



SAMPLE TRIBAL CODE OF
Judicial Conduct



AT THE NATIONAL JUDICIAL COLLEGE



SAMPLE TRIBAL CODE OF JUDICIAL CONDUCT
A TEMPLATE

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Sample Tribal Code of Judicial Conduct

This is a template to help you create a Code of Judicial Conduct for your tribal court. This project has been initiated on behalf of the National Judicial College (NJC) and the National Tribal Judicial Center (NTJC). The project has used many sources to incorporate ideas and suggestions into this document such as the American Bar Association (ABA) Model Code of Judicial Conduct, various current tribal codes or proposed tribal codes as well as statements from groups like the National American Indian Court Judges Association.

Remember, the template is only a starting point to work from as you develop your tribal code. We are not implying or suggesting that tribes should use this template verbatim nor incorporate it in its entirety.

The tribal codes or proposed tribal codes used are from a handful of tribes that have already made an attempt at codifying rules of conduct for their own jurisdictions. References to these codes are found in the footnotes as well as in the italicized suggestions. The tribal names have been abbreviated for economy and ease of use. The abbreviations are as follows:

GRIC:	Gila River Indian Community
LRBO:	Little River Band of Ottawa Indians
SM:	Stockbridge-Munsee Tribe
MP:	Mashantucket Pequot
OST:	Oglala Sioux Tribe
CTC:	Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians
WTN:	Winnebago Tribe of Nebraska
BMIC:	Bay Mills Indian Community

PLEASE NOTE: The *Italicized* comments are suggestions for possible language uses, etc., and are directly related to the representative codes we used. The bold comments are editorial comments, similar to comments made in the ABA version that do not go into as much detail. After your tribe determines an appropriate Model Code, then greater detail should go into these comments. We have included these comments to illustrate the difference in the ABA rules and those of current or proposed tribal codes.

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CANON 1 (We suggest referring to these as **Judicial Rules**; i.e. **Judicial Rule 1**)

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

- A. An independent and honorable judiciary is indispensable to justice in our society¹. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.² See footnotes for other examples.^{3 4 5}

¹ *GRIC* replaces “society” with “community”.

² *GRIC* adds the following paragraphs here.

“A judge should, at all times, consider how his or her behavior and demeanor, inside and outside of the courtroom affects the public image of the GRIC and its courts. Leaders are judged by their speech, actions, dress, appearance, manners, and conduct, and it is important to always project the image of judicial impartiality and independence. To preserve the independence of the judiciary, no judge shall answer or otherwise respond to any inquiry from the Tribal Council or others regarding any case other than to supply copies of publicly available court filings, record and any filed written opinions.”

³ *SM* includes the following, and the *OST* is very similar to the *SM*:

“Honesty and Independence of the Stockbridge-Munsee Judiciary

(A) A Stockbridge-Munsee judge shall uphold the integrity and independence of the Stockbridge-Munsee judiciary. An independent and honorable Stockbridge-Munsee judiciary is essential to justice in the tribal community. A Stockbridge-Munsee judge shall help create and maintain such a judiciary, and shall observe high standards of conduct toward achieving this goal.

(1) A judge shall encourage a separation between the judicial branch and other branches of tribal government, and shall avoid any contact or duty that violates such a separation.

(2) A judge shall not participate in legislative or executive decision making except where such participation is in accordance with the tradition of the Tribe.”

⁴ *LRBO* includes the following:

“A tribal court judge should uphold the integrity and independence of the tribal judiciary in that an independent and honorable tribal judiciary is indispensable to justice in the tribal community. A judge should participate in establishing, maintaining, and enforcing, and should himself or herself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant(s) and the public, not the judiciary. The provisions of this Code (Section 2.101 through 2.110, inclusive) should be construed and applied to further these objectives.”

⁵ *CTC* incorporates many rules into one:

“Maintaining the Integrity of the Judicial System

(a) A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.

(b) A judge shall not commit a criminal act.

(c) A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament or fitness to serve as a judge.

(d) A judge shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(e) A judge shall not allow family, social or other relationship to influence judicial conduct or judgment.

(f) A judge shall not use the position to advance the private interests of the judge or any person, nor shall a judge convey or permit anyone to convey the impression that anyone has a special influence with the judge, but a judge may provide a character or ability reference for a person about whom the judge has personal knowledge.

(g) A judge shall not testify as a character witness except pursuant to subpoena.

CANON 2 (*Judicial Rule 2*)

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law^{6,7} and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow (*WTN: his/her*) family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.⁸

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.⁹

CANON 3 (*Judicial Rule 3*)

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY¹⁰

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law*¹¹, ¹². In the performance of these duties, the following standards apply.

(h) A judge shall not hold membership in any organization that the judge knows is a discriminatory organization.”

⁶ *The OST changes many aspects of this rule including what “law” means.*

“A Judge of the Oglala Sioux Tribal Court should avoid impropriety and the appearance of impropriety in all his/her activities.

A. A Judge of the Oglala Sioux Tribal Court should respect and comply with the law and tradition of the Oglala Sioux Tribe and should at all times act in a manner that promotes public confidence in the honesty and impartiality of the Indian Judiciary. A Judge should also respect and comply with all state and federal laws.

B. A Judge of the Oglala Sioux Tribe should not allow family, social or other personal relationships to influence his/her judicial conduct. He/she should not attempt to use the prestige of his/her office to advance the private interests of others; nor should he/she convey the impression that anyone has special influence on the Judge.”

⁷ *GRIC actually defines “law” in its statutes. It states, “Law” denotes court rules as well as statutes, constitutional provisions, common law, and custom and tradition of the GRIC.”*

⁸ *The WTN is almost the same except they delete (C) and add commentary. The OST also deletes (C), as do other tribes.*

⁹ *The GRIC changes (C) to the following. “A judge shall not hold membership in any organization that is in opposition to tribal values of respect for the dignity of each individual and the value of the extended family.”*

¹⁰ *GRIC changed the description of this rule to the following: “A judge shall exercise the inherent powers and duties of judicial office impartially and diligently in order to achieve a prompt and speedy resolution of disputes, and obtain a just resolution of all matters under consideration.”*

¹¹ * *Indicates where the ABA defined a word. We suggest that you either follow their definition or include one of your own for all words that follow with a *. See note 85.*

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.¹³

(2) A judge shall be faithful to the law and maintain professional competence in it.¹⁴ A judge shall not be swayed by partisan interests, public clamor or fear of criticism.¹⁵

(3) A judge shall require¹⁶ order and decorum in proceedings before the judge.^{17, 18}

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers¹⁹ and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.²⁰

¹² *MP inserts in place of law* "Mashantucket Pequot Tribal Law." *This is an alternative to defining law as done by the GRIC. Another example here is by the OST and the LRBO, which states, "prescribed by Tribal law, custom or tradition."*

¹³ *The OST cuts this particular part out. We suggest that it remain included, although you may alter as you see fit.*

¹⁴ *GRIC says* "A judge shall be faithful to the tribal law, custom, and ordinances and shall maintain professional legal competence."

¹⁵ *The OST begins with the following:* "A Judge of the Oglala Sioux Tribal Court should adhere to the laws, customs, and traditions of the Tribe. He/she should be unswayed by partisan interests, public clamor, political pressure, or by fear of criticism, and should resist influences on the Court by other Tribal officials, governmental officials or any other attempting to improperly influence the Court." **This is a very detailed description that many tribes might find necessary to include.**

¹⁶ **The explanation of "require" from the ABA is more than adequate and should be included in your Judicial Model Code.**

¹⁷ *OST has some additional language that should be considered. It states,* "He/she should not interfere in the proceedings except where necessary to protect the rights of the parties. A Judge should not take an advocate's role. Similarly, a Judge should rely on only those procedures prescribed by the laws and customs of the Oglala Sioux Tribe."

¹⁸ *GRIC goes on further by saying,* "Persons who are before the court in any capacity shall conduct their business in a professional, appropriate, and respectful manner."

¹⁹ **Many tribal codes include "legal counselors" and even "lay advocates." If your tribe allows another type of representation by anyone else it should be included here such as, "Elders".**

²⁰ *Most tribes either leave this out or dramatically change it. For example, the GRIC states:* "A judge shall perform judicial duties without bias or prejudice and shall not permit staff, court officials and others subject to the judge's direction and control to do so." *But the other side of the example is the MP that leaves it out all together like many other tribes. We believe that some language should be included here and it should reflect the values of the community in which you serve.*

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.²¹

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer²², the right to be heard according to law*.²³ 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 concerning a pending or impending proceeding except that:

(a) Where circumstances require (*each tribe can insert its own laws on when it is required*), ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties (*insert "or legal counsel"*) of the substance of the ex parte communication and allows an opportunity to respond.²⁴

(b) A judge may obtain the advice of a disinterested expert on the law²⁵ applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.²⁶

²¹ Again, this language is often left out of current codes. The GRIC changes it to the following: "A judge shall require lawyers in proceedings before the judge to refrain from displaying improper bias or prejudice by words or conduct." **It continues by following the rest of what the ABA has. We think that this example should be followed.**

²² "Legal Counselor Advocate" here is better suited than Lawyer.

²³ **We suggest that you make this part of this section stand alone and the rest of this section should be a new section.** Following the example of the MP:

"(3) A judge shall give to every person who is legally interested in a proceeding, or his or her legal counsel, a full right to be heard according to tribal law.

(4) A judge shall refrain from all out-of-court or other communications with parties, witnesses, tribal officials, agents or others concerning a pending proceeding unless all parties to the proceedings are present or represented. A judge may initiate or consider any ex parte communication when expressly authorized by law."

²⁴ GRIC makes this clearer by stating: "The judge promptly notifies all other parties or their advocates of the substance of the ex parte communication and allows an opportunity to respond." **We suggest it be changed to follow this example.**

²⁵ GRIC adds, "including experts on custom and tradition of the GRIC." **We suggest that other tribes include this if applicable to their situation.**

²⁶ MP explains this in greater detail. "A judge may, however, obtain the advice of a disinterested expert on federal, state or tribal law, custom or tradition or on other sources of law applicable to a proceeding before the Court if the request for advice is limited to points of law or tradition or custom or on other sources of law applicable to a

(c) A judge may consult with court personnel²⁷ whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.²⁸

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.^{29, 30}

(10) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial* performance of the adjudicative duties of the office.³¹

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

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.³²

proceeding before the court and does not involve the particular merits of the case. The parties shall be given a reasonable opportunity to respond to information provided by the expert." **We like this detailed explanation and it would be wise to include it with the changes your tribe feels are necessary. It might also be necessary to say that this does not preclude a judge from consulting with other judges whose function is to aid the judge in carrying out his/ her adjudicative responsibilities. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him/her to file an Amicus Curiae brief.**

²⁷ **Each tribe should include a definition of every person who is categorized as "court personnel".**

²⁸ **You can include the name of your tribal court here but we suggest that the rest of this be left as is.**

²⁹ **If your tribe already has a rule dealing with this issue, you can include it here or incorporate it by reference to your code.**

³⁰ *WTN condensed this by saying "A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his/her direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."*

³¹ *GRIC completely removed this section.*

C. Administrative Responsibilities.³³

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.³⁴

(2) A judge shall require* staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.³⁵

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.³⁶

(5) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than [\$] within the prior [] years to the judge's

³² *WTN includes an additional rule here that one might want to consider.* "A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice."

³³ *Some tribes cut this section down drastically as the illustrated by the OST. The OST included the following:*

"1. A Judge should diligently perform his/her administrative responsibilities.
2. A Judge should require his/her staff and court officials to observe high standards of honesty and diligence.
3. A Judge should initiate appropriate disciplinary measures against a Judge or lawyer for unprofessional conduct of which the Judge may become aware."

³⁴ *Many tribes made no changes to this section. The BMIC changed it as follows:*

"(1) A judge should diligently perform his/her administrative responsibilities with a high degree of integrity and diligence.

(2) A judge should require his/her staff and court officials to observe high standards of integrity and diligence. As such, a judge should direct his/her staff and court officials subject to his/her control to observe high standards of fidelity, diligence and courtesy to litigants, jurors, witnesses, lawyers, lay advocates and others with whom they deal in their official capacity."

³⁵ **This is might be unnecessary for tribes with small court systems.**

³⁶ **Again, this might or might not be applicable, depending on each individual tribe.**

election campaign³⁷, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless.³⁸

- (a) the position is substantially uncompensated;
- (b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
- (c) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.

D. Disciplinary Responsibilities.³⁹

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority*.⁴⁰

(2) A judge who receives information indicating a substantial likelihood that a lawyer (*or advocate*) has committed a violation of the Rules of Professional Conduct [*substitute correct title if the applicable rules of lawyer conduct have a different title*] should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct [*substitute correct title if the applicable rules of lawyer conduct have a different title*] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority*.⁴¹

³⁷ **It is best to include a dollar amount, but if you do not be sure to at least include the words "substantial amount" in the code.**

³⁸ **This might not apply, since not all tribal judges are elected, and many are appointed. Include this in your code if applicable.**

³⁹ *WTN only said the following when dealing with disciplinary measures.* "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." **We do not feel this to be adequate. More depth should be used to guide the judges in your courts on what to do, and what constitutes taking or initiating appropriate disciplinary measures.**

⁴⁰ **Here you can include references to provisions of removal that are currently in your codes.** *You can also provide measures for investigating these allegations as seen in GRIC code.*

"a. When there is probable cause to believe that a GRIC judge has committed a violation of this Code, the Chief Justice of the GRIC court shall convene a panel comprised of five GRIC judges to hear evidence of the alleged violation.

i. The judicial panel shall report its findings to the GRIC Tribal Council.

a. The Tribal Council may, at its discretion, issue a temporary suspension.

ii. In the event that the judge alleged to have violated the Code is accused is the Chief Justice, the judge with the longest continuous tenure on the GRIC bench shall convene and chair the judicial panel."

⁴¹ **The lawyer or advocate should be reported to the disciplinary branch that the tribe has established to handle lawyers and all types of advocates. If he/she is an attorney licensed in the state court, he/she should be reported to the state bar disciplinary branch as well.**

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.⁴²

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer (*advocate*), or (*has*) personal (*first-hand*) knowledge* of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in 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 material witness concerning it;⁴³

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household*, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* (*minimal*) interest that could be substantially affected by the proceeding;⁴⁴

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:⁴⁵

(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 proceeding; or

⁴² **Many tribes have left this section out, but we believe it should be included since it is vital in maintaining an independent judiciary.**

⁴³ *OST made this a little clearer by saying:* "The Judge served as lawyer, advocate, or personal representative in the matter before the Court or a person with whom the Judge has been associated in a professional capacity served as a lawyer, advocate or personal representative concerning the matter."

⁴⁴ *CTC states:* "the judge knows that the judge, individually or as a fiduciary, or the judge's extended family, wherever residing, or any other person residing in the judge's household has a financial interest in the subject matter in controversy, is a party to the proceeding or has any other interest that could be substantially affected by the outcome of the proceeding." **This is clearer and should be considered.**

⁴⁵ *This might depend on how the tribe looks at kinship, but the CTC again simplify by saying:* "the judge, the judge's extended family wherever residing, or any other person residing in the judge's household."

(iv) is to the judge's knowledge,* likely to be a material witness in the proceeding;

(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [\$insert amount] for an individual or [\$insert amount] for an entity and said amount is reasonable and appropriate for an individual or a entity.⁴⁶

(f) the judge, while a judge or a candidate* for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to

(i) an issue in the proceeding; or

(ii) the controversy in the proceeding.⁴⁷

(2) A judge shall keep informed about the judge's personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.⁴⁸

F. Remittal (*Waiver*) of Disqualification. A judge disqualified by the terms of Section 3E may⁴⁹ disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers (*advocates*) 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.⁵⁰

⁴⁶ *Not always applicable. But if it were, it would be best to give direction to specific amounts that would lead to disqualification. If not, follow the minimal standard as seen in the GIRC that says: "the judge knows or learns by means of a timely motion that a party or a party's advocate has recently made substantial contributions to the judge's campaign."*

⁴⁷ *Many tribes have removed this section. If applicable, It is best to leave it in but with changes that acknowledge tribal customs.*

⁴⁸ *CTC stated: "A judge shall be responsible for knowing about the judge's financial interests, including such interests relating to service as a fiduciary, and shall make reasonable efforts to be informed about the financial interests of the judge's extended family, wherever residing."*

⁴⁹ *We suggest changing this to shall.*

⁵⁰ *WTN simplified this by saying: "A judge disqualified by the terms of Canon 3C(1) (c) or Canon 3C(1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his/her qualifications. If, based on such disclosure, the parties and lawyer, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his/her financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding."*

CANON 4 (*Judicial Rule 4*)

A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS⁵¹, ⁵²

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

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

C. Governmental, Civic or Charitable Activities.⁵³, ⁵⁴

⁵¹ *WTN titles this section somewhat different. "A Judge May Engage in Activities to Improve the Law, the Legal System, and Administration of Justice." The WNT and other tribes such as the OST split this Rule or Canon up into two distinct sections. They simplify much of the section and leave other parts out that should be included. Here is their complete Rule 4:*

"A judge, subject to the proper performance of his/her judicial duties, may engage in the following quasi-judicial activities, if in doing so s/he does not cast doubt on his/her capacity to decide impartially any issue that may come before him/her;

A. S/he may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. S/he may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and s/he may otherwise consult with an executive or legislative body or officials, but only on matters concerning the administration of justice.

C. S/he may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. S/he may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. S/he may make recommendations to public and private fund granting agencies on projects and program concerning the law, the legal system, and the administration of justice."

⁵² *OST are similar to WTN but with some noticeable differences:*

"A Judge of the Oglala Sioux Tribal Court may engage in activities to improve the law, the legal system and the administration of justice. A Judge may engage in the following activities, if in doing so, he/she does not cause doubt on his/her capacity to decide impartially on any issue that may come before the Court:

A. The Judge may speak, write, lecture, teach and participate in other activities concerning Tribal law and custom, the legal system of the Tribe and the administration of justice.

B. The Judge may appear at a public hearing before a Tribal Executive or Legislative body or official on matters concerning the Tribal legal system and the administration of justice, and he/she may otherwise consult with a Tribal executive or legislative body or official but only on matters concerning the general administration of justice.

C. The Judge may serve as a member, officer, or director of an organization or tribal government agency devoted to the improvement of tribal law, its legal system or the administration of justice. The Judge may assist such an organization in raising funds and may, participate in that management and investment. he/she may make recommendations to public and private fund-granting agencies on projects and programs concerning tribal law, its legal system and the administration of justice. A Tribal Judge may not serve as a member, officer, or director of any other tribal government entity."

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law*, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2) A judge shall not accept⁵⁵ appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law,* the legal system or the administration of justice. A judge may, however, represent a country, state or locality (*tribe*) on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law,* the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.⁵⁶

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization⁵⁷

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

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

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

⁵³ **Almost all tribes separate governmental activity from civic and charitable activities.**

⁵⁴ *BMIC says the following about civic and Charitable activities:* "A tribal judge may participate in civic and charitable activities that do not reflect adversely upon his/her impartiality or interfere with the performance of his/her judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization, whether tribal or otherwise, provided that a tribal judge does not participate if it is likely that the organization will be involved in proceedings which would ordinarily come before him/her or would be involved in adversarial proceedings in any tribal court." *BMIC, like others, separate the government part.*

⁵⁵ *The MP make a change here that should be followed, if applicable to your tribe. MP includes the phrase:* "Unless allowed by tribal law or tradition..."

⁵⁶ *CTC made several changes which are:* "A judge shall not serve as an officer, director, trustee or advisor of a private or public corporation or of an educational, religious, charitable, fraternal, political or civic organization if the corporation or organization regularly engages in proceedings that would ordinarily come before the judge or in adversary proceedings in the court."

⁵⁷ **Both (a) and (b) are important provisions that have at times been left out of current codes. We suggest they remain but changes can be made to allow for tradition, custom, or size of tribe.**

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law,* the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;⁵⁸

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. Financial Activities.

(1) A judge shall not engage in⁵⁹ financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.⁶⁰

⁵⁸ *CTC went in much greater depth in covering this issue:* "A judge shall not personally solicit funds for any private or public corporation or for any educational, religious, charitable, fraternal, political or civic organization or use or permit the use of the prestige of the judicial office for that purpose, but may be an officer, director or trustee of such an organization. This rule does not prohibit a judge from assisting an organization or governmental agency devoted to improvement of the law, legal education, the legal system, or the administration of justice in raising, managing or investing funds nor does it prohibit the judge from making recommendations to public- and private-granting agencies on projects and programs concerning the law, legal education, the legal system, and the administration of justice."

⁵⁹ *Should discuss less strict language such as that in BMIC that states:* "A tribal judge should avoid financial and business dealings that tend to reflect adversely..."

⁶⁰ *If you judge is only part time you might want to consider similar provisions such as those of the BMIC:* "Because it is recognized that the position of tribal judge may be a part-time position, such a tribal judge may accept other employment and participate in the operation of a business, legal or otherwise in nature, subject to the following:

(a) A part-time tribal judge should not practice law either as a lawyer or an advocate:

(i) in the tribal court in which he or she serves; or

(ii) in any court subject to the appellate jurisdiction of the tribal court or council on which he or she serves; and

(b) A part-time tribal judge should not act as a lawyer or advocate in any proceeding in which he or she has judicially served or in any related proceeding."

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family,* including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:⁶¹

(a) a business closely held by the judge or members of the judge's family,* or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.*

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household* not to accept, a gift, bequest, favor or loan from anyone except for:⁶²,
⁶³

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law,* the legal system or the administration of justice;

⁶¹ WTN change this by including a comment in the previous section that says that a judge can participate "in other remunerative activity including the operation of a business."

⁶² **This is something that should be closely looked at. Some cultural or traditional gifts that might otherwise violate these rules should be mentioned and allowed if applicable to your tribe.** *The MP acknowledges this by stating:* "Except as allowed by the laws and traditions of the Mashantucket Pequot Tribe, neither a judge nor a member of his or her family should accept a gift..."

⁶³ CTC condensed the gift section to the following: "Gifts, Bequests, Favors or Loans

(a) A judge shall not directly or indirectly accept gifts, bequests, favors or loans from anyone, except that a judge may accept

(1) gifts incident to a public testimonial to the judge, books supplied by publishers on a complimentary basis for official use or invitations to the judge to attend law-related functions or activities related to the improvement of law, legal education, the legal system or the administration of justice;

(2) ordinary social hospitality; gifts, bequests, favors or loans from relatives; gifts from friends for wedding, birthday or other personal occasions; loans from lending institutions in the regular course of business on terms generally available to persons who are not judges; or scholarships, fellowships or grants awarded on terms applied to other applicants,

(3) any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge."

Note: CTC does not mention anything about the family of the judge. On the other hand, WTN puts in language that is even stronger than the ABA by saying: "Neither a judge nor a member of his/her family residing in his/her household should accept a gift, bequest, favor, or loan from anyone except as follows." **This means that the family cannot accept these things, not that the judge should urge them not to accept.**

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.⁶⁴

E. Fiduciary Activities.⁶⁵

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary,* except for the estate, trust or person

⁶⁴ *CTC added a section dealing with non-public information that reads: "Nonpublic information acquired by a judge in a judicial capacity shall not be used or disclosed for any purpose not related to judicial duties." We suggest that this language be included somewhere in your code.*

⁶⁵ *Many tribes leave this section untouched, such as the GRIC. But others have made slight changes as seen by WTN that states: "Fiduciary Activities.*

A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his/her family, and then only if such service will not interfere with the proper performance of his/her judicial duties. "Member of his/her family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

1. S/he should not serve if it is likely that as a fiduciary s/he will be engaged in proceedings that would ordinarily come before him/her, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which s/he serves or one under its appellate jurisdiction.
2. While acting as a fiduciary a judge is subject to the same restriction on financial activities that apply to him/her in his/her personal capacity."

of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary* if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary* capacity.

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.*⁶⁶

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.*⁶⁷

H. Compensation, Reimbursement and Reporting.⁶⁸

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document

⁶⁶ **Some tribes have courts set up where a judge is a mediator. Where applicable this could be removed or left in with a clear exception explained. Any other exceptions should also be explained.**

⁶⁷ *Again, this might be changed in certain situations. See example in footnote 58 of BMIC. Other changes could be for practice in some other state courts but this should be carefully considered.*

⁶⁸ *WTN use this section as its own Canon or Rule titling it "A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities."*

in the office of the clerk of the court on which the judge serves or other office designated by law.*⁶⁹

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.*⁷⁰

CANON 5 (*Judicial Rule 5*)⁷¹

A JUDGE OR JUDICIAL CANDIDATE⁷² SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY⁷³

A. All Judges and Candidates⁷⁴

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(5), a judge or a candidate* for election or appointment to judicial office shall not:

- (a) act as a leader or hold an office in a political organization,*
- (b) publicly endorse or publicly oppose another candidate for public office;⁷⁵
- (c) make speeches on behalf of a political organization;
- (d) attend political gatherings⁷⁶; or

⁶⁹ Although changes can be made depending on need and circumstance, we suggest that a reporting provision be included in the code. This has been left out of many, but the tribal codes that have included it, used the wording from the ABA example.

⁷⁰ This disclosure does not have to be public information. We would suggest that it be exempted from public information acts as to not be too intrusive on the judge's personal lives. It should be as less intrusive as possible.

⁷¹ Many of the topics of this canon are left out by current codes, however, most have bits and pieces still included. A more detailed analysis is necessary for tribes who have elected judges.

⁷² Again, this might not be as applicable to tribes with appointed judges.

⁷³ The CTC take a different, less intrusive, approach than banning most political activity. The CTC states:

“(a) A judge shall not engage in political activity that

- (1) involves persons, organizations or specific issues that would disqualify a judge under 1-13-21(j);
- (2) creates a reasonable doubt about the judge's impartiality toward persons, organizations or factual issues that foreseeably may come before the court on which the judge serves, whether or not the judge would be disqualified;
- (3) implies support by the judge in the judge's official capacity to a cause other than the improvement of the law, legal education, the legal system, or the administration of justice; or
- (4) jeopardizes the political impartiality of the judicial branch of government.

(b) A judge shall not authorize any public official, or employee or other person who is subject to the judge's direction or control to do anything that a judge may not do under JR 1-13-401(a)(1)-(4) or to do on the judge's behalf anything that the judge may not do under JR 1-13-401(a)(1)-(4).”

⁷⁴ MP simply states the following and does not go into any more detail in this area: “Unless authorized by tribal law or tradition, a judge shall not engage in any tribal political activity except on behalf of measures to improve the law, the tribal justice system or the administration of justice.”

⁷⁵ WTN combines (b) and (c) by saying: “make speeches for a political organization or candidate or publicly endorse a candidate for public office;”

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(2) A judge shall resign from judicial office upon becoming a candidate* for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law* to do so.

(3) A candidate* for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality,* integrity and independence of the judiciary, and shall encourage members of the candidate's family* to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

b) shall prohibit employees and officials who serve at the pleasure of the candidate*, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly* permit any other person to do for the candidate* what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not⁷⁷:

(i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are

⁷⁶ *WTN also combines (d) and (e) by saying: "solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);"*

⁷⁷ *CTC simplifies and expounds this by saying: "Misrepresentation, Pledges, or Promises:*

(a) A judge shall not:

- (1) Misrepresent the judge's identity, qualifications, present position, education, experience or other fact;
- (2) Make pledges or promises of conduct in office that could inhibit or compromise the faithful, impartial and diligent performance of the duties of the office;
- (3) Seek support for the judge or invite opposition to another judicial candidate because of membership by either candidate in a political organization, or
- (4) Publicly identify the judge, for the purpose of appointment, as a member of a political party other than by registering to vote."

inconsistent with the impartial* performance of the adjudicative duties of the office; or⁷⁸

(ii) knowingly* misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;

(b) a non-judge candidate* for appointment to judicial office may, in addition, unless otherwise prohibited by law*:

(i) retain an office in a political organization*,

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

C. Judges and Candidates Subject to Public Election.

⁷⁸ WTN changes this section also by saying: "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his/her views on disputed legal or political issues; or misrepresent his/her identity, qualifications, present position, or other fact."

(1) A judge or a candidate* subject to public election* may, except as prohibited by law*:

(a) at any time

- (i) purchase tickets for and attend political gatherings;
- (ii) identify himself or herself as a member of a political party; and
- (iii) contribute to a political organization*;

(b) when a candidate for election

- (i) speak to gatherings on his or her own behalf;
- (ii) appear in newspaper, television and other media advertisements supporting his or her candidacy;
- (iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and
- (iv) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

(2) A candidate* shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year]⁷⁹ before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(3) A candidate shall instruct his or her campaign committee(s) at the start of the campaign not to accept campaign contributions for any election that exceed, in the aggregate*, [\$] from an individual or [\$] from an entity. This limitation is in addition to the limitations provided in Section 5C(2).7

⁷⁹ WTN states that the time period is ninety (90) days before and after the election.

(4) In addition to complying with all applicable statutory requirements for disclosure of campaign contributions, campaign committees established by a candidate shall file with []8 a report stating the name, address, occupation and employer of each person who has made campaign contributions to the committee whose value in the aggregate* exceed [\$].9 The report must be filed within []10 days following the election.

(5) Except as prohibited by law*, a candidate* for judicial office in a public election* may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law*, the legal system or the administration of justice, or (iii) as expressly authorized by law.

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates*. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to [Rule 8.2(b) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.⁸⁰

B. Retired Judge Subject to Recall⁸¹. A retired judge subject to recall who by law is not permitted to practice law is not required to comply:

- (1) except while serving as a judge, with Section 4F; and
- (2) at any time with Section 4E.

C. Continuing Part-time Judge. A continuing part-time judge*:

⁸⁰ **Very few tribes have this section in their codes. Most tribal codes do not distinguish between types of judges.**

⁸¹ *WTN states the following about retired judges:* "A retired judge who receives the same compensation as a full-time judge on the court from which s/he retired and is eligible for recall to judicial service should comply with all the provisions of this code except Canon 5G, but s/he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this code governing part-time judges."

(1) is not required to comply

(a) except while serving as a judge, with Section 3B(9); and

(b) at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, 4H, 5A(1), 5B(2) and 5D.

(2) 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.

D. Periodic Part-time Judge. A periodic part-time judge*:⁸²

(1) is not required to comply

(a) except while serving as a judge, with Section 3B(9);

(b) at any time, with Sections 4C(2), 4C(3)(a), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5B(2) and 5D.

(2) 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.

E. Pro Tempore Part-time Judge. A pro tempore part-time judge*:⁸³

(1) is not required to comply

(a) except while serving as a judge, with Sections 2A, 2B, 3B(9) and 4C(1);

(b) at any time with Sections 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5A(2), 5B(2) and 5D.

⁸² *WTN tribe includes this in their code with several changes.* “A. Part-time Judges. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

1. is not required to comply with Canon 5C(2), D,E,F, and G, and Canon 6C;

2. should not practice law in the court on which s/he serves or in any court subject to the appellate jurisdiction of the court on which s/he serves, or act as a lawyer in a proceeding in which s/he has served as a judge or in any other proceeding related thereto.”

⁸³ *WTN states the following about a Judge Pro Tempore:* “Judge Pro Tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

1. While acting as such, a judge pro tempore is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

2. A person who has been a judge pro tempore should not act as a lawyer in proceeding in which s/he has served as a judge or in any other proceeding related thereto.”

(2) A person who has been a pro tempore part-time judge* 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 except as otherwise permitted by [Rule 1.12(a) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

F. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.⁸⁴

⁸⁴ *MP includes rules for Discipline and Removal of Judges at the end of the code. It is suggested that each tribe develop these rules as well if they have not already done so. Most have and can be incorporated by reference. MP rules are as follows:*

“Discipline and Removal of Judges

In order to ensure compliance with the provisions of this Code, it is necessary to establish a means of enforcement. The disciplinary procedures contained within the Code shall not be utilized in substitution for the judicial appeal process. The Judicial Conduct Review Board is the entity charged herein with the responsibility of reviewing complaints made against judges of the Mashantucket Pequot Tribe. The board is comprised of a broad range of persons and is designed to allow for participation in decision-making by both legal professionals and tribal community members.

a. Filing of Complaints. Complaints filed against a judge shall be made in writing and shall be signed by the complainant. Each complaint shall be filed with the chief court clerk, who shall assign a docket number, and acknowledge receipt of the complaint. Upon receipt of such a complaint, the clerk shall immediately notify the Judicial Conduct Review Board.

b. Judicial Conduct Review Board. It is hereby established the Judicial Conduct Review Board which has the authority to hear complaints concerning the conduct of judges, to recommend disciplinary actions against them, and/or to recommend their removal from the Mashantucket Pequot judiciary if warranted, after a fair hearing.

c. Board Composition. The board shall consist of one judge of the court of appeals; the chief judge of the Mashantucket Pequot Tribal Court, or one other tribal court judge in the event that the chief judge is the subject of the board's focus; one member of the Mashantucket Pequot Tribal Bar chosen randomly by the court clerk; and the chair and vice-chair of the Mashantucket Pequot Judicial Committee, or the designee of the chair or vice-chair of the Mashantucket Pequot Judicial Committee so long as such designee is a member of the Mashantucket Pequot Judicial Committee. The judge of the Mashantucket Pequot Court of Appeals shall serve as chairperson for the Board and shall have the right to vote in all decisions of the board.

No person shall serve on the board if that person has reason to believe that he or she could not act with complete impartiality or if such person's impartiality might be reasonably questioned. No action shall be taken by the board except by vote of a majority of the Board and except as provided by subsections (m) and (n) herein.

d. Investigative Authority. The board shall conduct such investigation as it deems fit. At any stage of such an investigation the board shall have subpoena power and may require a person to appear or produce evidence before the board, and to provide evidence under oath. If the Board determines that the complaint is unfounded, the board shall dismiss the matter, notifying any complainant of its action.

e. Confidentiality. All proceedings before the board shall be confidential, and no information shall be published by the board except:

(1) Upon written request of the Mashantucket Pequot Tribal Council in connection with the consideration of the appointment or reappointment of a person who is or has been a Mashantucket Pequot judge, the board shall provide information on any complaints made against the judicial candidate and the board's disposition thereof; and

(2) Upon request of the person whose conduct is being investigated, or by a majority vote of the Board, after giving that person an opportunity to express his or her views on the question, any hearing held shall be public.

f. Determination to Proceed. The board shall meet at the Mashantucket Pequot courthouse on a day not more than 15 days after the filing of the complaint. The board shall consider each complaint received to determine whether it is within the board's authority to hear:

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- (1) If the board is unable to make that determination, it may request additional information;
 - (2) If the board determines that the complaint is not a type within its authority, it shall dismiss the complaint, notify in writing the complainant of its decision, and notify the judge complained against of the nature of the complaint and the board's decision;
 - (3) If the board determines that a complaint is within its authority to hear, it shall communicate the complaint to the judge complained against by providing him or her with a copy of the complaint and shall request a written response. The board may conduct such investigation of the matter as it deems appropriate. If the board determines that the complaint is unfounded or frivolous or otherwise provides insufficient cause for proceeding, it shall dismiss the complaint and notify the complainant and the judge complained against of its decision; or
 - (4) The dismissal of the complaint does not preclude later consideration of the matters involved in that complaint to the extent that they may evidence a pattern or practice of misconduct, or are otherwise relevant to the consideration of any other complaint or matter properly before the board under these Rules. A dismissed complaint may be reconsidered if new information is received upon the basis of which the board determines that such reconsideration is necessary to fulfill the purposes of the disciplinary process.
- g. Hearings. The board shall hold a hearing at the request of a majority of its members or of the individual whose conduct is being investigated. Such hearing shall be had before the board on the record. The board shall have subpoena power and every witness shall be sworn.
- h. Rights of the Judge. The judge shall be entitled to be present at the hearing, to be represented by counsel at the judge's own expense, to introduce evidence, to examine and cross-examine witnesses, and to subpoena documents and witnesses.
- i. Written Notice. The board shall issue to the judge a written notice containing a statement of alleged misconduct, including any section of the Mashantucket Pequot Code of Judicial Conduct or oath taken upon admittance to office alleged to have been violated, or other alleged disability. The notice shall state alleged facts upon which such charges are based. The board shall make available to the judge all information concerning such charges as the board has acquired.
- j. Response to Notice. Within 20 days after receipt of notice, the judge shall file a written response setting forth any admission, denial, affirmative defense, or other matter upon which he or she intends to rely at the hearing.
- k. Discovery. Discovery shall be allowed under the board's direction upon request to and with the approval of the Board.
- l. Evidence. The Mashantucket Pequot Rules of Evidence shall guide evidentiary matters.
- m. Board Decision. After hearing a matter, the board shall decide whether it is satisfied by clear and convincing evidence that:
- (1) The judge has violated a provision of the Mashantucket Pequot Code of Judicial Conduct and that the violation is of such serious nature as to warrant formal disciplinary action; or
 - (2) The judge has been convicted of a crime the nature of which casts into doubt his or her continued willingness to conform his or her conduct to the Mashantucket Pequot Code of Judicial Conduct; or
 - (3) The judge is suffering from a disability which materially affects his or her ability to perform his or her duties.
- n. Board Findings and Actions. The board shall make findings of fact and conclusions of law in its written decision. The decision of the board shall be by unanimous vote. If the board decides that a charge has not been established, it shall dismiss the matter and provide written notice to both the judge complained against and any complainant. If the board has decided that a charge has been established, it shall report its written decision to both the judge and the complainant and promptly recommend to the Mashantucket Pequot Tribal Council appropriate disciplinary action.”
- ⁸⁵ **This terminology is that of the ABA. It is referenced by the * that follow words throughout the text. We suggest that each tribe change and re-define these if they feel the ABA definitions to be inaccurate, or to leave it out altogether if necessary. We do suggest that you include a terminology section, and define other terms that the tribe decides to use. For example, you might define what “advocate” means or “immediate family.”**

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 under Sections 3E(1)(e) and 5C(3) and (4) denotes not only contributions in cash or in kind made directly to a candidate's committee or treasurer, but also, except in retention elections, all contributions made indirectly with the understanding that they will be used to support the election of the candidate or to oppose the election of the candidate's opponent. See Sections 3E(1)(e), 5C(3) and 5C(4).

"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).

"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 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 non-judicial office. See Preamble and Sections 5A, 5B, 5C and 5E.

"Continuing part-time judge." A continuing part-time judge is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall who is permitted to practice law. See Application Section C.

"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 mutual savings association or of a member in a credit

union, or a similar proprietary interest, 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).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 4E.

"Impartiality" or "impartial" denotes 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 the judge. See Sections 2A, 3B(10), 3E(1), 5A(3)(a) and 5A(3)(d)(i).

"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, 3E(1), and 5A(3).

"Law" denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A, 3B(2), 3B(6), 4B, 4C, 4D(5), 4F, 4I, 5A(2), 5A(3), 5B(2), 5C(1), 5C(3) and 5D.

"Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship. See Section 5A(3)(a).

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D(3), 4E and 4G.

"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).

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic 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, presentencing reports, dependency cases or psychiatric reports. See Section 3B(12).

"Periodic part-time judge." A periodic part-time judge is a judge who serves or expects to serve repeatedly on a part-time basis but under a separate appointment for each limited period of service or for each matter. See Application Section D.

"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 Sections 5A(1), 5B(2) and 5C(1).

"Pro tempore part-time judge." A pro tempore part-time judge is a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. See Application Section E.

"Public election." This term includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections. See Section 5C.

"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(5), 3B(6), 3B(9) and 3C(2).

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Section 3E(1)(d).