

Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2011

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2005-11

Michael F. Cavanagh
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Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

Proposed Alternative Amendments
of the Code of Judicial Conduct

On order of the Court, this is to advise that the Court is considering alternative amendments of various canons of the Code of Judicial Conduct. Before determining whether either alternative proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

ALTERNATIVE A

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

- A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
- B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

- C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others, but participation in activities allowed in Canon 4 is not a violation of this principle.
- D. A judge should not appear as a witness in a court proceeding unless subpoenaed.
- ~~D.E.~~ A judge may respond to requests for personal references.
- ~~E.F.~~ A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.
- G. No judge or other person, party, committee, organization, firm, group, or entity may accept any contribution of money, directly or indirectly, to or for a judge's benefit for any purpose whatever, including but not limited to, contributions for a campaign deficit, expenses associated with judicial office, a testimonial, an honorarium (other than for services, subject to Canon 5) or otherwise.

Canon 4. A Judge May Engage in Extrajudicial Activities to Improve the Law, the Legal System, and the Administration of Justice ~~to Improve the Law, the Legal System, and the Administration of Justice~~

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, the 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. A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

A judge, ~~subject to the proper performance of judicial duties,~~ may engage in the following ~~quasi-judicial~~ activities:

A. Law-Related Activities.

- ~~A.(1)~~ A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

~~B~~.(2) 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 may otherwise consult with such executive or legislative body or official on such matters.

~~C~~.(3) A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge ~~may assist such an organization in raising funds and~~ may participate in the ~~their~~ management and investment of such an organization's funds, ~~but should not individually solicit funds.~~

(4) A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

~~Canon 5. A Judge Should Regulate Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties~~

~~(A)~~B. Avocational Activities. A judge may write, lecture, teach, speak, and consult on nonlegal subjects, appear before public nonlegal bodies, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

~~(B)~~C. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve and be listed as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization, ~~subject to the following limitations: (1).~~ A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

~~(2) A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the office for that purpose, but may be listed as an officer, director, or trustee of such an organization. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, or speak on behalf of such organization.~~

D. Fundraising Activities. A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization or any organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or use or permit the use of the prestige of the office for that purpose. A judge may, however, serve as a member of an honorary committee or may join a general appeal on behalf of such an organization. A judge may speak on behalf of such an organization and may speak at or receive an award or other recognition in connection with an event of such an organization. A judge may allow his or her name or title to be used in advertising an event of such an organization that is not a fundraising event. A judge may not allow the judge's name or title to be used in advertising the event if it is a fundraising event, unless the judge's public participation is limited to serving only as a member of an honorary committee or joining a general appeal on behalf of the organization.

C.E. Financial Activities.

- (1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality or judicial office, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.
- (2) Subject to the requirements of CE(1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as director, officer, manager, advisor, or employee of any business. Provided, however, with respect to a judge holding office and serving as an officer, director, manager, advisor, or employee of any business not prohibited heretofore by law or judicial canon, the effective date of the prohibition contained herein shall be the date of expiration of the judge's current judicial term of office.
- (3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as it can be done without serious financial detriment, the judge should dispose of investments and other financial interests that require frequent disqualification.
- (4) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:
 - (a) A judge may accept a gift or gifts not to exceed a total value of \$100, incident to a public testimonial; books supplied by publishers

on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

- (b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.
 - (c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds \$100, the judge reports it in the same manner as compensation is reported in Canon 65C.
- (5) For the purposes of this section, "family member 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 family member, who resides in the judge's household.
 - (6) A judge is not required by this code to disclose income, debts, or investments, except as provided in this canon and Canons 3 and 65.
 - (7) Information acquired by a judge in a judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

D.F. **Fiduciary Activities.** A judge should not serve as an executor, administrator, testamentary trustee, or guardian, except for the estate, testamentary trust, or person of a member of the judge's immediate family, and then only if such service will not interfere with the proper performance of judicial duties. As a family fiduciary, a judge is subject to the following restrictions:

- (1) A judge should not serve if it is likely that as such fiduciary the judge 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.

- (2) While acting as such fiduciary, a judge is subject to the same restrictions on financial activities that apply in the judge's personal capacity.

E.G. Arbitration. A judge should not act as an arbitrator or mediator, except in the performance of judicial duties.

F.H. Practice of Law. A judge should not practice law for compensation except as otherwise provided by law.

G.I. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Canon 65. [Renumbered, but otherwise unchanged.]

Canon 76. A Judge or a Candidate for Judicial Office Should Refrain from Political Activity Inappropriate to Judicial Office

A. Political Conduct in General.

- (1) A judge or a candidate for judicial office should not:

- (a) hold any office in a political party;
- (b) make speeches on behalf of a political party or nonjudicial candidate or publicly endorse a candidate for nonjudicial office.

- (2) A judge or candidate for judicial office may:

- (a) attend political gatherings;
- (b) speak to such gatherings on the judge's own behalf or on behalf of other judicial candidates;
- (c) contribute to a political party.

- (3) A judge should resign the judicial office before becoming a candidate either in a party primary or in a general election for nonjudicial office.

B. Campaign Conduct.

- (1) A candidate, including an incumbent judge, for a judicial office:
 - (a) should maintain the dignity appropriate to judicial office, and should encourage family members to adhere to the same standards of political conduct that apply to the judge;
 - (b) should prohibit public employees subject to the judge's direction or control from doing for the judge what the judge is prohibited from doing under this canon;
 - (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
 - (d) should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false.

- (2) These provisions govern a candidate, including an incumbent judge, for a judicial office:
 - (a) A candidate should not personally solicit or accept campaign funds, or solicit publicly stated support by improper use of the judicial office in violation of B(1)(c). A candidate may send a thank-you note to a contributor.
 - (b) A candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.
 - (c) Such committees are prohibited from soliciting campaign contributions from lawyers in excess of \$100 per lawyer, but may solicit public support from lawyers. It is not a violation of this provision for a committee, in undertaking solicitations that are not directed exclusively to lawyers but may in fact go to lawyers who are members of a group or found on a mailing list, to solicit more than \$100 per person, provided that the following disclaimer appears on the letter or on a response card, in print that is at least the same size as the remainder of the print in the letter or the response card:

"Canon 76 of the Michigan Code of Judicial Conduct prohibits a judicial campaign committee from soliciting more than \$100 per lawyer. If you are a lawyer, please regard this as informative and not a solicitation for more than \$100."

- (d) A candidate's committee may not directly or indirectly accept funds from any committee that was established in connection with the candidate's attempt to secure any other judicial or nonjudicial office. The committee may solicit funds for the campaign no earlier than February 15 of the year of the election, and may not solicit or accept funds after the date of the general election.
- (e) A candidate should not use or permit the use of campaign contributions for the private benefit of the candidate or the candidate's family.
- (f) If a candidate is not opposed for such judicial office, the candidate or the candidate's committee shall return to the contributors funds raised in excess of the actual costs incurred or contribute such funds to the client security fund of the State Bar of Michigan, not later than January 1 following the election. Likewise, any candidate or committee having funds remaining after payment of all campaign expenses shall either return such funds to the contributors thereof or donate the funds to the client security fund of the State Bar of Michigan, not later than January 1 following the election.
- (g) A candidate for judicial office may not pay an endorsing organization for its ranking or endorsement. However, a candidate for judicial office may contribute campaign funds to pay some of the costs associated with the publication of the endorsement or ranking of the candidate, provided the candidate secures from the endorsing organization an assurance, before the endorsement or ranking is made, that the endorsing organization will not:
 - (i) demand payment from the candidate or the candidate's agent as a condition of the endorsement or favorable ranking,
 - (ii) seek any assurance from the candidate before the endorsement or ranking is made that it will be paid if it endorses or ranks the candidate favorably,
 - (iii) add an endorsement or favorable ranking of a different candidate in the event that the initially supported candidate decides not to pay the endorsing organization for publicizing its endorsement and favorable ranking,

- (iv) prevent the candidate from publicizing the endorsement or favorable ranking independent of the endorsing organization, regardless of whether the endorsing organization itself publicizes its endorsement or favorable ranking.
- (3) No judge should personally sell or permit any court or public employee working for or assigned to any court to sell fundraising tickets or accept contributions of any kind on the judge's behalf or on behalf of any other judicial candidate.

~~C. Fund Raising Other Than for Campaign Purposes Prohibited: Except as provided in 7B(2)(b), (c),~~

- ~~(1) No judge shall accept a testimonial occasion on the judge's behalf where the tickets are priced to cover more than the reasonable costs thereof, which may include only a nominal gift,~~
- ~~(2) No judge or other person, party, committee, organization, firm, group or entity may accept any contribution of money or of a tangible thing of value, directly or indirectly, to or for a judge's benefit for any purpose whatever, including but not limited to, contribution for a campaign deficit, expenses associated with judicial office, testimonial, honorarium (other than for services, subject to Canon 6) or otherwise.~~

~~D.C. Applicability.~~

- (1) A successful candidate, whether or not an incumbent, and an unsuccessful candidate who is a judge, are subject to judicial discipline for campaign misconduct. An unsuccessful candidate who is a lawyer is subject to lawyer discipline for judicial campaign misconduct.
- (2) A successful elected candidate who was not an incumbent has until midnight December 31 following the election to wind up the candidate's law practice, and has until June 30 following the election to resign from organizations and activities, and divest interests that do not qualify under Canons 4 ~~or~~ 5.
- (3) Upon notice of appointment to judicial office, a candidate shall wind up the candidate's law practice prior to taking office, and has six months from the date of taking office to resign from organizations and activities and divest interests that do not qualify under Canons 4 ~~or~~ 5.

Canon ~~8~~7. [Renumbered, but otherwise unchanged.]

ALTERNATIVE B

[The language proposed below in Canon 4 and Canon 5 would replace the current text found in Canon 4 and Canon 5 of the Code of Judicial Conduct; the other changes below would revise current Canon 2 and Canon 7 of the Code of Judicial Conduct as indicated.]

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A.-B. [Unchanged.]

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. A judge should not appear as a witness in a court proceeding unless subpoenaed, but participation in activities allowed in Canon 4 and Canon 5 is not a violation of this principle.

D.-E. [Unchanged.]

Canon 4. A Judge May Engage in Extrajudicial Activities

A. Extrajudicial Activities in General. A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (1) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (2) participate in activities that will lead to frequent disqualification of the judge;
- (3) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

B. Appearances before Governmental Bodies and Consultation with Government Officials. 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 may otherwise consult with such executive or legislative body or official on such matters.

- C. **Extra-Judicial Appointments.** A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.
- D. **Use of Nonpublic Information.** Information acquired by a judge in a judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.
- E. **Fiduciary Activities.** A judge should not serve as an executor, administrator, testamentary trustee, or guardian, except for the estate, testamentary trust, or person of a member of the judge's immediate family, and then only if such service will not interfere with the proper performance of judicial duties. As a family fiduciary, a judge is subject to the following restrictions:
- (1) A judge should not serve if it is likely that as such fiduciary the judge 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.
 - (2) While acting as such fiduciary, a judge is subject to the same restrictions on financial activities that apply in the judge's personal capacity.
- F. **Arbitration.** A judge should not act as an arbitrator or mediator, except in the performance of judicial duties.
- G. **Practice of Law.** A judge should not practice law for compensation except as otherwise provided by law.
- H. **Financial Activities.**
- (1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality or judicial office, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.
 - (2) Subject to the requirements of H(1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as director, officer, manager, advisor, or employee of any business. Provided, however, with respect to a judge

holding office and serving as an officer, director, manager, advisor, or employee of any business not prohibited heretofore by law or judicial canon, the effective date of the prohibition contained herein shall be the date of expiration of the judge's current judicial term of office.

- (3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as it can be done without serious financial detriment, the judge should dispose of investments and other financial interests that require frequent disqualification.

Canon 5. A Judge Should Regulate Participation in Extrajudicial Activities and Acceptance of Gifts

A. Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities. Subject to the requirements of Canon 4, a judge shall not individually solicit funds, but may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

- (1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;
- (2) joining a general appeal on behalf of an organization or entity, or serving as a member of an honorary committee of such an organization, including allowing the judge's name and title to be used on the organization's letterhead if other members are similarly designated;
- (3) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fundraising purpose, the judge may not allow the judge's name or title to be used in advertising the event;
- (4) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities; and
- (5) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

- (a) will be engaged in proceedings that would ordinarily come before the judge; or
- (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

B. Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value.

- (1) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:
 - (a) A judge may accept a gift or gifts not to exceed a total value of \$100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.
 - (b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.
 - (c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds \$100, the judge reports it in the same manner as compensation is reported in Canon 6C.
- (2) For the purposes of this section, "family member 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 family member, who resides in the judge's household.
- (3) A judge is not required by this code to disclose income, debts, or investments, except as provided in this canon and Canons 3 and 6.

Canon 7. A Judge or a Candidate for Judicial Office Should Refrain From Political Activity Inappropriate to Judicial Office

A.-B. [Unchanged.]

C. Fundraising Other Than for Campaign Purposes Prohibited.

Except as provided in 7B(2)(b) and (c),

- (1) ~~No judge shall accept a testimonial occasion on the judge's behalf where the tickets are priced to cover more than the reasonable costs thereof, which may include only a nominal gift,~~
- (2) no judge or other person, party, committee, organization, firm, group, or entity may accept any contribution of money or of a tangible thing of value, directly or indirectly, to or for a judge's benefit for any purpose whatever, including, but not limited to, contributions for a campaign deficit, expenses associated with judicial office, a testimonial, an honorarium (other than for services, subject to Canon 6), or otherwise.

D. [Unchanged.]

Staff Comment: Two alternative proposals are published for comment in this order. The first, Alternative A, combines Canon 4 and Canon 5 so that the obligations imposed with regard to extrajudicial activities are the same for both law-related and nonlaw-related functions. The proposal also clarifies various allowed and prohibited fundraising activities.

The second proposal is modeled loosely on the ABA Model Code of Judicial Conduct. The most recent iteration of the ABA Model Code splits the existing language of Michigan's Canon 4 through Canon 6 into 15 separate rules. For purposes of the proposed language of Alternative B, however, the separate model rules are combined in the proposed revised text of Michigan's current two Canons, and would retain nearly all the language that currently exists in Canon 4 and Canon 5. But the proposal is similar to the ABA Model Code in that proposed Canon 4 would begin with a description of the underlying foundational requirements for any extrajudicial activities (i.e., participation in the activity must not undermine the judge's independence, integrity, or impartiality) and other general requirements, and then would set out the allowed fundraising and other financial activities in Canon 5.

Either proposal would eliminate the language of Canon 7 that prohibits a judge from accepting a testimonial, and would clarify Canon 2 so that activities allowed under Canon 4 and Canon 5 would not be considered a violation of the principle of use of the

prestige of office. Both proposals contain proposed language that is intended to clarify the scope of activities in which a judge may participate, especially if those activities also serve a fundraising purpose. In Alternative A, this language is included at Canon 4D; in Alternative B, this language is included at Canon 5A(3).

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-11. Your comments and the comments of others will be posted at <http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed>.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 28, 2011

Corbin R. Davis

Clerk