 3D(1) and (2) should remain as it is but that the committee should consider proposing a comment to this rule that addressed the noted concerns. The committee asked the Canon 3 subcommittee to prepare draft language for discussion at a subsequent meeting.

At the September 2004 meeting, the committee revisited the discussion concerning whether any proposed amendment to the rule should be in the commentary or the body of the rule. After a lengthy discussion, the committee reversed its original decision and decided against commentary. Instead, the committee opted to recommend putting any changes in the body of the rule.

### **Definition of “Appropriate Action”**

The subcommittee discussed the term “appropriate action” as used in Canon 3D(1) and (2) and whether it should be defined. Some states use the term “*appropriate corrective action*” and define this term to include “direct communication with the judge or lawyer who has committed the violation”<sup>13</sup> or “private admonition or reporting misconduct to the appropriate disciplinary body or a bar association counseling program.”<sup>14</sup> Some states recognize referral of a judge or lawyer to a substance abuse treatment agency as “appropriate action.”<sup>15</sup> The committee considered proposing an amendment to Canon 3D(1) and (2) to define “appropriate action” or to substitute “appropriate corrective action” for that term in the first sentence of 3D(1) and (2) and adopt a definition similar to ones used in other states.

The Canon 3 subcommittee suggested changes of the term to “other appropriate corrective action” and proposed a definition taken from similar language in the Codes of California, Maryland, and New York. In addition, the July 2004 preliminary draft of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has moved the 3D provisions on reporting to Canon 2 at 2.17 and 2.18. The commentary to each defines “appropriate action” as follows:

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

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

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<sup>13</sup> CAL. CODE OF JUDICIAL ETHICS, Advisory Committee Commentary, Canon 3D(2) (West 2004).

<sup>14</sup> MD. CODE OF JUDICIAL CONDUCT, Commentary, Canon 3B(3) (West 2004).

<sup>15</sup> N.Y. CODE OF JUDICIAL CONDUCT, Commentary [3.19] [3D] (West 2004).

The subcommittee noted that any definition of “appropriate action” could be included in Canon 8 rather than adding it to Canon 3D. A specific reference to impairment was suggested because of the discussion at the June 11, 2004 meeting referring the subcommittee to the Disciplinary Rules of Professional Conduct 8.03 commentary;<sup>16</sup> and the “serious or repeated violation(s)” change in the proposed language was made based on committee discussion. After a full discussion, the committee elected to propose the following revision to Canon 3D (new language bolded):

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code **or is impaired by mental illness or by chemical dependency on alcohol or drugs so as to raise** a substantial question as to the other judge’s fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate **corrective** action. **If the corrective action proves ineffective, a judge shall report the violation or impairment to the State Commission on Judicial Conduct.**

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct **or is impaired by mental illness or by chemical dependency on alcohol or drugs so as to raise** a substantial question about the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the **Chief Disciplinary Counsel** of the State Bar of Texas or take other appropriate **corrective** action. **If the corrective action proves ineffective, a judge shall report the violation or impairment to the Office of the Chief Disciplinary Counsel.**

(3) **“Other appropriate corrective action” may include: direct communication with the judge or lawyer who is impaired or has committed the violation(s); or referral of the judge or lawyer to a substance abuse treatment agency or peer assistance/counseling programs, such as Amicus Curiae or Texas Lawyers’ Assistance Program.**

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<sup>16</sup> Some states have a provision which states that a judge is not required to disclose information gained by the judge while serving as a member of a committee that renders assistance to ill or impaired judges or lawyers or while serving as a member of a bar association professional ethics committee. *See, e.g.*, CONN. CODE OF JUDICIAL CONDUCT, Canon 3B(3) (West 2004); MICH. CODE OF JUDICIAL CONDUCT, Canon 3B(3) (West 2004); N.M. CODE OF JUDICIAL CONDUCT, Canon 3C(2) (West 2004).

## **Required Reporting of Criminal Charges to Judicial Conduct Commission**

Some states have a subsection (3) under Canon 3D Disciplinary Responsibilities, that requires a judge who is charged by prosecutorial complaint, information, or indictment, or convicted with certain crimes in the United States to make a prompt written report to the Judicial Conduct Commission.<sup>17</sup>

At the June 2004 meeting, the committee discussed the possible recommendation of an amendment to Canon 3D to add a provision that requires a judge who is charged with certain crimes (or convicted of certain crimes) in the United States to notify the Judicial Conduct Commission. The idea is to require the judge to report factual information relating to the charge (*e.g.*, cause number, where the charge is pending, etc.), but not require the judge to address the charge.

**The committee voted to add the following new provision to Canon 3D as provision (4):**

A judge who is charged by complaint, information, or indictment or convicted of a felony or misdemeanor crime in the United States, other than a violation of a traffic law, shall promptly and in writing report that fact to the State Commission on Judicial Conduct. This provision does not require the judge to address any such charge, but only to provide notice of the cause number and the court in which the charge is pending.

## **Absolute Privilege for Actions Taken Under Canon 3D.**

About half of the states have a separate provision under Canon 3D. Disciplinary Responsibilities, providing that acts taken under Canon 3D(1) or (2) are absolutely privileged, and no civil action predicated on such actions may be brought against the judge.<sup>18</sup> Some states actually grant immunity from any action, civil or criminal, when a judge is acting in good faith in the discharge of disciplinary responsibilities required or permitted by Sections 3D(1) and 3D(2).<sup>19</sup>

Though some states have done it this way, it seems somewhat unusual to address immunity in the context of the Code of Judicial Conduct. Some states instead simply state in the Code of Judicial Conduct that “[a]cts of a judge in the discharge of disciplinary responsibilities are part of a judge’s judicial duties.” *See, e.g.*, N.Y. CODE OF JUDICIAL CONDUCT, Canon 3D(3) (West 2004) (emphasis added). Perhaps the inclusion of this statement in the Code of Judicial

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<sup>17</sup> *See e.g.*, CAL. CODE OF JUDICIAL ETHICS, Canon 3D(3) (est 2004).

<sup>18</sup> *See, e.g.*, Codes of Judicial Conduct for Arizona, Arkansas, Georgia, Hawaii, Illinois, Indiana, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, Wisconsin, and Wyoming.

<sup>19</sup> *See, e.g.*, KY. CODE OF JUDICIAL CONDUCT, Canon 3D(3), available at [www.sunethics.com/kycodjudconduct.htm](http://www.sunethics.com/kycodjudconduct.htm).

Conduct is intended to qualify the judge for immunity. Although Section A. Judicial Duties in General of Canon 3 of Texas Code of Judicial Conduct speaks in terms of “judicial duties,” it defines them as including “all the duties of the judge’s office prescribed by law” and then states “the following *standards* apply.”<sup>20</sup> There is no provision in the Texas Code of Judicial Conduct that specifically states that disciplinary reporting is a “judicial duty.” There is no “immunity” or “absolute privilege” provision in Texas Canon 3. Judicial immunity is primarily a matter of common law in Texas.<sup>21</sup> **After a very brief discussion, the committee elected to make no recommendation for change at this time.**

### **RECOMMENDATIONS FOR POSSIBLE REVISIONS TO CANON 8**

Each subcommittee was responsible for reviewing the provisions of Canon 8 that relate to Canons 1-6 and making any proposed recommendations for change vis a vis the assigned Canon. Subcommittee 3 had no recommendations for proposed revisions to the construction and terminology set forth in Canon 8, except for the possible inclusion of definitions of the following terms:

**“impending”** (*See previous discussion on pages 5 - 6*).

**“nonpublic”** (*See previous discussion on pages 10 - 12*).

**“appropriate action”** (*See previous discussion on pages 15 - 16*).

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<sup>20</sup> Emphasis added.

<sup>21</sup> *See Dallas Cty., Texas v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002).

## APPENDIX

### Proposed Amendments to Canons 3 and 8 (proposed additions are in bold)

#### Canon 3. Performing the Duties of Judicial Office Impartially and Diligently

##### A. Judicial Duties in General.

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

##### B. Adjudicative Responsibilities.

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

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

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

(5) A judge shall perform judicial duties without bias or prejudice.

(6) 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 knowingly permit staff, court officials and others subject to the judge's direction and control to do so. **This requirement does not preclude proper judicial inquiry or consideration when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or similar factors, are issues in the proceeding.**

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining 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;

(d) consulting with other judges or with court personnel;

(e) considering an ex parte communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the

course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity. **The requirement to abstain from public comment about a pending proceeding continues during any appellate process and until final disposition. This section does not prohibit judges or judicial candidates from participating in the following activities, providing such participation does not interfere with a fair hearing in a case:**

**[i] making public statements in the course of their official duties or explaining for public information the procedures of the court; or**

**[ii] publicly discussing, acknowledging, and/or explaining, orally or in writing, the administration of justice, legal systems, recognized legal principles and theories, and/or issues and holdings contained in case law; or**

**[iii] identifying or discussing previously decided cases or issues pending in appellate courts in legal education programs and materials, scholarly articles, or other similar writings; or**

**[iv] participating in scholarly studies, such as those conducted by the American Law Institute, or serving on an advisory committee, such as Texas Supreme Court Advisory Committees, where the purpose of any such study or service is to analyze current law or procedure and make recommendations for changes or developments in the law.**

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, **a court's order**, a written opinion, **or other official ruling or notification**, or in accordance with Supreme Court guidelines for a court approved history project.

### C. Administrative Responsibilities.

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

(2) A judge should 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.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

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

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

### D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code **or is impaired by mental illness or by chemical dependency on alcohol or drugs so as to raise a substantial question as to the other judge's fitness for office** shall inform the State Commission on Judicial Conduct or take other appropriate **corrective** action. **If the corrective action proves ineffective, a judge shall report the violation or impairment to the State Commission on Judicial Conduct.**

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct **or is impaired by mental illness or by chemical dependency on alcohol or drugs so as to raise a substantial question about the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the Chief Disciplinary Counsel of the State Bar of Texas or take other appropriate corrective action. If the corrective action proves ineffective, a judge shall report the violation or impairment to the Office of the Chief Disciplinary Counsel.**

(3) **“Other appropriate corrective action” may include: direct communication with the judge or lawyer who is impaired or has committed the violation(s); or referral of the judge or lawyer to a substance abuse treatment agency or peer assistance/counseling programs, such as Amicus Curiae or Texas Lawyers’ Assistance Program.**

(4) **A judge who is charged by complaint, information, or indictment or convicted of a felony or misdemeanor crime in the United States, other than a violation of a traffic law, shall promptly and in writing report that fact to the State Commission on Judicial Conduct. This provision does not require the judge to address any such charges, but only to provide notice of the cause number and the court in which the charge is pending.**

Canon 8. Construction and Terminology of the Code

...

B. Terminology.

**19. A proceeding is “impending” if:**

**(i) it is pending in a court or administrative agency whose decisions are subject to review by de novo review, original proceeding, or appeal, in the judge’s court; or**

**(ii) the judge has actual knowledge, through press reports or otherwise, that an identifiable party has specific plans to file a proceeding, in the judge’s court or in a court or agency described in subparagraph (i); or**

**(iii) the judge has actual knowledge, through press reports or otherwise, that a specific event has occurred that is highly likely to lead to litigation between identifiable parties in the judge’s court or in a court or agency described in subparagraph (I).**

**20. “Nonpublic” means:**

**(i) With respect to confidences of the court, any written or oral communication with one or more judges or court personnel that relates to any confidences of the court or any individual judge’s or multi-member panel’s decision-making process in any case, including discussions, votes, positions taken, drafts of opinions, or other writings, except the court’s official decision.**

**(ii) With respect to other information or documents of the court, any information or document that, by law, is not available to the public.**