

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1768

Amending Commentary to Code of Judicial Conduct Canon 3D concerning a judicial assistance committee;

Amending Application of the Code of Judicial Conduct and its Commentary concerning senior judges' service as members of a judicial assistance committee.

IT IS ORDERED:

1. The Commentary to the Code of Judicial Conduct Canon 3D is amended to read:

Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

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D. Disciplinary Responsibilities.

(1) ■ A judge having information establishing a likelihood that another judge has violated this Code shall take appropriate action. A judge having knowledge* that another judge has engaged in conduct reflecting the other judge's lack of fitness for judicial office shall inform the appropriate disciplinary authority,* unless the judge reasonably believes that the misconduct has been or will otherwise be reported. Conduct reflecting lack of fitness for judicial office includes:

(a) soliciting or accepting a bribe or otherwise acting dishonestly in reaching a judicial or administrative decision,

(b) improperly using or threatening to use the judge's judicial power in a manner adverse to someone else's interests for the purpose of inducing that person to bestow a benefit upon

the judge or upon someone else pursuant to the judge's wishes,
or

(c) commission of a felony.

(2) ■ A judge having information establishing a likelihood that a lawyer has violated the Rules of Professional Conduct shall take appropriate action. A judge who obtains information establishing a likelihood that a lawyer has committed a violation of the Rules of Professional Conduct by an act of dishonesty, obstruction of justice, or breach of fiduciary* duty shall inform the appropriate disciplinary authority,* unless the judge reasonably believes that the misconduct has been or will otherwise be reported.

(3) ■ A judge possessing nonprivileged information pertaining to another judge's potential violation of this Code shall fully reveal this information upon proper request of the appropriate disciplinary authority* or of any other tribunal empowered to investigate or act upon judicial misconduct. A judge possessing nonprivileged information pertaining to a lawyer's potential violation of the Rules of Professional Conduct shall fully reveal this information upon proper request of the appropriate disciplinary authority or of any other tribunal empowered to investigate or act upon attorney misconduct.

(4) ■ Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1), 3D(2), and 3D(3) are part of a judge's judicial duties*.

Commentary.—*Section 3D establishes a judge's duty to take action in response to the misconduct of another judge (Section 3D(1)) or the misconduct of a lawyer (Section 3D(2)). In many instances, Section 3D allows a judge a degree of discretion in determining how he or she should respond to misconduct; the*

Section specifies only that the judge shall take "appropriate action." Thus, a judge who learns that another judge has engaged in an improper but de minimis ex parte contact, or who learns that a judge has engaged in a fundraising activity for a charity, may believe that the only action needed is to point out to the other judge that his or her conduct violates the Code. Similarly, a judge who learns that another judge is suffering from alcohol or drug addiction might direct that other judge to counseling or might seek the help of the other judge's colleagues or friends or refer the matter to a judicial assistance committee. On the other hand, if the other judge refuses to admit the problem or submit to ameliorative measures, and if the other judge's intoxication is interfering with his or her judicial duties (so as to constitute a violation of Canon 1 and Section 3A), then a judge who knows of this problem may be obliged to report it to the Commission on Judicial Conduct, unless that judge is a senior judge acting as a member of a judicial assistance committee.

Appropriate action will vary with particular situations and with particular individuals. There will generally be a range of reasonable responses available to the judge who learns of misconduct. However, a judge who learns of misconduct must respond reasonably. For example, the judge may not "respond" by explicitly or implicitly condoning the misconduct.

A judge's discretion to determine an appropriate response to misconduct is circumscribed in certain instances. Both Sections 3D(1) and 3D(2) grant no discretion—they require the judge to report misconduct to the appropriate disciplinary authority—if (a)

the misconduct is serious and (b) the judge's awareness of the misconduct rises to the specified level of certainty.

With regard to this level of awareness, a judge must report judicial misconduct if he or she "knows" that another judge has engaged in serious misconduct, while a judge must report attorney misconduct if he or she has information "establishing a likelihood" that an attorney has engaged in serious misconduct. The term "knows" is defined in the Terminology Section. The term "likelihood" is used in the sense of "more probable than not," a preponderance of the evidence.

If the misconduct the judge learns of is not among the serious types of misconduct, or if the misconduct is serious but the judge's level of awareness of the misconduct does not rise to the specified degree of certainty, there is no absolute duty to report. However, the judge who is aware of a likelihood of misconduct will still be under the more general obligation to take appropriate action.

A judge is not required to report all conduct that indicates lack of fitness for judicial office, only conduct of the same seriousness as that described in Subsections 3D(1)(a)-(c).

Section 3D applies to magistrates. However, a magistrate may report serious misconduct to the presiding judge or chief justice instead of the Judicial Conduct Commission.

* * * *

2. The section of the Alaska Code of Judicial Conduct entitled Application of the Code of Judicial Conduct, section B, is amended to read as follows:

Application of the Code of Judicial Conduct

* * * *

B. Senior Judges.

(1) Senior judges (retired justices of the supreme court and retired judges of the court of appeals, the superior court, and the district court who are eligible for judicial service under Administrative Rule 23) shall comply with all provisions of this Code except:

(a) 4D(1)(b) (transactions with persons likely to come before the judge's court);

(b) 4D(4) (management of financial resources to minimize disqualification);

(c) 4E(1) (fiduciary service for persons other than family members);

(d) 4E(2) (fiduciary service where proceedings likely before judge's court);

(e) 4F (service as arbitrator or mediator). However, a senior judge who serves as an arbitrator or mediator must comply with Administrative Rule 23 (f); and

(f) a senior judge may speak publicly regarding the qualification of a judge seeking retention who faces active opposition.

(2) In addition, a senior judge need not comply with Section 4C(2) (appointment to government positions) except during periods of appointment to active judicial service under Administrative Rule 23.

(3) Senior judges who serve as members of a judicial assistance committee have additional ethical obligations to maintain the

confidentiality of communications received in that capacity, including the identities of those seeking the services of the committee or those referring matters to the committee. Consequently, senior judges serving in this capacity may not report any failure of a judge referred to the committee to admit the problem or submit to treatment.

Commentary.—*A senior judge—a retired justice or judge who is eligible for judicial service under Administrative Rule 23—must comply with all provisions of the Code except those listed. Thus, a senior judge may engage in financial and business dealings with any person and has no duty to manage investments and business and financial interests to minimize the number of cases in which the judge is disqualified. A senior judge may serve as a personal representative, trustee, guardian, or other fiduciary for persons other than family members. Although senior judges may not engage in the practice of law, they may serve as private arbitrators or mediators and may maintain private arbitration and mediation businesses, even during periods of pro tem service. However, in order to be eligible for judicial service, a judge who performs private arbitration or mediation must comply with the disclosure requirements and employment restrictions set out in Administrative Rule 23(e).*

Senior judges may publicly speak regarding the qualifications of judges facing active opposition. This limited exception to Canon 5A(1)(b) preserves the general insulation of judges from political pressures while allowing for an informed public debate on the qualifications of a judge up for retention.

A senior judge may serve on a government committee or commission or hold a government position except during periods of pro tem service.

Despite the relaxation of restrictions on senior judges' financial dealings, they remain subject to the disqualification provisions of Section 3E.

The special confidentiality obligations when serving as a member of a judicial assistance committee are narrowly tailored to provide for candid reporting to the judicial assistance committee.

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DATED: September 8, 2011

EFFECTIVE DATE: October 14, 2011

/s/
Chief Justice Carpeneti

/s/
Justice Fabe

/s/
Justice Winfree

/s/
Justice Christen

/s/
Justice Stowers