

2010 Supplement to:
Judges' Guide to
CASA/GAL Program Development

2004 Edition

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Second Supplement to Chapter 7: “Ethical Considerations for Judges Involved with CASA Programs”

Reviewing the Current Situation

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Note: This supplement is an examination of the American Bar Association (ABA) *Model Code of Judicial Conduct* (2007), cross referencing those comparable applicable provisions of the 2007 code with those canons of the *ABA Model Code of Judicial Conduct* (amended 1990-2003) previously discussed in the 2004 Edition and the 2007 Supplement to the *Judge's Guide to CASA/GAL Program Development*.

Introduction

This second supplement is offered as an update to the *Judges' Guide to CASA/GAL Program Development*, Chapter 7: “Ethical Considerations for Judges Involved with CASA Programs” and to the 2007 supplement to chapter 7. It does not include a review of judicial advisory opinions rendered subsequent to June 2007. The purpose of this supplement is to cross-reference the comparable applicable provisions of the *ABA Model Code of Judicial Conduct* (2007) with those applicable canons of the *ABA Model Code of Judicial Conduct* (amended 1990-2003) and update the progress in the states as to their review of their judicial codes.

The *ABA Model Code of Judicial Conduct* (2007) was adopted by the ABA on February 12, 2007. The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, after sponsoring 9 public hearings, meeting in person 19 times and convening via teleconference 31 times over 39 months, presented to the ABA House of Delegates their proposals to change both the substance and the format of the ABA Model Code of Judicial Conduct (amended 1990-2003). Many interested groups appeared before the commission and gave written and oral testimony. One of those groups, the National Council of Juvenile and Family Court Judges (NCJFCJ), urged the commission to adopt the Conference of Chief Judges' and the Conference of State Court Administrators' Joint Resolution 8, titled: “In Support of Modification of the Model Code of Judicial Conduct to Encourage Judicial Conduct.” The commission did not accept many of the changes recommended by Joint Resolution

8. In support of Joint Resolution 8 and other changes to the *ABA Model Code of Judicial Conduct* (amended 1990-2003), NCJFCJ adopted Resolution 13, titled: “A Resolution in Support of Specific Changes to the Model Code of Judicial Conduct,” published on the NCJFCJ website.¹ Resolution 13 was adopted by the NCJFCJ Membership on July 29, 2008, in Norfolk, VA, and urged the membership of NCJFCJ to encourage their state judicial commissions to adopt the language contained in the resolution.

Some of the recommended changes have been incorporated in the revised judicial codes of the states mentioned below.

The Status of State Review of the *ABA Model Code of Judicial Conduct* (2007) as Of January 7, 2010.²

This review states that as of January 7, 2010:

Thirty-nine jurisdictions have initiated or completed review of their judicial codes in light of the 2007 revisions to the *ABA Model Code of Judicial Conduct*. Of those jurisdictions:

- Twelve (AZ, AR, DE, HI, IN, KS, MN, MT, NV, OH, UT and WY) have approved a revised judicial code.
- Twenty-two have established committees to review their code (CA, DC, IL, IA, KY, LA, ME, MD, MS, MO, NE, NJ, NM, NY, ND, OR, RI, SC, TN, TX, VT, and WI).
- Five (CO, CT, NH, OK, WA) have proposed revisions of their Judicial Codes.³

Judges are cautioned to examine their respective state revisions and proposed revisions to their judicial codes.

Review of Applicable Canons

The following canons are applicable to the ethical issues discussed in “Reviewing the Current Situation,” Chapter 7 of the *Judges’ Guide to CASA/GAL Program Development*, 2004 Edition, and the 2007 Supplement. The *ABA Model Code of Judicial Conduct* (amended 1990-2003) is compared to the *ABA Model Code of Judicial Conduct* (2007).

May a judge participate in the creation, development and implementation of a CASA program?

***ABA Model Code of Judicial Conduct* (amended 1990-2003)**

ABA Canon 4C(3) provides that:

¹ <http://www.ncjfcj.org>

² <http://www.abanet.org>

³ Id

*A judge may serve as an officer, director, trustee or **non-legal** [emphasis added] advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civil organization not conducted for profit, subject to the following limitations and other requirements of this code.*

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

ABA Model Code of Judicial Conduct (2007)

ABA Canon 3 provides that:

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities except as prohibited by law or this code. However, when engaging in extrajudicial activities, a judge shall not:*

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity,* or impartiality,**

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationary, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Commentary

(1) To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate judicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

(2) Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

ABA Model Code of Conduct (2007)

Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

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

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

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

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to appellate jurisdiction of which the judge is a member.

Commentary

- (1) The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public service or private nonprofit educational institutions, and other nonprofit educational institutions, including law-related and charitable organizations.
- (2) Even for law-related organizations, a judge should consider whether the membership and purposes of the organization would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity and impartiality.

May a judge advocate for the formation of a CASA program and encourage community support thereof?

ABA Model Code of Judicial Conduct (amended 1990-2003)

ABA Canon 4B provides that:

(B) Avocational Activities. A judge may speak, write, lecture, teach and participate in other judicial activities involving the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this code.

ABA Model Code of Judicial Conduct (2007)

Unfortunately, ABA Canon 4B (2003) is eliminated from *ABA Model Code of Judicial Conduct* (2007) and placed in the comment to Rule 3.1 with the following language as noted above:

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects.

May a judge communicate with financial supporters of the program or participate in fundraising activities?

ABA Model Code of Judicial Conduct (amended 1990-2003)

ABA Canon 4C (3)(b) provides that:

A judge, as an officer, director, trustee or non-legal advisor, or 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 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...

ABA Model Code of Judicial Conduct (2007)

Rule 3.7

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

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

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

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

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

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

Commentary

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

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

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

(4) Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate the rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

(5) In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono public legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono public legal work, and participating in events recognizing lawyers who have done pro bono public work.

Concluding Remarks: Canons and Rules—Old and New

Renumbered new Canon 3 is basically the old Canon 4.

- It expands the canon to include “personal” as well as “extrajudicial activities.”
- It replaces “conflict with judicial obligations” with “conflict with the obligations of judicial office.”

Rule 3.1 is basically the old Canon 4A permitting extrajudicial activities subject to the listed prohibitions.

Rule 3.1(B) added a prohibition of participating in extrajudicial activities that will “lead to frequent disqualification of the judge.”

Commentary Rule 3.1:

(1) This comment (1) enlarges the participation of extrajudicial activities that a judge can participate in to activities that are not law-related, *...as long as they are undertaken in connection with not-for-profit organizations.*

(2) This comment (2) explains the importance to the community of judges being integrated into their communities by participating in *...both law-related and other extrajudicial activities...*

Rule 3.7(A)

Rule 3.7(A)(1) is similar to the same as the first clause of Canon 4(c)(3)(b)(1) of the old code.

Commentary Rule 3.7

(1) This comment (1) explains that the activities permitted are applicable to all public and private nonprofit organizations.

(3) This comment (3) explains that mere attendance at an event, whether or not the event serves a fundraising event, does not constitute a violation of paragraph (A)(4). (However, note that paragraph (A)(4) provides that if the event serves a fundraising purpose, the judge is permitted to be a featured speaker or may participate only if the organization or entity is concerned with the law, the legal system or the administration of justice.) It also clarifies a previous issue that judges are concerned about, namely, participating in certain minor activities undertaken in connection with those events, such as serving as an usher, food server or preparer, or performing similar functions at the those fundraising events, and explains that those activities are not considered solicitation and do not present an element of coercion or abuse the prestige of judicial office.

While not prohibiting activities involving money, no permissible activities are mentioned involving the handling of money.

Comment (4) is similar to parts of the second paragraph of the commentary to Canon 4C(3)(b) of the amended 2003 code. The letterhead of the organization or entity may include a judge's name and position even when used for fundraising or member solicitation purposes if it is not coercive and does not abuse the prestige of judicial office, as long as the judge is identified in the same way as other persons on the letterhead.

Relevancy of Comments

Commentary

Comments to the ABA *Model Code of Judicial Conduct* (2007) are included above to assist judges in interpreting the new rules. However, these comments are not to be interpreted as black letter law.

(3) The comments that accompany the rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from

the binding obligations set forth in the rules. Therefore, when a comment contains the term ‘must,’ it does not mean that the comment itself is binding or enforceable; it signifies that the rule in question, properly understood, is obligatory as to the conduct in question.

(4) Second, the comments identify aspirational goals for judges. To implement fully the principles of this code as articulated in the canons, judges should strive to exceed the standards of conduct established by the rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

Editor’s note: Words followed by asterisks are being used in the sense defined in the [Terminology section](#) of the ABA Model Code of Judicial Conduct (2007).