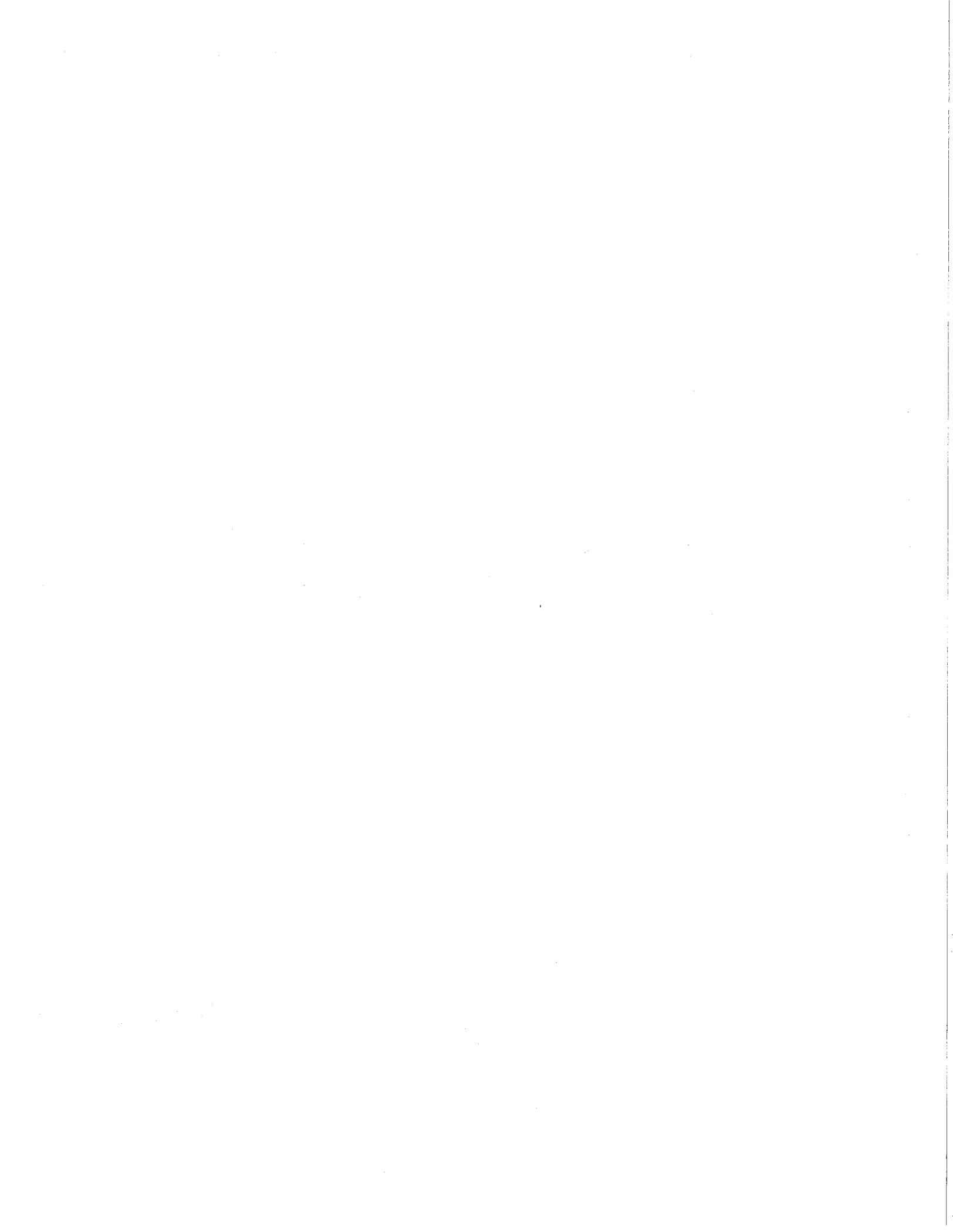


CODE OF JUDICIAL CONDUCT FOR ARMY TRIAL AND APPELLATE JUDGES

16 May 2008





REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON, DC 20310-2200

DAJA-ZA

16 MAY 2008

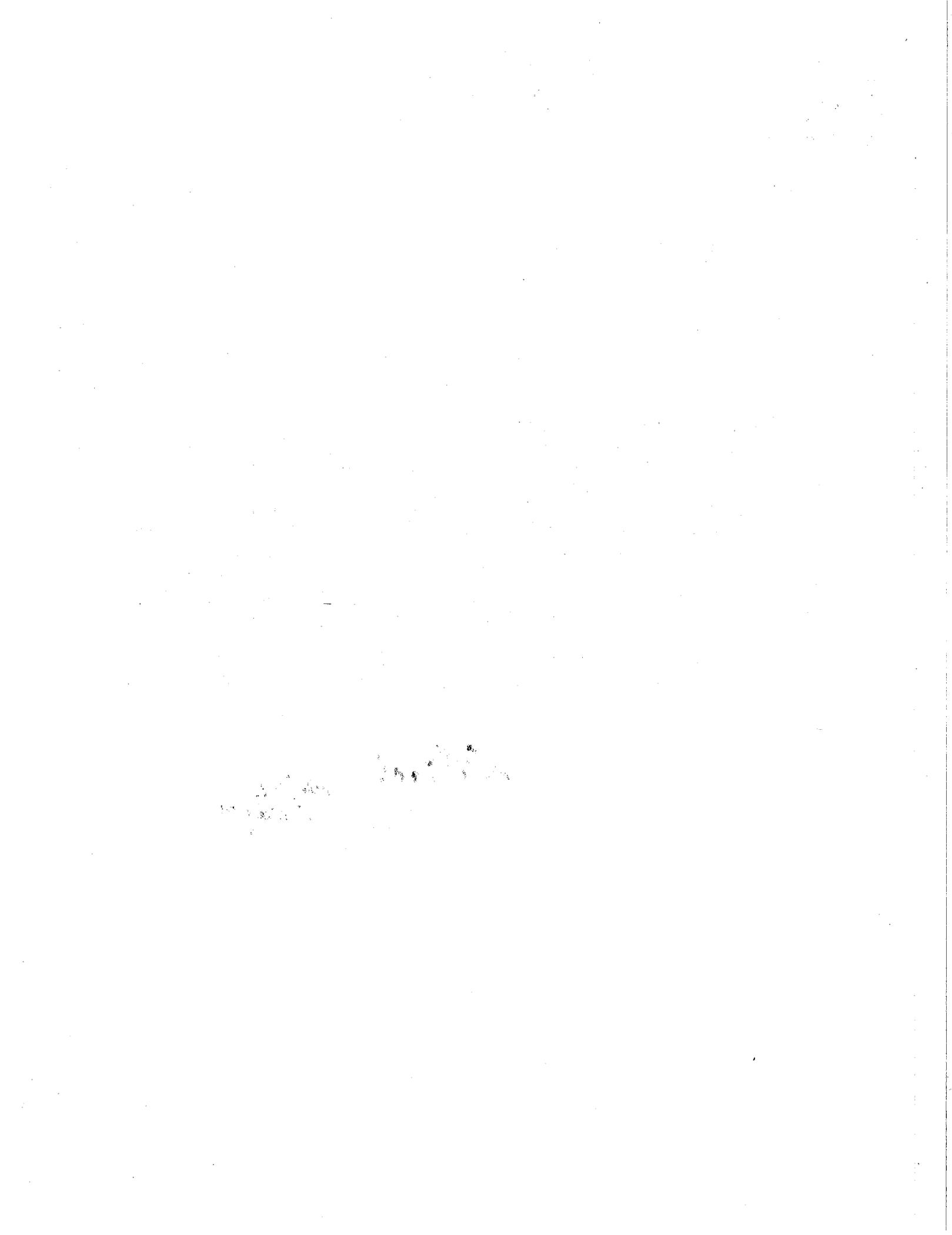
MEMORANDUM FOR ARMY JUDGES

SUBJECT: Army Code of Judicial Conduct

1. Effective immediately, all U.S. Army trial and appellate judges and military magistrates are to comply with the enclosed Code of Judicial Conduct.
2. An independent judiciary is indispensable to our system of justice. Equally important is the confidence of the public in the autonomy, integrity and neutrality of our military judiciary as an institution. Army judges must strive to maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. The enclosed Code, patterned after the American Bar Association's Model Code of Judicial Conduct (2007), adheres to these principles while at the same time providing sound, clear and reasonable guidance to judges faced with uncertainty as to what is acceptable behavior. Adherence to this Code of Judicial Conduct will help ensure the greatest possible public confidence in the independence, impartiality and competence of Army judges and the military justice system.
3. Future editions of Army Regulations 27-1, 27-10 and 27-26 will delete any cites to the ABA Code of Judicial Conduct, referencing instead the Code of Judicial Conduct for Army Trial and Appellate Judges.

Encl


SCOTT C. BLACK *MG, USA*
Major General, USA *16 May 08*
The Judge Advocate General



**CODE OF JUDICIAL CONDUCT
FOR
ARMY TRIAL AND APPELLATE JUDGES**

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**CODE OF JUDICIAL CONDUCT
FOR
ARMY TRIAL AND APPELLATE JUDGES**

PREAMBLE

[1] The United States military legal system is based upon the principle that an independent, impartial, fair, and competent judiciary, composed of men and women of integrity, will interpret and apply the laws that govern our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that Army judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the military legal system.

[2] Army judges will maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They must aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Code of Judicial Conduct establishes standards for the ethical conduct of Army judges. It is not intended as an exhaustive guide; judges are also governed by general ethical standards. The Code is intended, however, to provide guidance and assist Army judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their behavior.

SCOPE

[1] While the American Bar Association's (ABA) Model Code of Judicial Conduct (February 2007) served as a template for this Code, modifications were necessary to meet the unique requirements of Army practice. This Code, like the ABA Model Code, consists of four Canons, numbered Rules under each of the first three Canons, and Comments that generally follow and explain each Rule and the fourth Canon. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to an Army judge or military magistrate.

[2] The Canons state overarching principles of judicial ethics that all Army judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the individual judge, and no disciplinary action should be taken for action or inaction within reasonable bounds of such discretion.

[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. Second, the Comments identify aspirational goals for Army judges. To implement fully the principles of this Code as articulated in the Canons, Army 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.

[4] The Rules of the Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, federal statutes and regulations, Department of Defense directives, Army regulations, other court rules and decisional law. The Rules must not be interpreted to impinge upon the essential independence of judges in making judicial decisions. Compliance with this Code does not relieve an Army judge from compliance with Joint Ethics Rules or applicable State Bar requirements.

[5] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in disciplinary action. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and will depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system. *See* Rule for Courts-Martial (hereinafter R.C.M.) 109 and Army Regulations 27-1 and 27-10 for procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of Army judges to perform the duties of their office.

[6] This Code is not to be construed as a general order or regulation within the meaning of Article 92, Uniform Code of Military Justice (hereinafter UCMJ), nor is it designed or intended as a basis for civil liability or criminal actions under the Uniform Code of Military Justice. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

[7] This Code applies to both active duty and reserve trial and appellate judges; but its application to reserve trial and appellate judges is limited to their military judicial duties. Application to National Guard judges is limited to their service as judges when in a Title 10, U.S. Code status. This Code also applies to military magistrates when they are performing magisterial duties.

TERMINOLOGY

“Appropriate authority” means the authority having responsibility for initiation of a disciplinary process in connection with the violation to be reported. *See* Rules 2.14 and 2.15.

“Army judge” includes “judge,” “military judge,” “trial judge,” and “appellate judge” and is intended to refer to Army military judges of any component while on active duty, Army Reserve judges in a training status, and Army National Guard judges when in a Title 10, U.S. Code status, who are serving in a trial or appellate judge position.

“Economic interest” means ownership of more than a *de minimis* legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

- (1) an interest in the individual holdings within a mutual or common investment fund;
- (2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;
- (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
- (4) an interest in the issuer of government securities held by the judge.

See Rule 1.3.

“Fiduciary” includes relationships such as executor, administrator, trustee, or guardian. *See* Rules 3.2 and 3.8.

“Impartial,” “impartiality,” and “impartially” mean 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 a judge. *See* Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.13, 3.1, and 3.13.

“Impending matter” is a matter that is imminent or expected to occur in the near future. *See* Rules 2.9, 2.10, and 3.13.

“Impropriety” includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality. *See* Canon 1 and Rule 1.2.

“Independence” means a judge’s freedom from influence or controls other than those established by law. *See* Canons 1 and 4, and Rules 1.2, 3.1, and 3.13.

“Integrity” means probity, fairness, honesty, uprightness, and soundness of character. *See* Canon 1 and Rule 1.2.

“Knowingly,” “knowledge,” “known,” and “knows” mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances. *See* Rules 2.15, 2.16, and 3.6.

“Law” encompasses court rules as well as statutes, constitutional provisions, decisional law, Department of Defense directives, and Army regulations. *See* Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, and 3.13.

“Member of the judge’s family” means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. *See* Rules 3.7, 3.8, 3.10, and 3.11.

“Member of a judge’s family residing in the judge’s household” means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. *See* Rule 3.13.

“Military magistrate” means a Judge Advocate empowered to direct the release of persons from pretrial confinement, or to recommend release from pretrial confinement pending final disposition of foreign criminal charges on a determination that continued confinement does not meet legal requirements, and to issue search and seizure authorizations on probable cause. The term “military magistrate” also encompasses “part-time military magistrate” as defined by Army regulations.

“Nonpublic information” means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, information offered in grand jury proceedings, presentencing reports, medical and psychiatric reports, and classified information. *See* Rule 3.5.

“Pending matter” is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. *See* Rules 2.9, 2.10, and 3.13.

APPLICATION

The Application section establishes when the various Rules apply to an Army judge or to a military magistrate.

I. APPLICABILITY OF THIS CODE

All Army judges, as defined by this Code, shall comply with this Code when serving in a judicial assignment or performing judicial functions on active duty, except as provided below.

COMMENT

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The intent of this Code is to cover only those individuals who have been certified as judges by The Judge Advocate General and are currently performing in a judicial assignment or performing judicial functions. Army Reserve judges while on active duty or inactive duty for training and Army National Guard judges, when in a Title 10, U.S. Code status, must comply with the provisions of this Code, except as otherwise noted in this Section. For applicability to other individuals, *see* paragraph III below.

II. RESERVE COMPONENT JUDGE

An Army Reserve judge, or an Army National Guard judge when serving in a Title 10, U.S. Code status,

(A) is not required to comply:

(1) with Rule 2.10 (Judicial Statements on Pending and Impending Cases), except while serving as a judge; or

(2) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or Remunerative Activities); and

(B) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto. Army Reserve judges may not practice before any courts-martial and may not assist other

members of their firms in courts-martial practice while members of the Army judiciary.

COMMENT

When an Army Reserve or National Guard judge is no longer a judge, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the informed consent of all parties.

III. MILITARY MAGISTRATES

A military magistrate, who is not a full time judge, shall comply with Canon 1, and with Rules 2.2 (Impartiality and Fairness), 2.3 (Bias, Prejudice, and Harassment), 2.4 (External Influences on Judicial Conduct), 2.5(A) (Competence, Diligence, and Cooperation), 2.6 (Ensuring the Right to Be Heard), 2.7 (Responsibility to Decide), 2.8 (Decorum, Demeanor, and Communication with Court Members), 2.9 (*Ex Parte* Communications), 2.10 (Judicial Statements on Pending and Impending Cases), 3.5 (Use of Nonpublic Information), and 3.6(A) (Affiliation with Discriminatory Organizations). A military magistrate, who is not a full time judge, is not otherwise required to comply with this Code.

COMMENT

When performing their magistrate duties, military magistrates perform judicial functions. When performing their judicial roles, military magistrates must be aware of the ethical responsibilities of a judge and must comply with the standards expected of judges to the extent set forth above.

IV. TIME FOR COMPLIANCE

A person to whom this Code becomes applicable shall comply immediately with its provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.

COMMENT

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as a fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event longer than one year.

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

RULE 1.1

Compliance with the Law

A judge shall comply with the law, including the Code of Judicial Conduct.

RULE 1.2

Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Congress and the public expect the military to have a judicial system that is responsive to the unique needs of discipline in the armed services but safeguards the rights of soldiers. To this end, Congress has created a military judiciary which is intended to be independent. Accordingly, judges must recognize and safeguard against any affront to the independence of a court, such as attempted unlawful influence by a commander or other superior, or invasion of the deliberative process.

[5] Army judges must ensure that their conduct comports, and is perceived to comport, with the principle of judicial independence and integrity. That principle includes maintaining the confidentiality of the deliberative process and the invocation, when necessary, of qualified judicial privilege. The judiciary's independence and integrity ultimately depends upon the personal and professional conduct of each individual judge.

[6] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[7] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[8] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of, and confidence in, the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

RULE 1.3

Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

COMMENT

[1] Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. This is even more important and difficult in the court-martial system because the Army judiciary exists within the executive branch.

[2] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business. An Army judge's conduct is further constrained by federal statutes and regulations, Department of Defense directives and Army regulations.

[3] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office. When preparing letters of recommendation, Army judges may use judicial letterhead stationery, may refer to their position and duties in the body of the letter, and may use their duty title in the signature block, so long as other conditions pertaining to the use of government letterhead are met.

[4] Judges may participate in the process of judicial selection by cooperating with appointing authorities and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

[5] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule, Department of Defense Directives, Army regulations or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.1

Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.

COMMENT

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities so as to minimize the risk of conflicts that would result in frequent disqualification. *See* Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of, and confidence in, the justice system.

RULE 2.2

Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

RULE 2.3

Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment. This prohibition includes, but is not limited to, bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. A judge shall not permit others subject to the judge's direction and control to engage in such bias, prejudice, or harassment.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome. In addition, Army judges shall comply with all Department of Defense and Army policies regarding sexual harassment and other forms of harassment.

RULE 2.4

External Influences on Judicial Conduct

- (A) A judge shall not be swayed by public clamor or fear of criticism.
- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- (C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

COMMENT

An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

RULE 2.5

Competence, Diligence, and Cooperation

- (A) A judge shall perform judicial and administrative duties competently and diligently.
- (B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without

unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

RULE 2.6

Ensuring the Right to Be Heard

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.

COMMENT

The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

RULE 2.7

Responsibility to Decide

A judge shall hear and decide matters assigned to the judge except when disqualification is required by Rule 2.11, R.C.M. 902, or other law.

COMMENT

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

[2] Absent extraordinary circumstances, the same rules of professional conduct should apply to both trial and appellate judges. Therefore, imposing the broader circumstances for disqualification under R.C.M. 902 upon appellate judges than is required under Article 66(h), UCMJ, is a matter of sound judicial policy.

RULE 2.8

Decorum, Demeanor, and Communication with Court Members

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

(B) A judge shall be patient, dignified, and courteous to litigants, court members, witnesses, lawyers, court staff, spectators, and others with whom

the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, spectators, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize court members for their findings or sentence other than in a court order or opinion in a proceeding, but may express appreciation to the court members for their service to the judicial system and the community.

COMMENT

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing court members for their findings and/or sentence may imply a judicial expectation in future cases and may impair a court member's ability to be fair and impartial in a subsequent case, and could convey to the members that the convening authority or Army establishment approves or disapproves of their decision.

[3] Because of the possibility of post-session proceedings, a judge should not meet with court members until after their service on a standing convening order is complete and even then should be careful not to discuss the merits of any case.

RULE 2.9

Ex Parte Communications

(A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) *Ex parte* communication with counsel for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication and the judge does not make any decision regarding substantive issues on the merits as a result of the *ex parte* communication; and

(b) with the exception of authorized *ex parte* hearings conducted on the record, the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court reporters and like court staff whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers should be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] The judge's ability to engage in *ex parte* communications for administrative purposes recognizes the unique aspects of a world-wide military practice and the difficulties that may arise therefrom. Army judges must have the ability to discuss

docketing of cases, scheduling of terms of court, anticipated motions and issues, the expected number of witnesses to be called, the anticipated length of trial, the expected plea and trial forum, choice of counsel, travel arrangements, etc. with counsel to efficiently manage and perform their judicial duties. The purpose of such *ex parte* communication is informative. It allows the judge to be informed of anticipated issues and administrative matters, but not to litigate or decide contested issues during, or based upon, the *ex parte* communication. To promote the fairness and impartiality of the proceedings and to avoid any appearance of impropriety, the judge should notify the opposing counsel regarding the nature of *ex parte* communications under Rule 2.9(A)(1).

[5] The Court of Appeals for the Armed Forces recognizes a qualified judicial privilege protecting the confidentiality of judicial communications. This privilege is grounded in the need for confidentiality in the effective discharge of the judge's duties. Implicit in the existence of the privilege is recognition that the full and frank exchange of ideas among judges or between a judge and his staff may be chilled and obstructed if those discussions are revealed outside the Court. *See Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988). A judge may consult with other judges on pending matters, but must avoid *ex parte* discussions of a case with judges who have previously been disqualified from hearing the matter and with judges who have appellate jurisdiction over the matter. Receipt of factual information that is not part of the record must be disclosed.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. This provision does not preclude Army judges from taking judicial notice during consideration of a case. This provision also does not prevent an Army judge from calling for additional evidence to be presented during trial [see Article 46, UCMJ, and R.C.M. 913(c)(1)(F)], nor does it prevent the U.S. Army Court of Criminal Appeals from exercising its fact finding powers under Article 66(c), UCMJ, or considering extra-record matters as permitted by law.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

RULE 2.10

Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall require court staff, and others subject to the judge's direction and control, to refrain from making statements that the judge would be prohibited from making by paragraph (A).

(C) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(D) Subject to the requirements of paragraph (A), and applicable Army regulations, a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

[4] Army regulations further govern the conduct of judges, lawyers, and support personnel relating to trial publicity.

RULE 2.11

Disqualification

Army judges shall disqualify themselves from a proceeding when required by R.C.M. 902 or other provision of law. Army appellate judges shall disqualify themselves from hearing a case for the same reasons that Army trial judges must disqualify themselves under R.C.M. 902.

COMMENT

*See R.C.M. 902 for the rules and procedures regarding disqualification of Army judges. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. In addition, the Court of Appeals for the Armed Forces has held that 28 U.S.C. § 455, which governs disqualification of federal judges, applies to judges of the Courts of Criminal Appeals. See *United States v. Lynn*, 54 M.J. 202, 205 (2000). Appellate judges, however, are not subject to voir dire by counsel regarding potential grounds for challenge.*

RULE 2.12

Supervisory Duties

- (A) A judge shall require court staff, and others subject to the judge's direction and control, to act in a manner consistent with the judge's obligations under this Code.
- (B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.
- (C) Supervising judges shall not use their supervisory position to direct or influence the judgments and rulings of subordinate judges.
- (D) On an appellate panel, each judge shall exercise his or her judgment without regard to the rank or superior position of the other judges on the panel.

COMMENT

[1] A judge is responsible for his or her own conduct and for the conduct of others when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

RULE 2.13

Appointments

- (A) In making appointments, a judge:
 - (1) shall exercise the power of appointment impartially and on the basis of merit; and
 - (2) shall avoid nepotism, favoritism, and unnecessary appointments.
- (B) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT

Although Army judges ordinarily lack specific powers of appointment, this Rule prohibits Army judges from using their position as judges to exercise undue or improper influence on the civil service or military personnel system.

RULE 2.14

Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action.

COMMENT

[1] “Appropriate action” means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or suggesting a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge’s responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge’s attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. *See* Rule 2.15.

RULE 2.15

Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge that another judge or military magistrate has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the Chief Trial Judge or Deputy Judge Advocate General.

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the Chief Trial Judge and the Professional Responsibility Branch, Personnel, Plans & Training Office.

(C) A judge who receives information indicating a substantial likelihood that another judge or military magistrate has committed a violation of this Code shall notify the Chief Trial Judge or Deputy Judge Advocate General.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall notify the Chief Trial Judge and the Professional Responsibility Branch, Personnel, Plans & Training Office.

COMMENT

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] Army judges have a responsibility to ensure that the highest standards of justice and ethical responsibility are observed throughout the military justice system. This responsibility includes taking appropriate action when a substantial question is raised as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The Rule is designed to reflect the standards for reporting professional misconduct that appear in the Army Rules of Professional Conduct for Lawyers (AR 27-26).

[3] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

RULE 2.16

Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

COMMENT

Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public. Cooperation, however, does not require an Army judge to waive any privilege.

CANON 3

A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES SO AS 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, Department of Defense Directives, Army regulations 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; or**
- (D) make use of court premises, staff, stationery, 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.**

COMMENT

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law and military justice system, the legal system, and the administration of justice, including revision of substantive and procedural law, such as by speaking, writing, teaching, participating in scholarly research projects, and providing constructive critiques of counsel after the completion of cases to enhance their performance. 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. In expressing their views while engaged in appropriate extrajudicial activities, Army judges must ensure that such expressions do not violate restrictions on speech imposed on military officers by virtue of their military status.

[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. In both actuality and appearance, Army judges must follow carefully the provisions of statutes, executive orders, and applicable Department

of Defense directives and Army regulations prescribing rules to uphold the integrity of, and public confidence in, military and federal public service.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. *See* Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

RULE 3.2

Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

- (A) in connection with matters concerning the law, the legal system, or the administration of justice;**
- (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties;**
- (C) when the judge is acting *pro se* in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity; or**
- (D) when permitted by applicable federal statutes and regulations, Department of Defense directives, and Army regulations.**

COMMENT

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending

matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

[4] As a military officer, an Army judge is subject to the obligations of military service, including serving on a board or commission, orders that may require the judge to testify before a legislative or executive body, or obtaining permission of a superior before testifying. To the extent the judge may be consulted or have any choice in the matter, the judge should consider the purpose of this Rule and Rules 3.4, and 3.7, and invite attention to any potential violation of the Code.

RULE 3.3

Testifying as a Character Witness

A judge should not volunteer to testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding.

COMMENT

Although they may testify as a character witness if subpoenaed or ordered to do so by an appropriate authority, a judge should not volunteer to testify as a character witness because doing so may lend the prestige of judicial office to advance the interests of another. *See* Rule 1.3. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. Thus, except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

RULE 3.4

Appointments to Governmental Positions

An Army judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice, unless the committee, board, commission, or position is one normally associated with being a professional Army officer and is otherwise permitted under federal statute, Department of Defense Directives, Army regulations and applicable state bar rules.

COMMENT

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] The appropriateness of Army judges accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept appointments that are likely to interfere with the effectiveness and independence of the judiciary. As military officers, Army judges may serve as members of promotion and selection boards, subject to the limitations on Army appellate judges found in Article 66(g), UCMJ.

[3] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

RULE 3.5

Use of Nonpublic Information

A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

COMMENT

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information unless otherwise permitted under federal statute, Department of Defense Directives, Army regulations and applicable state bar rules.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, other judicial officers, or other persons if consistent with other provisions of this Code.

RULE 3.6

Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges must be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] Membership in a fraternal, sororal, religious, civic, charitable, youth or ethnic heritage organization shall not generally be deemed to be a violation of this Rule. Organizations chartered, approved, or recognized by the Department of Defense or by Headquarters, Department of the Army, are presumed to be proper for membership.

[4] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[5] A judge's membership in a religious group or organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

RULE 3.7

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

Subject to the requirements of Rule 3.1, and applicable federal statutes and regulations, Department of Defense directives, and Army regulations, 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:

- (A) 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;
- (B) 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;
- (C) 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;
- (D) 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;
- (E) 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; and
- (F) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity.

COMMENT

[1] The activities permitted 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 (D) and is permissible if otherwise

consistent with this Code, applicable federal statutes and regulations, Department of Defense directives, and Army regulations. 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 this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons. In evaluating the application of this guidance, the judge should consult applicable federal statutes and regulations, Department of Defense directives, and Army regulations, which further govern the judge's conduct.

RULE 3.8

Appointments to Fiduciary Positions

(A) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(C) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

COMMENT

A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require disqualification of a judge under Rule 2.11 and R.C.M. 902.

RULE 3.9

Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.

COMMENT

This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties.

RULE 3.10

Practice of Law

A judge shall not practice law. If the judge complies with applicable regulatory guidance, a judge may, however, act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum.

COMMENT

[1] A judge may act *pro se* in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. *See* Rule 1.3. Moreover, Army judges must comply with applicable regulatory guidance before engaging in any private law practice.

[2] Judges will ensure that they do not engage in any matter that interferes with, or is incompatible with, their duties. Judges will not engage in any matter that, under the circumstances, may reasonably be expected to create the appearance of a conflict of interest or bring discredit on the Government or the Department of the Army.

[3] The prohibition against practicing law does not include teaching courses concerning the law if the judge does not violate applicable law or other prohibitions in this Code.

RULE 3.11

Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.

(B) A judge shall not engage in financial activities that:

- (1) interferes with the proper performance of judicial duties;
- (2) leads to frequent disqualification of the judge;
- (3) involves the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

- (4) results in violation of other provisions of this Code.

COMMENT

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. *See* Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. *See* Rules 1.3 and 2.11. Army judges are also subject to additional constraints imposed by virtue of their status as officers. *See* Rule 3.12.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

RULE 3.12

Standards of Conduct

A judge is bound by all applicable federal statutes and regulations, Department of Defense directives, and Army regulations governing standards of conduct of military personnel.

COMMENT

Army judges are bound by federal statutes and regulations, Department of Defense directives, and Army regulations governing their financial activities, to include the acceptance of gifts, bequests, honoraria, etc. *See, e.g.*, "Standards of Ethical Conduct for Employees of the Executive Branch" (5 CFR 2635) and the Department of Defense Joint Ethics Regulation. Where this Code conflicts with those statutes, directives, or regulations, the statutes, directives, and regulations govern. This Code provides general guidelines that should assist the military judge in determining the propriety of his or her activities even under the federal statutes and regulations, Department of Defense directives, and Army regulations when those provisions may not be clear on a particular issue.

RULE 3.13

Acceptance of Gifts, Loans, Bequests, Benefits, or Other Things of Value

- (A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following:

- (1)** items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
- (2)** gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge under Rule 2.11 and R.C.M. 902;
- (3)** ordinary social hospitality;
- (4)** commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
- (5)** rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
- (6)** scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;
- (7)** books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use;
- (8)** gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse or other family member of a judge residing in the judge's household, but that incidentally benefit the judge;
- (9)** gifts incident to a public testimonial;
- (10)** invitations to the judge and the judge's spouse or guest to attend without charge:
 - (a)** an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge.

COMMENT

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items may be accepted. If the benefit is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, the judge is prohibited under paragraph (A) from accepting the gift.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11 and R.C.M. 902, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

[5] Federal statutes and regulations, Department of Defense directives, and Army regulations also control what gifts and favors an Army judge legally may accept. This Code does not supersede the rules under applicable federal statutes and regulations, Department of Defense directives, and Army regulations. *See* Rule 3.12.

CANON 4

A JUDGE SHALL NOT ENGAGE IN POLITICAL ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

COMMENT

An Army judge must be sensitive to political activity which casts doubt on the judge's independence and ability to decide issues impartially. Army judges, as military officers, must be cognizant that their political activities are governed by applicable federal statutes and regulations, Department of Defense directives, and Army regulations.

