

AMENDMENTS TO CODE OF JUDICIAL CONDUCT

It is ordered that the Georgia Code of Judicial Conduct relating to Terminology be amended by adding the following new terms (Aggregate, Campaign committee, Campaign contribution disclosure report, Contribution, Election cycle, Financial disclosure statement, Maximum allowable contribution and Support) and that Canons 3E. Disqualification and 3F. Remittal of Disqualification, be amended effective September 8, 2011, as follows:

...

TERMINOLOGY

Terms explained below are noted with an asterisk (*) in the Sections where they appear. In addition, the Sections where terms appear are referred to after the explanation of each term below.

“Aggregate” in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate or a candidate’s campaign committee within the current or immediately preceding election cycle but also all contributions made indirectly or independently with the knowledge that they will be used to influence the election of the judge. See Sections 3E(1)(d) and 3E(2).

“Appropriate authority” denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).

“Campaign committee” is defined as that term is defined by the “Georgia Government Transparency and Campaign Finance Act of 2010” (OCGA § 21-5-3), as may be amended from time to time. See Preamble and Sections 3E(2), 7B(1)(d) and 7B(1)(e).

“Campaign contribution disclosure report” is defined as that term is defined by the “Georgia Government Transparency and Campaign Finance Act of 2010” (OCGA § 21-5-3), as may be amended from time to time. See Section 3E(1).

“Candidate.” A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she appoints and/or forms a campaign committee, makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term “candidate” has the same meaning when applied to a judge seeking election or appointment to

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non-judicial office. See Preamble and Sections 3E(1)(d), 3E(1)(e), 3E(2), 7A(1), 7A(2), 7B(1), 7B(2) and 7C.

“Comment” in connection with a case refers to evaluative statements judging the professional wisdom of specific lawyering tactics or the legal correctness of particular court decisions. In contrast, it does not mean the giving of generally informative explanations to describe litigation factors including: the prima facie legal elements of case types pending before the courts, legal concepts such as burden of proof and duty of persuasion or principles such as innocent until proven guilty and knowing waiver of constitutional rights, variable realities illustrated by hypothetical factual patterns of aggravating or mitigating conduct, procedural phases of unfolding lawsuits, the social policy goals behind the law subject to application in various cases, as well as competing theories about what the law should be. See Section 3B(9).

“Contribution” is defined as that term is defined by the “Georgia Government Transparency and Campaign Finance Act of 2010” (OCGA § 21-5-3), as may be amended from time to time. See Preamble and Sections 3E(1)(d), 3E(2), 7A(1)(c) and 7B(2).

“Court personnel” does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).

“De minimis” denotes an insignificant interest that could not raise reasonable question as to a judge’s impartiality. See Sections 3E(1)(c) and 3E(1)(d).

“Economic interest” denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge’s spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a

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mutual savings association, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities. See Sections 3E(1)(c) and 3E(2).

“Election cycle” is defined as that term is defined by the “Georgia Government Transparency and Campaign Finance Act of 2010” (OCGA § 21-5-3), as may be amended from time to time. See Section 3E(2).

“Fiduciary” includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(1)(c), 3E(2) and 5D.

“Financial disclosure statement” is defined as that term is defined by the “Georgia Government Transparency and Campaign Finance Act of 2010” (OCGA § 21-5-50), as may be amended from time to time. See Section 3E(1).

“Invidious discrimination” is any action by an organization that characterizes some immutable individual trait such as a person’s race, gender or national origin, as well as religion, as odious or as signifying inferiority, which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position or participation in the organization. See Section 2C.

“Knowingly”, “knowledge”, “known” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances. See Sections 3D(1), 3D(2), 3E(1) and 3E(2).

“Law” denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 4A, 4B, 4C, 5C(4), and 5G.

“Maximum allowable contribution” is defined as such limitations are defined by the “Georgia Government Transparency and Campaign Finance Act of 2010” (OCGA § 21-5-41), as may be amended from time to time. Where the “Act” does not prescribe a limitation, there is no “maximum allowable contribution.” See Sections 3E(1)(d) and 3E(2).

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“Member of the judge’s family residing in the judge’s household” denotes 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 Sections 3E(1) and 4D(5).

“Non-public information” denotes information that, by law, is not available to the public. Non-public information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, pre-sentencing reports, dependency cases or psychiatric reports. See Section 3B(11).

“Political organization” denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Section 7A(1).

“Public election.” This term includes primary and general elections; it includes partisan elections, nonpartisan elections and may include (as context demands) retention elections. See Sections 3E(2), 7A(1), 7A(2), 7B(1), and 7B(2).

“Require.” The rules prescribing that a judge “require” certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term “require” in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control. See Sections 3B(3), 3B(4), 3B(6), 3B(9) and 3C(2).

“Support” is defined as non-monetary assistance to a candidate. See Sections 3E(1)(d) and 7B(2).

...

Canon 3

Judges Shall Perform the Duties of Judicial Office Impartially and Diligently

...

E. Disqualification

(1) Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

Commentary: Under this rule, judges are subject to disqualification whenever their impartiality might reasonably be questioned, regard-

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less of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

Judges should disclose on the record information that the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification. The public filing of a “campaign contribution disclosure report”^{} or “financial disclosure statement”^{*} shall be deemed a disclosure to all parties of the information contained therein.*

The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.

(a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge^{*} of disputed evidentiary facts concerning the proceeding;

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

Commentary: *A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a governmental agency, however, should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of such association.*

(c) the judge or the judge’s spouse, or a person within the sixth¹ degree of relationship to either of them, or the spouse of such a

¹ OCGA § 15-1-8 (a)(2), which statutorily governs judicial disqualification, provides for a sixth degree of separation.

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person, or any other member of the judge's family residing in the judge's household*:

- (i) is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) is acting as a lawyer in the proceeding;
- (iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the outcome of the proceeding;
- (iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

Commentary: *The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(c)(iii) requires the judge's disqualification.*

(d) the judge has received or benefited from an aggregate* amount of campaign contributions* or support* so as to create a reasonable question as to the judge's impartiality. When determining impartiality with respect to campaign contributions* or support,* the following may be considered:

- (i) amount of the contribution* or support*;
- (ii) timing of the contribution* or support*;
- (iii) relationship of contributor or supporter to the parties;
- (iv) impact of contribution* or support*;
- (v) nature of contributor's prior political activities or support* and prior relationship with the judge;
- (vi) nature of case pending and its importance to the parties or counsel;
- (vii) contributions* made independently in support of the judge over and above the maximum allowable contribution* which may be contributed* to the candidate*; and
- (viii) any factor relevant to the issue of campaign contributions* or support* that causes the judge's impartiality to be questioned.

(e) the judge has made pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, or statements that commit the candidate* with respect to issues likely to come before the court.

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(2) Judges shall keep informed about their personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal financial interests of their spouses and minor children residing in their households.

Commentary: *A judge shall recuse when the judge knows* or learns by means of a timely motion that a particular party, party's lawyer, or law firm of a party's lawyer has within the current or immediately preceding election cycle* of a judicial campaign for public election* made aggregate* contributions* in an amount that is greater than the maximum allowable contribution* permitted by law.*

There is a rebuttable presumption that there is no per se basis for disqualification where the aggregate contributions* are equal to or less than the maximum allowable contribution* permitted by law. However, because the presumption is rebuttable, a judge who knows* or learns by means of a timely motion that a party, party's lawyer, or law firm of a party's lawyer has within the current or immediately preceding election cycle* of a judicial campaign for public election* made aggregate* contributions* permitted by law, should weigh the considerations in subsection 1(d) of Canon 3E in deciding whether recusal may be appropriate.*

Where a motion to recuse is based upon campaign contributions to the judge and the aggregate* of contributions* alleged would result in a rebuttable presumption that there is no per se basis for disqualification under the provisions of this Canon, any affidavit required to be filed by court rule must specify additional facts demonstrating a basis for disqualification pursuant to the considerations set forth in subsection 1(d) of Canon 3E. In the absence of such additional facts, the affidavit shall not be deemed legally sufficient to require assignment to another judge under applicable court rules.*

In summary, Canon 3E provides that:

(1) If contributions made to a judicial candidate* or to that candidate's* campaign committee* are permitted by the law and do not exceed the maximum allowable contribution*, then there is no mandatory requirement that the judge recuse.*

(2) If (a) a judicial candidate has knowledge* of a contribution* made to the candidate* or the candidate's* campaign committee* that exceeds the maximum allowable contribution* permitted by law and, (b) after having such knowledge,* the violation is not corrected in a timely manner (i.e., usually accomplished by returning the contribution*), then the judge shall recuse.*

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(3) If a judge has knowledge of a pattern of contributions* made by a particular party, party's lawyer, or law firm of a party's lawyer that include contributions* (a) made to a judicial candidate* or to that candidate's* campaign committee* and/or (b) made to a third party attempting to influence the election of the judicial candidate,* then the judge should consider whether recusal is appropriate in accordance with the considerations in subsection 1(d) of Canon 3E.*

F. Remittal of Disqualification. Judges disqualified by the terms of Section 3E may disclose on the record the basis of their disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary: *A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently to the court, judges must not solicit, seek or hear comment on possible remittal or waiver of the disqualification, unless the lawyers jointly propose remittal after consultation as provided in Section 3F. A party may act through counsel, if counsel represents on the record that the party has been consulted and consents. As a practical matter, judges may wish to have all parties and their lawyers sign a remittal agreement.*